AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 77 Tuesday,
No. 113 June 12, 2012

Pages 34781–35240

OFFICE OF THE FEDERAL REGISTER

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

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

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

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

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

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

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

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

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

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

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

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

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

Single copies/back copies:

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

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

Printed on recycled paper.

Contents

Federal Register

Vol. 77, No. 113

Tuesday, June 12, 2012

Agricultural Marketing Service
PROPOSED RULES
Cotton Board Rules and Regulations:
Adjusting Supplemental Assessment on Imports (2011 Amendments), 34855–34868
Lamb Promotion, Research, and Information Orders:
Amendment to Order to Raise Assessment Rate, 34868–34870

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service

Animal and Plant Health Inspection Service
RULES
Highly Pathogenic Avian Influenza, 34783–34784
Importation of Tomatoes from Economic Community of West African States into Continental U.S., 34781–34783
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Animal Welfare, 34934
Importation of Wooden Handicrafts from China, 34933

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 34951–34953

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Affordable Care Act Tribal Maternal, Infant and Early Childhood Home Visiting Program Annual Report, 34953–34954

Coast Guard
RULES
Drawbridge Operations:
Chelsea River, Chelsea and East Boston, MA, 34797
Safety Zones:
Recurring Events in Captain of Port New York Zone, 34797–34798
USMMA Fireworks, Long Island Sound, Kings Point, NY, 34798–34800
PROPOSED RULES
Safety Zones:
Bostock 50th Anniversary Fireworks, Long Island Sound; Manursing Island, NY, 34894–34897

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See Minority Business Development Agency
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
RULES
Swap Data Recordkeeping and Reporting Requirements:
Pre-Enactment and Transition Swaps, 35200–35239
NOTICES
Meetings; Sunshine Act, 34940

Defense Department
NOTICES
Meetings:
Defense Audit Advisory Committee, 34940–34941
Privacy Act; Computer Matching Program, 34941–34942

Drug Enforcement Administration
NOTICES
Affirmance of Immediate Suspension Orders:
Darryl J. Mohr, M.D., 34998–35020
Applications:
Importer of Controlled Substance, 35020–35021
Decisions And Orders:
4 OTC, Inc., 35031–35054
Bill Alexander, M.D., 35028–35031
Kwan Bo Jin, M.D., 35021–35027
Serenity Cafe, 35027–35028
Dismissals Of Proceedings:
Donald Brooks Reece II, M.D., 35054–35055
Importers of Controlled Substances; Registrations:
Lipomed, Inc., 35055–35057
Rhodes Technologies, 35057–35058
Manufacturers of Controlled Substances; Applications:
Apertus Pharmaceuticals, LLC, 35058

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Annual State Application Under Part B of the Individuals with Disabilities Education Act, 34942–34943
Privacy Act; Systems of Records, 34943

Employment and Training Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 35060
Amended Certifications Regarding Eligibility to Apply for Worker Adjustment Assistance:
Pfizer Therapeutic Research, et al., Groton, CT, 35060–35061
Negative Determinations on Reconsideration:
Roseburg Forest Products Composite Panels Division, Missoula, MT, 35061
States Triggering Off in Emergency Unemployment Compensation and Federal–State Extended Benefits Programs, 35061–35063

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Approvals and Promulgations of Air Quality Implementation Plans:
Maryland; Permit to Construct Exemptions, 34808–34810

Minnesota; Regional Haze, 34801–34808
Approvals and Promulgations of Implementation Plans and Designation of Areas for Air Quality Planning Purposes:
Redesignation of Illinois Portion of the St. Louis, MO–IL Area to Attainment for 1997 8-hour Ozone Standard, 34819–34830
Determinations of Failure to Attain by 2005 and Determinations of Current Attainment of 1-Hour Ozone National Ambient Air Quality Standards:
Baltimore Nonattainment Area in Maryland, 34810–34819
Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 34830–34846
PROPOSED RULES
Approvals and Promulgations of Air Quality Implementation Plans:
Maryland; Permit to Construct Exemptions, 34897–34898
Approvals and Promulgations of Implementation Plans:
Florida; Infrastructure Requirements for 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards, 34906–34915
Mississippi; Fine Particulate Matter National Ambient Air Quality Standards, 34898–34906
National Pollutant Discharge Elimination System:
Requirements for Cooling Water Intake Structures at Existing Facilities; Stated Preference Survey Data Availability, 34927–34931
Renewable Fuels Produced from Grain Sorghum under the RFS Program; Data Availability, 34915–34927

Export–Import Bank
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 34945–34946

Farm Credit Administration
NOTICES
Meetings; Sunshine Act, 34946

Federal Aviation Administration
RULES
Removal of Six Month Line Check Requirement for Pilots Over Age 60:
Technical Amendments, 34784–34785
PROPOSED RULES
Airworthiness Directives:
Bombardier, Inc. Airplanes, 34870–34872, 34874–34876
Fokker Services B.V. Airplanes, 34872–34874
The Boeing Company, 34876–34879
The Boeing Company Airplanes, 34879–34883
NOTICES
Meetings:
Commercial Space Transportation Advisory Committee; Public Teleconference, 35102–35103
Petitions for Exemption; Summaries of Petitions Received, 35103–35104
Requests to Release Airport Property:
Merrill Field Airport, Anchorage, AK, 35104–35105

Federal Communications Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 34946–34949

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 34943–34945

Federal Highway Administration
NOTICES
Environmental Impact Statements; Availability, etc.:
Bronx County, NY; Rescission, 35105

Federal Motor Carrier Safety Administration
RULES
Inspection, Repair, and Maintenance:
Driver-Vehicle Inspection Report for Intermodal Equipment, 34846–34853

Federal Railroad Administration
RULES
Systems for Telephonic Notification of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings, 35164–35197
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 35106–35107
Petitions for Waivers of Compliance, 35107–35108
Prevention of Operation of Trains over the Highway-Rail Grade Crossing at U.S. Highway 87, Brady, TX:
Gulf, Colorado and San Saba Railway, 35108–35110

Fish and Wildlife Service
RULES
Endangered and Threatened Wildlife and Plants:
Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 35118–35161
PROPOSED RULES
Migratory Bird Hunting:
Regulations for 2012–13 Hunting Season; Meeting, 34931–34932

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Food Contact Substance Notification Program, 34955–34958
Guidance on Informed Consent for In Vitro Diagnostic Device Studies Using Leftover Human Specimens Not Individually Identifiable, 34954–34955
Draft Guidances for Institutional Review Boards, Clinical Investigators, and Sponsors:
Considerations when Transferring Clinical Investigation Oversight to Another Institutional Review Board, 34958–34959

Foreign Assets Control Office
NOTICES
Additional Designation of Entity Pursuant to Executive Order 13382, 35114

Foreign-Trade Zones Board
NOTICES
Applications for Reorganization Under Alternative Site Framework:
Foreign-Trade Zone 139, Sierra Vista, AZ, 34934–34935
Approval of Temporary/Interim Manufacturing Authority:
Siemens Energy, Inc., Foreign-Trade Zone 161, 34935

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See Substance Abuse and Mental Health Services Administration

NOTICES
Draft Guidance:
Considerations in Transferring Previously-Approved Research Project to New IRB or Research Institution, 34949–34950
Petitions to Designate a Class of Employees for Inclusion in the Special Exposure Cohort; Evaluations:
Clarksville Facility, Clarksville, TN, 34950
Medina Facility, San Antonio, TX, 34950–34951

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

Housing and Urban Development Department
NOTICES
Buy American Exceptions under the American Recovery and Reinvestment Act, 34972
Funding Awards:
Fiscal Year 2011–2012 Technical Assistance and Capacity Building under Transformation Initiative (OneCPD TA and Core Curricula), 34973–34974
McKinney–Vento HMIS Technical Assistance Fiscal Year 2012, 34972–34973

Indian Affairs Bureau
NOTICES
Realignment of the Division of Workforce Development:
Office of Indian Energy and Economic Development to Office of Deputy Director, Indian Services, Bureau of Indian Affairs, 34974–34975
Seminole Nation of Oklahoma Alcohol Control and Enforcement Ordinance, 34975–34981
Stillaguamish Tribe of Indians Liquor Control Ordinance, 34981–34983

Inter-American Foundation
NOTICES
Meetings; Sunshine Act, 34974

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
See Surface Mining Reclamation and Enforcement Office

Internal Revenue Service
RULES
Substantial Business Activities, 34785–34788
Surrogate Foreign Corporations, 34788–34797
PROPOSED RULES
Basis of Indebtedness of S Corporations to their Shareholders, 34884–34887
Substantial Business Activities, 34887–34888

International Trade Administration
NOTICES
Antidumping Duty Administrative Reviews; Results, Extensions, Amendments, etc.:
Brass Sheet and Strip from France, 34937–34938
Certain Frozen Warmwater Shrimp from Socialist Republic of Vietnam, 34935–34937
Continuation of Antidumping Duty Orders:
Certain Tin Mill Products from Japan, 34938–34940

International Trade Commission
NOTICES
Antidumping Duty Investigations and Preliminary Phase Investigations:
Xanthan Gum from Austria and China, 34997–34998

Justice Department
See Drug Enforcement Administration

Labor Department
See Employment and Training Administration
See Occupational Safety and Health Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Job Corps Process Study, 35059
Pilot Surveys of Employee Voice in the Coal Mining Industry, 35058–35059

Land Management Bureau
NOTICES
Filings of Plats of Survey, 34983–34984

Legal Services Corporation
NOTICES
Meetings; Sunshine Act, 35065

Minority Business Development Agency
PROPOSED RULES
Petition for Inclusion of Eligible Arab-American Community in Groups for Minority Business Development Agency, 34883–34884

National Archives and Records Administration
NOTICES
Records Schedules; Availability, 35065–35067

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Arts Advisory Panel, 35067–35068

National Highway Traffic Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 35110–35112
Petitions to Modify Exemptions of Previously Approved Antitheft Devices:
Ford Motor Co., 35112–35113

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Exclusive Economic Zone Off Alaska:
Pacific Cod for American Fisheries Act Catcher/Processors Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area, 34853

National Park Service
NOTICES
Intents to Repatriate Cultural Items:
Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ, 34985–34986
Department of the Interior, Indian Arts and Crafts Board, Museum of the Plains Indian, Browning, MT, 34986
National Park Service, Little Bighorn Battlefield National Monument, Crow Agency, MT, 34986–34987
San Diego Museum of Man, San Diego, CA, 34984–34985

Inventory Completions:
Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ, 34989–34991
Museum of Anthropology, University of Michigan, Ann Arbor, MI; Correction, 34991
San Diego State University, San Diego, CA, 34988–34989
University of California, Santa Barbara, Repository of Archaeological and Ethnographic Collections, Santa Barbara, CA, 34991–34997
University of Pennsylvania Museum of Archaeology and Anthropology, Philadelphia, PA, 34987–34988
Meetings:
Denali National Park Subsistence Resource Commission, 34997

National Science Foundation
NOTICES
Permits Issued under the Antarctic Conservation Act, 35068

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 35068
Applications and Amendments to Facility Operating Licenses and Combined Licenses:
Biweekly Notice, 35069–35079
Environmental Impact Statements; Availability, etc.:
Seabrook Station, Unit 1 NextEra Energy Seabrook, LLC License Renewal Application, 35079–35080
Facility Operating Licenses:
Entergy Nuclear Operations, Inc., Pilgrim Nuclear Power Station, 35080–35081
Meetings:
Advisory Committee on Reactor Safeguards Subcommittee on Power Uprates, 35081
Meetings; Sunshine Act, 35081–35082

Occupational Safety and Health Administration
NOTICES
Requests for Nominations:
Whistleblower Protection Advisory Committee, 35063–35065

Personnel Management Office
PROPOSED RULES
Prevailing Rate Systems:
Special Wage Schedules for Nonappropriated Fund Automotive Mechanics, 34854–34855

Securities and Exchange Commission
NOTICES
Applications:
Arrow Investment Advisers, LLC and Arrow Investments Trust, 35082–35088
Meetings; Sunshine Act, 35088
Self-Regulatory Organizations; Proposed Rule Changes:
Chicago Board Options Exchange, Inc., 35091–35092, 35095–35097
NASDAQ OMX PHLX LLC, 35092–35095, 35101–35102
NYSE Arca, Inc., 35089–35091, 35097–35101

Substance Abuse and Mental Health Services Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 34959–34964

Surface Mining Reclamation and Enforcement Office
PROPOSED RULES
Kentucky Regulatory Program:
Public Comment Period and Opportunity for Public Hearing, 34888–34890
Oklahoma Regulatory Program:
Public Comment Period and Opportunity for Public Hearing, 34890–34892
Utah Regulatory Program:
Public Comment Period and Opportunity for Public Hearing, 34892–34894
Wyoming Regulatory Program:
Withdrawal, 34894

Surface Transportation Board
NOTICES
Abandonment Exemptions:
Canadian National Railway Co., Niagara County, NY, 35113–35114

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
See National Highway Traffic Safety Administration
See Surface Transportation Board

Treasury Department
See Foreign Assets Control Office
See Internal Revenue Service

U.S. Customs and Border Protection
NOTICES
Final Determinations:
Digital Projectors, 34967–34971
Toshiba E-Studio Multi-Function Peripherals, 34964–34967
Requests for Applicants:
Advisory Committee on Commercial Operations, 34971–34972

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 35114–35115

Separate Parts In This Issue

Part II
Interior Department, Fish and Wildlife Service, 35118–35161

Part III
Transportation Department, Federal Railroad Administration, 35164–35197

Part IV
Commodity Futures Trading Commission, 35200–35239

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

5 CFR

Proposed Rules:

532 34854

7 CFR

319 34781

Proposed Rules:

1205 34855
1280 34868

9 CFR

93 34783
94 34783
95 34783

14 CFR

121 34784

Proposed Rules:

39 (6 documents) 34870, 34872, 34874, 34876, 34879, 34881

15 CFR

Proposed Rules:

1400 34883

17 CFR

46 35200

26 CFR

1 (2 documents) 34785, 34788

Proposed Rules:

1 (2 documents) 34884, 34887

30 CFR

Proposed Rules:

917 34888
936 34890
944 34892
950 34894

33 CFR

117 34797
165 (2 documents) 34797, 34798

Proposed Rules:

165 34894

40 CFR

52 (4 documents) 34801, 34808, 34810, 34819
81 34819
97 34830

Proposed Rules:

52 (3 documents) 34897, 34898, 34906
80 34915
122 34927
123 34927
124 34927
125 34927

49 CFR

234 35164
390 34846
396 34846

50 CFR

17 35118
679 34853

Proposed Rules:

20 34931

Rules and Regulations

Federal Register
Vol. 77, No. 113
Tuesday, June 12, 2012

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2011–0012]

RIN 0579–AD48

Importation of Tomatoes From the Economic Community of West African States Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the fruits and vegetables regulations to allow the importation of tomatoes from the member States of the Economic Community of West African States (ECOWAS) into the continental United States. As a condition of entry, tomatoes from the ECOWAS will be subject to a systems approach that includes requirements for pest exclusion at the production site, fruit fly trapping and monitoring, and procedures for packing the tomatoes. The tomatoes will also be required to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country with an additional declaration that the tomatoes have been produced in accordance with these requirements. This action will allow for the importation of tomatoes from the ECOWAS into the continental United States while continuing to provide protection against the introduction of quarantine pests.

DATES: *Effective Date:* July 12, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Tony Román, Import Specialist, Plant Protection and Quarantine, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1236; (301) 851–2242.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart–Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–56, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States. Section 319.56–28 of the regulations contains administrative instructions allowing the importation of tomatoes from various countries where the Mediterranean fruit fly (Medfly, *Ceratitis capitata*) is present.

On August 2, 2011, we published in the **Federal Register** (76 FR 46209–46212, Docket No. APHIS–2011–0012) a proposal [1] to amend the regulations by allowing tomatoes from the member States of the Economic Community of West African States (ECOWAS) to be imported into the continental United States under a systems approach that would include requirements for pest exclusion at the production site, fruit fly trapping and monitoring, and procedures for packing the tomatoes. We also proposed to require the tomatoes to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country with an additional declaration that the tomatoes had been produced in accordance with the proposed requirements.

We solicited comments concerning our proposal for 60 days ending October 3, 2011. We received four comments by that date. They were from members of the public and a State department of agriculture.

Two commenters opposed the importation of tomatoes from the ECOWAS without raising any issues related to the pest risk analysis or proposed rule. The remaining comments are discussed below by topic.

One commenter opposed the proposed rule, stating that the pest risk analysis (PRA) identified 10 quarantine pest species that could potentially accompany shipments of tomatoes from the ECOWAS into the continental United States and that the potential introduction of these pests, specifically the fruit flies, into the commenter's State would pose a risk to the State's agriculture.

The PRA, which includes a qualitative, pathway-initiated pest risk assessment and a risk management document, not only identifies quarantine pests that could potentially accompany shipments of fresh tomatoes from the ECOWAS, but also identifies mitigation measures that will be required for this commodity to be imported into any State in the continental United States. The mitigation measures for tomatoes from the ECOWAS have been previously evaluated and proven effective for other commodities, and we will continuously monitor the effectiveness of those mitigations with port-of-entry inspections. We do not consider it necessary to prohibit the importation of a commodity based on identification of quarantine pests that could potentially accompany consignments when proven mitigations are available for this risk and will be required as a condition of importation.

The commenter also requested additional information regarding the production site monitoring and post-harvest procedures. Specifically, the commenter asked about the frequency of Animal and Plant Health Inspection Service (APHIS) visits to production and packing facilities, the guidelines for and oversight of the packinghouse, and the corrective measures and penalties resulting from the detection of live pests.

While being used for packing tomatoes for export to the United States, the packinghouses will only be allowed to accept fruit from registered production sites. In addition, no shade trees may be grown within 10 meters of the entry door of the packinghouses, and no other fruit fly host plants may be grown within 50 meters of the entry door of the packinghouses.

After initial approval of production site by both APHIS and the national plant protection organization (NPPO) of the exporting country, APHIS may monitor the production sites if necessary; however, regular inspection of production sites by APHIS is no longer required. The NPPO of the exporting country will be responsible for monitoring the production sites monthly beginning 2 months before harvest and continuing through the end of the shipping season. The inspection

[1] To view the proposed rule, the pest risk analysis, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS–2011–0012.*

of shipments at the port of entry by APHIS is sufficient to verify that the required packinghouse procedures have been followed because failure to follow these procedures will be evident by the presence of fruit flies or other quarantine pests at the point of entry.

The detection of a single fruit fly of concern inside a pest exclusionary structure (PES) starting 2 months prior to export and continuing through the duration of the harvest, or detection of a fruit fly of concern in a consignment at port of entry inspection which is traced back to a PES will result in immediate cancellation of exports from that production site until APHIS and NPPO of the exporting country have mutually determined that the risk has been properly mitigated.

With regard to other quarantine pests, the systems approach for the importation of tomatoes from ECOWAS includes the submission of a bilateral workplan to APHIS by the NPPO of each exporting country. Those workplans will include the specific corrective measures that must be taken to prevent a recurrence of the quarantine mealy bugs and moths identified in the PRA.

One commenter opposed the proposed rule and stated that the potentially negative impact on the U.S. economy, specifically small tomato producers, resulting from this action would be too great. The commenter said that APHIS should promote greater production of tomatoes by U.S. farmers and promote the purchase of tomatoes produced in the United States as the healthy choice.

The Plant Protection Act (7 U.S.C. 7701 *et seq.*), the authorizing statute for APHIS' plant-health-related activities, authorizes the Secretary of Agriculture to prohibit or restrict the importation of any plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed into the United States. The factors cited by the commenter are not within our decisionmaking authority under the Act.

In addition, the economic analysis made available with the proposed rule noted that even when assuming imports into the United States of 20 percent of the average annual exports from ECOWAS to the rest of the world, and no displacement of tomato imports from other countries, the welfare loss for U.S. small-entity producers would be equivalent to about 0.05 percent of their average annual revenue, or about $4.00.

The commenter also mentioned the cost of controlling and monitoring the inspection and production of the commodity in another country and asked whether the cost of importing the commodity outweighs the benefits.

APHIS involvement in the inspection and monitoring of the importation of tomatoes in ECOWAS member countries is limited. Prior to the importation of the tomatoes, APHIS and the NPPO of the exporting country approve the production sites. The only other time APHIS action may be required in the exporting country is in the event of the capture of a fruit fly of concern inside a PES.

In addition, the agricultural quarantine and inspection (AQI) program provides for inspections of imported agricultural goods, products, and other articles to prevent the introduction of harmful agricultural pests and diseases. Services to directly provide these inspections or that support these inspections are known as AQI services. APHIS charges a user fee to recover the costs of providing AQI services. Therefore, much of the costs associated with the importation of tomatoes from the ECOWAS will be funded by the importers.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

Executive Order 12866 and Regulatory Flexibility Act

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

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The analysis examines impacts for U.S. small entities of this final rule, which will allow fresh tomato imports from member countries of the ECOWAS. The United States has no history of importing tomatoes from these countries. We model three levels of tomato exports to the United States from ECOWAS member States: (i) 5 percent of ECOWAS average annual world exports, 2003–2008 (484 metric tons (MT)); (ii) 10 percent of ECOWAS average annual world exports, 2003–2008 (967 MT); and (iii) 20 percent of ECOWAS average annual world exports, 2003–2008 (1,934 MT). Even when assuming the largest import quantity and no displacement of tomato imports from other countries, the welfare loss for U.S. small-entity producers would be equivalent to about 0.05 percent of their average annual revenue, that is, about $4.00. While U.S. tomato producers are predominantly small, this rule will not have a significant economic impact on a substantial number of small entities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This rule would allow tomatoes to be imported into the United States from the ECOWAS. If this rule is adopted, State and local laws and regulations regarding tomatoes imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0381.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we amend 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Section 319.56–28 is amended as follows:

■ a. By adding a new paragraph (h) to read as set forth below.

■ b. By revising the Office of Management and Budget citation at the end of the section to read as set forth below.

§ 319.56–28 Tomatoes from certain countries.

* * * * *

(h) *Tomatoes (fruit) (Solanum lycopersicum) from member States of the Economic Community of West African States.* Fresh tomatoes may be imported into the continental United States from member States of the Economic Community of West African States (ECOWAS) only in accordance with this section and other applicable provisions of this subpart. The ECOWAS consists of Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo Republic. These conditions are designed to prevent the introduction of the following quarantine pests: *Bactrocera cucurbitae, B. invadens, Ceratitis capitata, C. rosa, Chrysodeixis chalcites, Helicoverpa armigera, H. assulta, Leucinodes orbonalis, Maconellicoccus hirsutus,* and *Nipaecoccus viridis.*

(1) *Production site requirements.* (i) Production sites in which the tomatoes are produced must be registered with the national plant protection organization (NPPO) of the exporting country. Initial approval of production sites must be completed jointly by the NPPO of the exporting country and APHIS.

(ii) The NPPO of the exporting country must visit and inspect the production sites monthly, beginning 2 months before the harvest and continuing through the end of the shipping season. APHIS may monitor the production sites if necessary.

(iii) Production sites must be pest-exclusionary structures (PES). The PES must have self-closing double doors. All openings, including vents, to the outside of the PES must be covered by screening with mesh openings of not more than 1.6 mm.

(iv) No shade trees may be grown within 10 meters of the entry door of the PES, and no other fruit fly host plants may be grown within 50 meters of the entry door of the PES.

(2) *Mitigation measures for fruit flies.* (i) Beginning 2 months prior to the start of the shipping season and continuing through the end of the harvest, the NPPO of the exporting country must set and maintain fruit fly traps with an APHIS-approved protein bait inside each PES at a rate of eight traps per hectare, with a minimum of four traps in each PES, and check the traps every 7 days. The NPPO of the exporting country must maintain records of trap placement, trap maintenance, and captures of any fruit flies of concern. The NPPO must maintain trapping records for 1 year, and make the records available to APHIS upon request.

(ii) Capture of a single fruit fly of concern inside a PES will immediately result in cancellation of exports to the United States from that PES. The detection of a fruit fly of concern in a consignment at the port of entry that is traced back to a PES will also result in immediate cancellation of exports to the United States from that PES. In both cases, exports from the PES in question may not resume until APHIS and the NPPO of the exporting country have mutually determined that the risk has been properly mitigated.

(3) *Harvesting requirements.* The stem and calyx must be removed from the tomato.

(4) *Packinghouse requirements.* (i) While in use for exporting tomatoes to the United States, the packinghouses may only accept fruit from registered production sites.

(ii) No shade trees may be grown within 10 meters of the entry door of the packinghouses, and no other fruit fly host plants may be grown within 50 meters of the entry door of the packinghouses.

(5) *Post-harvest procedures.* (i) The tomatoes must be safeguarded by an insect-proof mesh screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing.

(ii) Tomatoes must be packed within 24 hours of harvest in insect-proof cartons or containers, or covered with insect-proof mesh or a plastic tarpaulin for transport to the United States. These safeguards must remain intact until arrival in the United States or the consignment will be denied entry into the United States.

(iii) If transported by sea, the containers in which the tomatoes are packed must be kept closed if stored within 20 meters of a fruit fly host prior to being loaded on the vessel.

(6) *Commercial consignments.* The tomatoes may be imported in commercial consignments only.

(7) *Phytosanitary certificate.* Each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by the NPPO of the exporting country, providing an additional declaration ''These tomatoes were grown in registered production sites in [name of country] and the consignment has been inspected and found free of quarantine pests.''

(Approved by the Office of Management and Budget under control numbers 0579–0049, 0579–0131, 0579–0316, 0579–0286, 0579–0345, and 0579–0381.)

Done in Washington, DC, this 6th day of June 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–14294 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 93, 94, and 95

[Docket No. APHIS–2006–0074]

RIN 0579–AC36

Highly Pathogenic Avian Influenza

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule; reopening of comment period.

SUMMARY: We are reopening the comment period for our interim rule that amended the regulations concerning the importation of animals and animal products to prohibit or restrict the importation of bird and poultry products from regions where any subtype of highly pathogenic avian influenza (HPAI) is considered to exist. The interim rule also imposed restrictions concerning importation of live poultry and birds that have been vaccinated for certain types of HPAI, or that have been moved through regions where any subtype of HPAI is considered to exist. This action will give the public an additional opportunity to comment on the interim rule and on a change to its provisions that we are considering.

DATES: We will consider all comments that we receive on or before July 12, 2012.

ADDRESSES: You may submit comments by either of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2006-0074.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2006–0074, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2006-0074* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Javier Vargas, Case Manager, National Center for Import and Export, Animal Health Policy and Programs, VS, APHIS, 4700 River Road, Unit 38, Riverdale, MD 20737; (301) 851–3300.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) regulations in Title 9 of the Code of Federal Regulations (CFR), parts 93, 94, and 95 (referred to below as the regulations), govern the importation into the United States of specified animals and animal products and byproducts to prevent the introduction of various animal diseases, including Newcastle disease and highly pathogenic avian influenza (HPAI).

On January 24, 2011, we published in the **Federal Register** (76 FR 4046–4056, Docket No. APHIS–2006–0074) an interim rule [1] that amended the regulations governing the importation into the United States of live birds, poultry, eggs for hatching, and bird and poultry products and by-products. The interim rule was effective upon publication.

Comments on the interim rule were required to be received on or before March 25, 2011. In a document published in the **Federal Register** on May 3, 2011 (76 FR 24793, Docket No. APHIS–2006–0074), we reopened the comment period for an additional 15 days until May 18, 2011, to allow interested persons additional time to prepare and submit comments. We received 16 comments by that date.

We are once again reopening the comment period for the interim rule and are soliciting public comment on a change we are considering to the provisions of the January 2011 interim rule.

Specifically, the interim rule amended §§ 93.101(b) and 93.205(a) to prohibit the importation into the United States of live birds or poultry that have been moved through a region identified in accordance with § 94.6(a) as a region where any form of HPAI exists. We took this action to minimize the risk of introducing HPAI into the United States through the importation of infected avians. However, several peer-reviewed scientific studies [2] have come to our attention since the publication of the interim rule establishing that pigeons (and other Columbiform species such as doves) have a very low risk of being infected by HPAI viruses and would therefore contribute little to the risk of transmission and spread of such viruses. Thus, it appears that it may not be necessary to prohibit the importation of Columbiform avians from HPAI regions provided that all other requirements in the regulations pertaining to pigeons, doves, and other poultry are followed.

Under § 93.209 of the current regulations, poultry, including Columbiform avians, offered for importation from any region of the world except Canada are required to be quarantined in an approved facility for at least 30 days after importation into the United States to determine, through inspections and testing, their freedom from communicable diseases of poultry and from exposure to such diseases. We further require in § 93.205(a) certification that live poultry, including Columbiform avians (except those from Canada), were inspected on the premises of origin immediately before the date of movement from such region and that they were then found to be free of evidence of communicable diseases of poultry. We also require that, as far as it has been possible to determine, during the 90 days prior to movement the poultry were not exposed to communicable diseases of poultry and the premises were not in any area under quarantine. Columbiform avians and other poultry must also not have been vaccinated with a vaccine for the H5 or H7 subtype of avian influenza.

Section 93.205(a) also requires that live poultry are also required to have been kept in the region from which they are offered for importation since they were hatched, or for at least 90 days immediately preceding the date of movement, that the poultry have not been moved through a region identified in accordance with § 94.6(a) of this subchapter as a region where any form of HPAI exists, and that, as far as it has been possible to determine, no case of HPAI or exotic Newcastle disease (END) occurred on the premises where such poultry were kept, or on adjoining premises, during that 90-day period.

Based on our review of the studies referred to above and the mitigations already in the regulations, we have determined that the importation of Columbiform avians from regions considered to have HPAI poses a minimal risk to the United States. Therefore, we are considering adding to the final rule following this interim rule a provision to amend § 93.205(a) of the regulations to allow the importation of Columbiform avians that have originated in or transited regions considered to have HPAI subject to the regulations. Columbiform avians and other poultry from regions considered to have END would remain prohibited from importation to the United States.

We are therefore reopening the comment period on Docket No. APHIS–2006–0074 for an additional 30 days. This action will allow interested persons additional time to prepare and submit comments on the interim rule and on the change we are considering with respect to Columbiform avians.

Authority: 7 U.S.C. 450, 1622, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 6th day of June 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–14297 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the interim rule and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2006-0074.*

[2] Studies we reviewed included *Infectious and Lethal Doses of H5N1 Highly Pathogenic Avian Influenza Virus for House Sparrows (Passer Domesticus) and Rock Pigeons (Columbia Livia)* J VET Diagn Invest July 2009 21: 437–445; and *Pathogenesis and pathobiology of avian influenza virus infection in birds,* M.J. Pantin-Jackwood and D.E. Swayne, Southeast Poultry Research Laboratory, Agricultural Research Service, USDA, Athens, GA 30605.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2012–0486; Amdt. No. 121–359]

Removal of Six Month Line Check Requirement for Pilots Over Age 60; Technical Amendment

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical amendment.

SUMMARY: The ''FAA Modernization and Reform Act of 2012,'' enacted on February 14, 2012, in Section 305 of the Act, removed the line check performance evaluation requirements for pilots over 60 years of age that applied to air carriers engaged in part 121 operations. This technical amendment conforms to the FAA's regulations as a result of the Act.

DATES: Effective June 12, 2012.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this rule contact Nancy Lauck Claussen, Air Transportation Division, AFS–200, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8166, email *nancy.l.claussen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

In 2007, Congress enacted the ''Fair Treatment for Experienced Pilots Act'' which became effective December 13, 2007. This legislation raised the upper age limit for pilots in part 121 from age 60 to age 65. It also required that air carriers engaged in part 121 operations evaluate the performance of 60 years old pilots, through a line check, every 6 months.

On February 14, 2012, Congress enacted the ''FAA Modernization and Reform Act of 2012'' (the ''Act''). Section 305 of the Act removed the line check evaluation performance requirements contained in the Fair Treatment for Experienced Pilots Act.

Upon enactment of the Act, § 121.440 (d) through (f) of the Code of Federal Regulations (CFR) ceased to be effective. Section 121.440(d) requires that no certificate holder may use the services of any person as a pilot unless the certificate holder evaluates every 6 months the performance, through a line check, of each pilot who has attained 60 years of age.

Section 121.440(e) requires that no pilot who has attained 60 years of age may serve as a pilot in operations, under this part, unless the certificate holder has evaluated the pilot's performance every 6 months, through a line check.

Section 121.440(f) establishes limitations regarding the requirements in (d) and (e) that apply to the line check requirements for pilots over age 60.

The requirement that the performance of each pilot of the air carrier who has attained 60 years of age be evaluated, through a line check, every 6 months, is more restrictive than line check requirements that apply to other pilots in part 121 operations. These provisions only require that pilots-in command be evaluated, through a line check, every 12 months. With Section 305 of the Act, it was Congress' objective to impact rules governing the age limitation requirements of pilots over age 60 engaged in operations under part 121. This technical amendment aligns FAA regulations to statutory requirements which will establish the same line check requirements for all pilots in part 121 operations, regardless of age.

Discussion of Dates

The Act was effective on February 14, 2012. Pending publication of this rule, the FAA has not enforced the line check requirements for pilots who have attained 60 years of age. This technical amendment conforms to the FAA's regulations as a result of the Act and is effective upon publication in the **Federal Register**.

Technical Amendment

A legislative mandate of this nature makes it unnecessary to provide an opportunity for notice and comment. Further, we find that good cause exists under 5 U.S.C. 553(d)(3) to make the amendment effective upon publication to minimize any possible confusion. If we do not correct the language in the CFR, we are likely to receive numerous petitions for exemption, because the published language is not consistent with the statute. Since the FAA would not have safety or policy reasons to deny the exemptions, we have included these amendments in this final rule to remove the requirements that each pilot of the air carrier who has attained 60 years of age be evaluated, through a line check, every 6 months.

List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Aviation safety, Charter flights, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14 Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105, 46301.

§ 121.440 [Amended]

■ 2. Amend § 121.440 by removing paragraphs (d) through (f).

Issued in Washington, DC, on June 5, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

[FR Doc. 2012–14280 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9592]

RIN 1545–BK86

Substantial Business Activities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary Regulations.

SUMMARY: This document contains temporary regulations regarding whether a foreign corporation has substantial business activities in a foreign country. These regulations affect certain domestic corporations and partnerships (and certain parties related thereto), and foreign corporations that acquire substantially all of the properties of such domestic corporations or partnerships. The text of these temporary regulations serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject also published in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on June 12, 2012.

Applicability Date: For date of applicability, see § 1.7874–3T(f).

FOR FURTHER INFORMATION CONTACT: Mary W. Lyons, (202) 622–3860 and David A. Levine, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2006, temporary regulations under section 7874 (TD 9265, 2006–2 CB 1) were published in the **Federal Register** (71 FR 32437) concerning the treatment of a foreign corporation as a surrogate foreign corporation (2006 temporary regulations). A notice of proposed rulemaking (REG–112994–06) cross-referencing the 2006 temporary regulations was published in the same issue of the **Federal Register** (71 FR

32495, 2006–2 CB 47). On July 28, 2006, Notice 2006–70 (2006–2 CB 252) was published, announcing a modification to the effective date contained in the 2006 temporary regulations. See § 601.601(d)(2)(ii)(*b*). On June 12, 2009, the 2006 temporary regulations and the related notice of proposed rulemaking were withdrawn and replaced with new temporary regulations (2009 temporary regulations), which generally applied to acquisitions completed on or after June 9, 2009. TD 9453 (74 FR 27920, 2009–2 CB 114). A notice of proposed rulemaking (REG–112994–06) cross-referencing the 2009 temporary regulations was published in the same issue of the **Federal Register** (74 FR 27947, 2009–2 CB 144). No public hearing was requested or held; however, comments were received. All comments are available at www.regulations.gov or upon request. After consideration of the comments received regarding whether a foreign corporation has substantial business activities in a foreign country, the Internal Revenue Service (IRS) and the Department of the Treasury (Treasury Department) have decided to issue new temporary regulations under § 1.7874–3T (2012 temporary regulations) and a new notice of proposed rulemaking that provide guidance regarding this determination. The other portions of the 2009 temporary regulations are finalized in a separate Treasury Decision published elsewhere in this issue of the **Federal Register**.

Explanation of Provisions

A. General Approach

A foreign corporation is generally treated as a surrogate foreign corporation under section 7874(a)(2)(B) if pursuant to a plan (or a series of related transactions): (i) The foreign corporation completes after March 4, 2003, the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation; (ii) after the acquisition at least 60 percent of the stock (by vote or value) of the foreign corporation is held by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; and (iii) after the acquisition, the expanded affiliated group that includes the foreign corporation does not have substantial business activities in the foreign country (relevant foreign country) in which, or under the law of which, the foreign corporation is created or organized, when compared to the total business activities of the expanded affiliated group. Similar provisions apply if a foreign corporation acquires substantially all of the properties constituting a trade or business of a domestic partnership.

The 2006 temporary regulations provided that the determination of whether the expanded affiliated group has substantial business activities in the relevant foreign country is based on all the facts and circumstances. The 2006 temporary regulations also provided a safe harbor, which generally was satisfied if at least ten percent of the employees, assets, and sales of the expanded affiliated group were in the relevant foreign country. The 2009 temporary regulations retained the facts and circumstances general rule provided in the 2006 temporary regulations, with certain modifications, but removed the safe harbor.

The IRS and the Treasury Department received comments requesting additional guidance on the level of business activities necessary for an expanded affiliated group to have substantial business activities in the relevant foreign country. One comment suggested providing a new safe harbor, which would require a higher percentage of business activities in the relevant foreign country than was required under the safe harbor included in the 2006 temporary regulations. The comment also recommended different safe harbors depending on the extent of the expanded affiliated group's business activities in the United States.

After consideration of the comments and the underlying policies of section 7874, the IRS and the Treasury Department believe the facts and circumstances test of the 2009 temporary regulations should be replaced with a bright-line rule describing the threshold of activities required for an expanded affiliated group to have substantial business activities in the relevant foreign country. The IRS and the Treasury Department believe that such a rule will provide more certainty in applying section 7874 to particular transactions than the 2009 temporary regulations and will improve the administrability of this provision.

B. Threshold of Business Activities

The 2012 temporary regulations provide that an expanded affiliated group will have substantial business activities in the relevant foreign country only if at least 25 percent of the group employees, group assets, and group income are located or derived in the relevant foreign country, determined as follows:

1. Group Employees

The 2012 temporary regulations set forth two tests, each of which must be satisfied, based on employees of members of the expanded affiliated group (group employees). The first test is calculated as the number of group employees based in the relevant foreign country divided by the total number of group employees determined on the applicable date discussed in section B.4. of this preamble. The second test is calculated as employee compensation with respect to group employees based in the relevant foreign country divided by the total employee compensation with respect to all group employees determined during the one-year testing period.

2. Group Assets

The group assets test is calculated as the value of the group assets located in the relevant foreign country divided by the total value of all group assets determined on the applicable date. The term group assets generally means tangible personal property or real property used or held for use in the active conduct of a trade or business by members of the expanded affiliated group. For this purpose, group assets include certain property rented by members of the expanded affiliated group, with the value of such rented property being deemed to be eight times the net annual rent paid or accrued with respect to such property. The IRS and the Treasury Department believe that using an eight-times multiple for this purpose is administrable and consistent with the treatment of rented property for other purposes. See, for example, Uniform Division of Income for Tax Purposes Act, §§ 10 and 11. In order to constitute group assets, such rented property must satisfy the other applicable requirements for group assets, including that the property is used or held for use in the active conduct of a trade or business.

3. Group Income

The group income test is calculated as the group income derived in the relevant foreign country divided by the total group income determined during the one-year testing period. The term group income means gross income of members of the expanded affiliated group from transactions occurring in the ordinary course of business with customers that are not related persons. Group income is considered to be derived in a foreign country only if the customer is located in such country.

4. Applicable Date

Section 7874(a)(2)(B)(iii) provides that the determination of whether the expanded affiliated group has substantial business activities is made after the acquisition. However, the IRS and the Treasury Department believe that when the acquisition occurs other than at the end of a month the factors used to determine whether the substantial business activities test is satisfied may not be readily determinable in some cases. Accordingly, the 2012 temporary regulations provide that the number of group employees and the value of group assets can be measured as of the applicable date, which is either the date on which the acquisition is completed or the last day of the month immediately preceding the month in which the acquisition is completed. The applicable date is also used to determine the testing period, which is used in computing group income and employee compensation. When the applicable date is the last day of the month immediately preceding the month in which the acquisition is completed, group employees, employee compensation, group assets, and group income consist of those items or amounts of members that comprise the expanded affiliated group determined at the close of the acquisition date.

C. Attribution From a Partnership

The 2009 temporary regulations provided that for purposes of the substantial business activities test, a member of an expanded affiliated group that holds at least a ten-percent capital and profits interest in a partnership takes into account its proportionate share of all items of the partnership. The IRS and the Treasury Department believe that the policies of section 7874 are better advanced if the treatment of partnerships is made consistent with that of corporations for purposes of applying the substantial business activities test on a group basis. Accordingly, the 2012 temporary regulations provide that the items of a partnership should be taken into account for this purpose only if one or more members of the expanded affiliated group holds, in the aggregate, more than 50 percent (by value) of the interests in the partnership. The IRS and the Treasury Department further believe that, consistent with the treatment of corporations, if this ownership requirement is satisfied, then all the items of the partnership should be taken into account for this purpose.

D. Effective Date

Subject to a transition rule, the 2012 temporary regulations apply to acquisitions completed on or after June 7, 2012.

Special Analyses

It has been determined that that these temporary regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the 2012 temporary regulations and because the regulations do not impose a collection of information on small entities, the requirements of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the 2012 temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Requests for Comments

The IRS and the Treasury Department are considering to what extent partners of a partnership should be treated as if they were employees solely for purposes of the two tests based on group employees, and specifically request comments on these issues. For information on how to submit comments or request a public hearing, see the section ''Comments and Requests for a Public Hearing'' set forth in the notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

Drafting Information

The principal authors of the 2012 temporary regulations are Mary W. Lyons and David A. Levine of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.7874–3T is also issued under 26 U.S.C. 7874(c)(6) and (g).* * *

■ **Par. 2.** Section 1.7874–3T is added to read as follows:

§ 1.7874–3T Substantial business activities (temporary).

(a) *Scope.* This section provides rules regarding whether a foreign corporation has substantial business activities in the relevant foreign country when compared to the total business activities of the expanded affiliated group for purposes of section 7874(a)(2)(B)(iii). Paragraph (b) of this section sets forth the threshold of business activities that constitute substantial business activities. Paragraph (c) of this section describes certain items not to be taken into account as located or derived in the relevant foreign country. Paragraph (d) of this section provides definitions and certain rules of application. Paragraph (e) of this section provides rules regarding the treatment of a partnership in which one or more members of an expanded affiliated group own an interest. Paragraph (f) of this section provides the dates of applicability and expiration.

(b) *Threshold of business activities.* The expanded affiliated group will have substantial business activities in the relevant foreign country after the acquisition when compared to the total business activities of the expanded affiliated group only if, subject to paragraph (c) of this section, each of the tests described in paragraphs (b)(1) through (b)(3) of this section is satisfied.

(1) *Group employees*—(i) *Number of employees.* The number of group employees based in the relevant foreign country is at least 25 percent of the total number of group employees on the applicable date.

(ii) *Employee compensation.* The employee compensation incurred with respect to group employees based in the relevant foreign country is at least 25 percent of the total employee compensation incurred with respect to all group employees during the testing period.

(2) *Group assets.* The value of the group assets located in the relevant foreign country is at least 25 percent of the total value of all group assets on the applicable date.

(3) *Group income.* The group income derived in the relevant foreign country is at least 25 percent of the total group income during the testing period.

(c) *Items not to be considered.* The following items are not taken into account in the numerator, but are taken into account in the denominator, for each of the tests described in paragraphs (b)(1) through (b)(3) of this section:

(1) Any group assets, group employees, or group income attributable to business activities that are associated with properties or liabilities the transfer of which is disregarded under section 7874(c)(4).

(2) Any group assets or group employees located in, or group income derived in, the relevant foreign country as part of a plan with a principal purpose of avoiding the purposes of section 7874.

(3) Any group assets or group employees located in, or group income derived in, the relevant foreign country if such group assets or group employees, or the business activities to which such group income is attributable, are subsequently transferred to another country in connection with a plan that existed at the time of the acquisition described in section 7874(a)(2)(B)(i).

(d) *Definitions and application of rules.* The following definitions and rules apply for purposes of this section:

(1) The term *acquisition date* means the date on which the acquisition described in section 7874(a)(2)(B)(i) is completed.

(2) The term *applicable date* means either of the following dates, applied consistently for all purposes of this section:

(i) The acquisition date; or

(ii) The last day of the month immediately preceding the month in which the acquisition described in section 7874(a)(2)(B)(i) is completed.

(3) The term *employee compensation* means all amounts incurred by members of the expanded affiliated group that directly relate to services performed by group employees (including, for example, wages, salaries, deferred compensation, employee benefits, and employer payroll taxes). Employee compensation is determined in U.S. dollars translated, if necessary, using the weighted average exchange rate (as defined in § 1.989(b)-1) for the testing period.

(4) The term *expanded affiliated group* means the affiliated group defined in section 7874(c)(1) determined at the close of the acquisition date. The term *member of the expanded affiliated group* means an entity included in the expanded affiliated group. A reference to a member of the expanded affiliated group includes a predecessor with respect to such member.

(5) The term *group assets* means tangible personal property or real property used or held for use in the active conduct of a trade or business by members of the expanded affiliated group, provided such property is owned by members of the expanded affiliated group at the close of the acquisition date. A group asset is considered to be located in the relevant foreign country only if the asset was physically present in such country at the close of the acquisition date and for more time than in any other country during the testing period. All group assets must be valued consistently and on a gross basis (that is, not reduced by liabilities) using either the adjusted tax basis or fair market value determined in U.S. dollars translated, if necessary, at the spot rate determined under the principles of § 1.988–1(d)(1), (2), and (4). Tangible personal property or real property that is rented by members of the expanded affiliated group from a person other than a member of the expanded affiliated group is also treated as a group asset, provided such property is used in the active conduct of a trade or business and is being rented by members of the expanded affiliated group at the close of the acquisition date. For purposes of this section, a group asset that is rented is valued at eight times the net annual rent paid or accrued with respect to the property by members of the expanded affiliated group.

(6) The term *group employees* means employees of members of the expanded affiliated group. A group employee is considered to be based in the relevant foreign country only if the employee spent more time providing services in such country than in any other single country during the testing period.

(7) The term *group income* means gross income of members of the expanded affiliated group from transactions occurring in the ordinary course of business with customers that are not related persons. Group income is translated into U.S. dollars, if necessary, using the weighted average exchange rate (as defined in § 1.989(b)-1) for the testing period. Group income is considered derived in the relevant foreign country only if it is derived from a transaction with a customer located in such country.

(8) The term *net annual rent* means the annual rent paid or accrued with respect to property, less any payments received or accrued from subleasing such property (or other similar arrangement).

(9) The term *related person* has the meaning specified in section 954(d)(3), except that section 954(d)(3) is applied by substituting ''one or more members of the expanded affiliated group'' for ''a controlled foreign corporation'' and ''the controlled foreign corporation'' each place they appear.

(10) The term *relevant foreign country* means the foreign country in which, or under the law of which, the foreign corporation was created or organized.

(11) The term *testing period* means the one-year period ending on the applicable date.

(e) *Treatment of partnerships.* For purposes of this section, if one or more members of the expanded affiliated group own, in the aggregate, more than 50 percent (by value) of the interests in a partnership, such partnership will be treated as a corporation that is a member of the expanded affiliated group. Thus, all items of such a partnership are taken into account for purposes of this section. No items of a partnership are taken into account for purposes of this section unless the partnership is treated as a member of the expanded affiliated group pursuant to this paragraph.

(f) *Effective/applicability and expiration dates.* Except as otherwise provided in this paragraph, this section shall apply to acquisitions that are completed on or after June 7, 2012. For acquisitions completed on or after June 7, 2012 that were either described in a filing with the Securities and Exchange Commission on or before June 7, 2012, or that were subject to a written agreement that was binding on June 7, 2012, and at all times thereafter, taxpayers may apply either the rules in § 1.7874–2T(g), as contained in 26 CFR part 1 revised as of April 12, 2012, or the rules set forth in this section. The applicability of this section expires on June 5, 2015.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: June 4, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–14226 Filed 6–7–12; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9591]

RIN 1545–BF47

Surrogate Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding whether a foreign corporation is treated as a surrogate foreign corporation. The final

regulations affect certain domestic corporations and partnerships (and certain parties related thereto), and foreign corporations that acquire substantially all of the properties of such domestic corporations or partnerships.

DATES: *Effective Date:* These regulations are effective on June 12, 2012.

Applicability Dates: For dates of applicability, see §§ 1.7874–1(g) and 1.7874–2(l).

FOR FURTHER INFORMATION CONTACT: Milton M. Cahn, (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 6, 2006, temporary regulations under section 7874 of the Internal Revenue Code (Code) (TD 9265, 2006–2 CB 1) were published in the **Federal Register** (71 FR 32437) concerning the treatment of a foreign corporation as a surrogate foreign corporation (2006 temporary regulations). A notice of proposed rulemaking (REG–112994–06) cross-referencing the 2006 temporary regulations was published in the same issue of the **Federal Register** (71 FR 32495). On July 28, 2006, Notice 2006–70 (2006–2 CB 252) was published, announcing a modification to the effective date contained in the 2006 temporary regulations. See § 601.601(d)(2)(ii)(*b*). On June 12, 2009, the 2006 temporary regulations and the related notice of proposed rulemaking were withdrawn and replaced with new temporary regulations (2009 temporary regulations), which generally applied to acquisitions completed on or after June 9, 2009. TD 9453 (74 FR 27920, 2009–2 CB 114). A notice of proposed rulemaking (REG–112994–06) cross-referencing the 2009 temporary regulations was published in the same issue of the **Federal Register** (74 FR 27947, 2009–2 CB 144). No public hearing was requested or held; however, comments were received. All comments are available at *www.regulations.gov* or upon request. After consideration of the comments, the 2009 proposed regulations are adopted as final regulations with the modifications described in this preamble. The 2009 temporary regulations are removed. As discussed in paragraph A. of this preamble, new temporary regulations under section 7874 regarding whether a foreign corporation has substantial business activities in a foreign country, and a corresponding notice of proposed rulemaking, are published elsewhere in this issue of the **Federal Register**.

Summary of Comments and Explanation of Revisions

A. Substantial Business Activities

A foreign corporation is generally treated as a surrogate foreign corporation under section 7874(a)(2)(B) if pursuant to a plan (or a series of related transactions): (i) The foreign corporation completes after March 4, 2003, the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation; (ii) after the acquisition at least 60 percent of the stock (by vote or value) of the foreign corporation is held by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; and (iii) after the acquisition, the expanded affiliated group that includes the foreign corporation does not have substantial business activities in the foreign country (relevant foreign country) in which, or under the law of which, the foreign corporation is created or organized, when compared to the total business activities of the expanded affiliated group. Similar provisions apply if a foreign corporation acquires substantially all of the properties constituting a trade or business of a domestic partnership.

The 2006 temporary regulations provided that the determination of whether the expanded affiliated group has substantial business activities in the relevant foreign country is based on all the facts and circumstances. The 2006 temporary regulations also provided a safe harbor, which generally was satisfied if at least ten percent of the employees, assets, and sales of the expanded affiliated group were in the relevant foreign country. The 2009 temporary regulations retained the facts and circumstances general rule provided in the 2006 temporary regulations, with certain modifications, but removed the safe harbor.

Comments were received regarding the determination as to whether an expanded affiliated group has substantial business activities in a foreign country. These comments are discussed in the preamble to temporary regulations, published elsewhere in this issue of the **Federal Register**, that provide guidance on the substantial business activities test.

B. Options

1. General Approach

The 2009 temporary regulations generally provide that, for purposes of section 7874, an option or similar interest (together, an ''option'') with respect to a corporation is treated as stock of the corporation with a value equal to the holder's claim on the equity of the corporation. For this purpose, the equity of the corporation does not include the value of any property the holder of the option would be required to provide to the corporation pursuant to the terms of the option if such option were exercised. The 2009 temporary regulations provide similar rules for an option with respect to a partnership.

A comment suggested that, subject to an anti-abuse rule, options should be ignored for purposes of section 7874. The comment asserts that this approach, consistent with the treatment of options under other Code sections, would be more administrable; the comment recognized, however, that unlike the approach taken in the 2009 temporary regulations, this approach does not properly take into account the economic interest of an option holder. Alternatively, the comment suggested that if the approach taken in the 2009 temporary regulations is retained, certain types of options (for example, publicly traded options and customary compensatory options) should be excluded from the general rule.

The Internal Revenue Service (IRS) and the Department of the Treasury (Treasury Department) believe that the claim-on-equity approach in the 2009 temporary regulations is preferable to disregarding options subject to an anti-avoidance rule. The IRS and the Treasury Department believe this approach most properly reflects the economics of the transaction and is not easily manipulated. Moreover, the IRS and the Treasury Department believe that the simplicity of uniformly treating all types of options outweighs the benefits of excluding, or providing other special rules for, certain types of options. Accordingly, the claim-on-equity approach provided in the 2009 temporary regulations is retained, with certain modifications, in these final regulations.

2. Voting Power

Certain portions of section 7874 also look to the voting power of stock. For example, one of the requirements for a foreign corporation to be treated as a surrogate foreign corporation is that, after the acquisition, at least 60 percent of the stock (by vote or value) of the entity is held, in the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation. Section 7874(a)(2)(B)(ii). As discussed in section B.1. of this preamble, however, the 2009 temporary regulations only address options with

respect to the amount of stock treated as held by value; they do not address the effect of options on voting power.

A comment suggested that if the general approach of the 2009 temporary regulations is retained, the effect options have on voting power, if any, should be addressed. Specifically, the comment suggested that options could be treated as: (i) Not having voting power; (ii) having voting power corresponding to the number of shares the value of which equals the claim on equity; or (iii) having voting power corresponding to the number of shares that would be obtained upon exercise of the option.

In response to this comment, the final regulations provide that for purposes of determining the voting power of stock under section 7874, an option will be treated as exercised if a principal purpose of the issuance or acquisition of the option is to avoid treating the foreign corporation as a surrogate foreign corporation. In all other cases, options are not taken into account for purposes of determining the voting power of stock under section 7874.

3. Effect of Options on Equity Holders

A comment requested clarification that if an option is treated as stock under the claim-on-equity approach, then the ownership percentages of shareholders are reduced. The IRS and the Treasury Department believe that the value of stock inherently reflects the existence of options that have a claim on equity. Therefore, no adjustment to the value of stock under the regulations is necessary. For example, if the stock of a foreign corporation has an aggregate value of $100x (which reflects the existence of options) and there is a single option outstanding with a claim on equity of $10x with respect to the foreign corporation, then under the regulations the total value of the stock of the foreign corporation is treated as $110x for purposes of section 7874. An example in the regulations is modified to clarify this result.

4. Other Rules

The 2009 temporary regulations provide that, with respect to a foreign corporation, the general option rule does not apply if a principal purpose of the issuance or acquisition of the option is to avoid the foreign corporation being treated as a surrogate foreign corporation. The 2009 temporary regulations do not contain a similar rule with respect to domestic corporations or domestic partnerships.

A comment questioned why the anti-abuse rule only applies to foreign corporations and noted that avoidance concerns may equally be present with options in domestic corporations or partnerships. Accordingly, the comment suggested that the anti-abuse rule be extended to apply to options with respect to domestic corporations and domestic partnerships. The IRS and the Treasury Department agree with this comment. As a result, the final regulations modify the anti-abuse rule such that it applies to options with respect to all corporations and partnerships, domestic or foreign.

Another comment suggested that the regulations include special rules to take into account certain types of options, such as options subject to vesting and nontransferable options. In response to this comment, the final regulations provide that the claim-on-equity approach does not apply if, at the time of the acquisition, the probability that the option will be exercised is remote.

The final regulations clarify that the rules addressing options also apply for purposes of determining the membership of an expanded affiliated group under section 7874(c)(1). In addition, the text of the final regulations is clarified to provide that a claim on equity equals the value of the stock or partnership interest that may be acquired pursuant to the option, less the exercise price (but in no case is a claim on equity less than zero).

C. Insolvent Entities

The 2009 temporary regulations provide that, for purposes of section 7874, if immediately prior to the first date properties are acquired as part of an acquisition described in section 7874(a)(2)(B)(i), a domestic corporation is in a title 11 or similar case (as defined in section 368(a)(3)), or the liabilities of the domestic corporation exceed the value of its assets, then any claim by a creditor against the domestic corporation shall be treated as stock of the domestic corporation. A similar rule applies with respect to a domestic partnership, or a foreign partnership that owns stock of a domestic corporation.

A comment was received stating that, in certain cases, the creditors should be viewed as purchasers of the insolvent entity's assets and, as a result, the transaction should not be subject to section 7874. The comment further stated that applying section 7874 to such creditors could provide third-party bidders for the entity's assets an undue advantage over existing creditors because such bidders would not be subject to section 7874. Accordingly, the comment suggested that the insolvency rule be modified to only apply where creditors acquire the insolvent entity's debt pursuant to a plan to acquire its stock or assets.

The IRS and the Treasury Department believe that, for purposes of section 7874, the creditors of an insolvent entity should be considered the equity holders of the entity. Furthermore, the IRS and the Treasury Department do not believe that insolvent entities should be treated more favorably than other entities under section 7874. Accordingly, this comment is not adopted.

D. Acquisitions of Multiple Domestic Entities and Disregard of Affiliate-Owned Stock

The 2009 temporary regulations generally provide that if, pursuant to a plan (or series of related transactions), a foreign corporation completes two or more acquisitions described in section 7874(a)(2)(B)(i) involving domestic corporations or partnerships (domestic entities) then, for purposes of section 7874(a)(2)(B)(ii), the acquisitions are treated as a single acquisition and the domestic entities are treated as a single domestic entity.

Section 7874(c)(2)(A) and § 1.7874–1 provide special rules for determining ownership under section 7874(a)(2)(B)(ii) for stock held by members of the expanded affiliated group that includes the foreign corporation. Section 7874(c)(2)(B) provides that stock of the foreign corporation that is sold in a public offering related to the acquisition described in section 7874(a)(2)(B)(i) is not taken into account for purposes of determining ownership under section 7874(a)(2)(B)(ii).

A comment requested clarification as to the application of section 7874(c)(2)(A) and § 1.7874–1 when acquisitions of two or more domestic entities are treated as a single domestic entity under the 2009 temporary regulations. The IRS and the Treasury Department are studying the manner in which § 1.7874–1 should interact with various rules under section 7874, including the rules in section 7874(c)(2)(B), § 1.7874–2(e), and Notice 2009–78 (2009–2 CB 452) (determination of the ownership fraction when stock is issued in exchange for certain types of property). See § 601.601(d)(2)(ii)(*b*). Accordingly, no change has been made to this regulation, but the IRS and the Treasury Department request comments regarding the interaction of § 1.7874–1 and other rules under section 7874 related to the ownership fraction.

E. Downstream Transactions

The final regulations clarify that an acquisition by a corporation of its stock

from another corporation or a partnership is an acquisition of the transferor's properties for purposes of section 7874(a)(2)(B)(i). This rule applies even though, for Federal tax purposes, the acquired stock no longer exists after the transaction. Thus, for example, if a domestic corporation that holds stock in a foreign corporation merges into the foreign corporation, the foreign corporation is, for purposes of section 7874(a)(2)(B)(i), treated as acquiring properties of the domestic corporation in the form of the foreign corporation's stock.

Effective/Applicability Dates

These final regulations apply to acquisitions completed on or after June 7, 2012.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to this regulation and because the regulation does not impose a collection of information on small entities, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Milton M. Cahn of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Sections 1.7874–1 and 1.7874–2 also issued under 26 U.S.C. 7874(c)(6) and (g). * * *

■ **Par. 2.** Section 1.7874–1 is amended by:

■ 1. Revising paragraph (e).

■ 2. Adding two sentences at the end of paragraph (g).

The revision and addition read as follows:

§ 1.7874–1 Disregard of affiliate-owned stock.

* * * * *

(e) *Stock held by a partnership.* For purposes of this section, each partner in a partnership shall be treated as holding its proportionate share of stock held by the partnership, as determined under the rules and principles of sections 701 through 777.

* * * * *

(g) * * * Paragraph (e) of this section shall apply to acquisitions completed on or after June 7, 2012. See § 1.7874–1T(e), as contained in 26 CFR part 1 revised as of April 1, 2012, for acquisitions completed before June 7, 2012.

§ 1.7874–1T [Removed]

■ **Par. 3.** Section 1.7874–1T is removed.

■ **Par. 4.** Section 1.7874–2 is added to read as follows:

§ 1.7874–2 Surrogate foreign corporation.

(a) *Scope.* This section provides rules for determining whether a foreign corporation is treated as a surrogate foreign corporation under section 7874(a)(2)(B). Paragraph (b) of this section provides definitions and special rules. Paragraph (c) of this section provides rules to determine whether a foreign corporation has acquired properties held by a domestic corporation (or a partnership). Paragraph (d) of this section provides rules that apply when two or more foreign corporations complete, in the aggregate, an acquisition described in section 7874(a)(2)(B)(i). Paragraph (e) of this section provides rules that apply when a single foreign corporation completes more than one acquisition described in section 7874(a)(2)(B)(i). Paragraph (f) of this section provides rules to identify the stock of a foreign corporation that is held by reason of holding stock in a domestic corporation (or an interest in a domestic partnership). Paragraph (g) of this section provides rules that treat certain publicly traded foreign partnerships as foreign corporations for purposes of section 7874. Paragraph (h) of this section provides rules concerning the treatment of certain options (or similar interests) for purposes of section 7874. Paragraph (i) of this section provides rules that treat certain interests (including debt, stock, or a partnership interest) as stock of a foreign corporation for purposes of section 7874. Paragraph (j) of this section provides rules concerning the conversion of a foreign corporation to a domestic corporation by reason of section 7874(b). Paragraph (k) of this section provides examples that illustrate the rules of this section. Paragraph (l) of this section provides the effective/applicability date of this section.

(b) *Definitions and special rules.* Except as otherwise indicated, the following definitions and special rules apply for purposes of this section.

(1) The rules of this section are subject to section 7874(c)(4).

(2) A *former shareholder* of a domestic corporation is any person that held stock in the domestic corporation before the acquisition described in section 7874(a)(2)(B)(i), including any person that holds stock in the domestic corporation both before and after the acquisition.

(3) A *former partner* of a domestic partnership is any person that held an interest in the domestic partnership before the acquisition described in section 7874(a)(2)(B)(i), including any person that holds an interest in the domestic partnership both before and after the acquisition.

(4) An *interest in a partnership* includes a capital or profits interest.

(5) References to *properties held* by a domestic corporation include properties held directly or indirectly by the domestic corporation.

(6) The rules and principles of sections 701 through 777 shall be applied for purposes of determining a proportionate amount (or share) of properties held by a partnership (such as stock).

(7) Any reference to the acquisition of properties held by a domestic corporation (or a partnership) includes a direct or indirect acquisition of such properties.

(8) In the case of an acquisition of stock of a domestic corporation or an interest in a partnership, the proportionate amount of properties held by the domestic corporation (or the partnership) that is treated as indirectly acquired shall, as applicable, be determined at the time of the acquisition based on the relative value of—

(i) The stock acquired compared to all outstanding stock of the domestic corporation; or

(ii) The interest acquired compared to all interests in the partnership.

(9) The determination of whether a foreign corporation is a surrogate foreign corporation is made after the acquisition described in section 7874(a)(2)(B)(i). A foreign corporation that is treated as a

surrogate foreign corporation (including a surrogate foreign corporation treated as a domestic corporation described in section 7874(b)) shall continue to be treated as a surrogate foreign corporation (or a domestic corporation), even if the conditions of section 7874(a)(2)(B)(ii) and (iii) are not satisfied at a later date.

(c) *Acquisition of properties*—(1) *Indirect acquisition of properties.* For purposes of section 7874(a)(2)(B)(i), an indirect acquisition of properties held by a domestic corporation (or a partnership) includes, but is not limited to, the acquisitions described in paragraphs (c)(1)(i) through (iv) of this section. An acquisition of less than all of the stock of a domestic corporation (or interests in a partnership) shall constitute an indirect acquisition of a proportionate amount of the properties held by the domestic corporation or the partnership. See paragraph (b)(8) of this section for rules determining the proportionate amount of properties indirectly acquired.

(i) An acquisition of stock of a domestic corporation. See *Example 1* of paragraph (k) of this section for an illustration of the rules of this paragraph (c)(1)(i).

(ii) An acquisition of an interest in a partnership. See *Example 2* of paragraph (k) of this section for an illustration of the rules of this paragraph (c)(1)(ii).

(iii) An acquisition by a corporation (acquiring corporation) of properties held by a domestic corporation (or a partnership) in exchange for stock of a foreign corporation (foreign issuing corporation) that is part of the expanded affiliated group that includes the acquiring corporation after the acquisition shall be treated as an acquisition by the foreign issuing corporation. See *Example 3* of paragraph (k) of this section for an illustration of the rules of this paragraph (c)(1)(iii).

(iv) An acquisition by a partnership (acquiring partnership) of properties held by a domestic corporation (or a partnership) in exchange for stock of a foreign corporation that is part of the expanded affiliated group that would include the acquiring partnership after the acquisition (if the partnership were a corporation) shall be treated as an acquisition by the foreign issuing corporation.

(2) *Acquisition of stock of a foreign corporation.* An acquisition of stock of a foreign corporation that owns directly or indirectly stock of a domestic corporation (or an interest in a partnership) shall not constitute an indirect acquisition of any properties held by the domestic corporation (or the partnership). See *Example 4* of paragraph (k) of this section for an illustration of the rules of this paragraph (c)(2).

(3) *Downstream transactions.* An acquisition by a corporation of its stock from another corporation or a partnership (for example, as a result of a downstream merger) is an acquisition of the other corporation's or partnership's properties for purposes of section 7874(a)(2)(B)(i).

(d) *Acquisitions by multiple foreign corporations.* If, pursuant to a plan (or a series of related transactions), two or more foreign corporations complete, in the aggregate, an acquisition described in section 7874(a)(2)(B)(i), then each foreign corporation shall be treated as completing the acquisition for purposes of determining whether such foreign corporation is treated as a surrogate foreign corporation. See *Examples 5* and *6* of paragraph (k) of this section for illustrations of the rules of this paragraph (d).

(e) *Acquisitions of multiple domestic entities.* If, pursuant to a plan (or a series of related transactions), a foreign corporation completes two or more acquisitions described in section 7874(a)(2)(B)(i) involving domestic corporations and/or domestic partnerships (domestic entities), then, for purposes of section 7874(a)(2)(B)(ii), the acquisitions shall be treated as a single acquisition and the domestic entities shall be treated as a single domestic entity. If the transaction involves one or more domestic corporations and one or more domestic partnerships, the stock of the foreign corporation held by former shareholders and former partners by reason of holding stock or a partnership interest in the domestic entities shall be aggregated for purposes of determining whether the ownership condition of section 7874(a)(2)(B)(ii) is satisfied. See *Example 7* of paragraph (k) of this section for an illustration of the rules of this paragraph (e).

(f) *Stock held by reason of holding stock in a domestic corporation or an interest in a domestic partnership*—(1) *Specified transactions.* For purposes of section 7874(a)(2)(B)(ii), stock of a foreign corporation that is held by reason of holding stock in a domestic corporation (or an interest in a domestic partnership) includes, but is not limited to, the stock described in paragraphs (f)(1)(i) through (iii) of this section.

(i) Stock of a foreign corporation received in exchange for, or with respect to, stock of a domestic corporation.

(ii) Stock of a foreign corporation received in exchange for, or with respect to, an interest in a domestic partnership.

(iii) To the extent that paragraph (f)(1)(ii) of this section does not apply, stock of a foreign corporation received by a domestic partnership in exchange for all or part of its properties. In such a case, each partner in the domestic partnership shall be treated as holding its proportionate share of the stock of the foreign corporation by reason of holding an interest in the domestic partnership.

(2) *Transactions involving other property*—(i) *Stock of a domestic corporation.* If, pursuant to the same transaction, stock of a foreign corporation is received in exchange for, or with respect to, stock of a domestic corporation and other property, the stock of the foreign corporation that was received in exchange for, or with respect to, the stock of the domestic corporation shall be determined based on the relative value of the stock of the domestic corporation compared to the aggregate value of such stock and the other property.

(ii) *Interest in a domestic partnership.* If, pursuant to the same transaction, stock of a foreign corporation is received in exchange for, or with respect to, an interest in a domestic partnership and other property, the stock of the foreign corporation that was received in exchange for, or with respect to, the interest in the domestic partnership shall be determined based on the relative value of the interest in the domestic partnership compared to the aggregate value of such interest and the other property.

(3) See *Examples 8* through *10* of paragraph (k) of this section for illustrations of the rules of this paragraph (f).

(g) *Publicly traded foreign partnerships*—(1) *Treatment as a foreign corporation.* For purposes of section 7874, a publicly traded foreign partnership described in paragraph (g)(2) of this section shall be treated as a foreign corporation that is organized in the foreign country in which, or under the law of which, the publicly traded foreign partnership was created or organized, and the partnership interests in the publicly traded foreign partnership shall be treated as stock of the foreign corporation. For purposes of determining whether the foreign corporation shall be treated as a surrogate foreign corporation, a deemed acquisition of assets and liabilities by reason of § 1.708–1(b)(4) shall not constitute an acquisition described in section 7874(a)(2)(B)(i).

(2) *Publicly traded foreign partnership.* A publicly traded foreign partnership described in this paragraph (g)(2) is any foreign partnership that would, but for section 7704(c), be treated as a corporation under section 7704(a)—

(i) At the time of the acquisition described in section 7874(a)(2)(B)(i); or

(ii) At any time after the acquisition pursuant to a plan that existed at the time of the acquisition. For this purpose, a plan shall be deemed to exist at the time of the acquisition if the foreign partnership would, but for section 7704(c), be treated as a corporation under section 7704(a) at any time during the two-year period following the completion of the acquisition.

(3) *Surrogate foreign corporation to which section 7874(b) applies.* If paragraph (g)(1) of this section applies to a publicly traded foreign partnership and the foreign corporation is a surrogate foreign corporation to which section 7874(b) applies, the publicly traded foreign partnership shall be treated as a domestic corporation for purposes of the Internal Revenue Code (Code). See paragraph (g)(6) of this section for the timing and treatment of the conversion of the publicly traded foreign partnership to a domestic corporation. See *Example 11* of paragraph (k) of this section for an illustration of the rules of this paragraph (g)(3).

(4) *Surrogate foreign corporation to which section 7874(b) does not apply.* If paragraph (g)(1) of this section applies to a publicly traded foreign partnership and the foreign corporation is a surrogate foreign corporation to which section 7874(b) does not apply, the publicly traded foreign partnership shall continue to be treated as a foreign partnership for purposes of the Code, but section 7874(a)(1) shall apply to any expatriated entity (as defined in section 7874(a)(2)(A)). See *Example 13* of paragraph (k) of this section for an illustration of the rules of this paragraph (g)(4).

(5) *Foreign corporation not treated as a surrogate foreign corporation.* If paragraph (g)(1) of this section applies to a publicly traded foreign partnership and the foreign corporation is not treated as a surrogate foreign corporation, the status of the publicly traded foreign partnership as a foreign partnership shall not be affected by section 7874. See *Example 12* of paragraph (k) of this section for an illustration of the rules of this paragraph (g)(5).

(6) *Conversion to a domestic corporation.* Except for purposes of determining whether the publicly traded foreign partnership is a surrogate foreign corporation, if paragraph (g)(1) of this section applies to a publicly traded foreign partnership and the foreign corporation is a surrogate foreign corporation to which section 7874(b) applies, then at the later of the end of the day immediately preceding the first date properties are acquired as part of the acquisition described in section 7874(a)(2)(B)(i) or immediately after the formation of the publicly traded foreign partnership, the publicly traded foreign partnership shall be treated as transferring all of its assets and liabilities to a newly formed domestic corporation in exchange solely for stock of the domestic corporation, and then distributing such stock to its partners in proportion to their partnership interests in liquidation of the partnership. The treatment of the transfer of assets and liabilities to the domestic corporation and the distribution of the stock of the domestic corporation to the partners in liquidation of the partnership shall be determined under all relevant provisions of the Code and general tax principles.

(h) *Options*—(1) *Value.* Except to the extent otherwise provided in this paragraph (h), for purposes of section 7874, including for purposes of determining the membership of an expanded affiliated group under section 7874(c)(1), an option with respect to a corporation or partnership will be treated as stock in the corporation, or an interest in the partnership, as applicable, with a value equal to the holder's claim on the equity of the corporation or partnership. For this purpose, claim on the equity equals the value of the stock or partnership interest that may be acquired pursuant to the option, less the exercise price (but in no case is a claim on the equity less than zero). Also for this purpose, the equity of the corporation or partnership shall not include the amount of any property the holder of the option would be required to provide to the corporation or partnership under the terms of the option if such option were exercised. See *Example 14* and *Example 16* of paragraph (k) of this section for illustrations of the rules of this paragraph (h)(1).

(2) *Voting power.* Except to the extent otherwise provided in this paragraph (h), for purposes of determining the voting power of a foreign corporation under section 7874, including for purposes of determining the membership of an expanded affiliated group under section 7874(c)(1), an option will be treated as exercised only if a principal purpose of the issuance or transfer of the option is to avoid the foreign corporation being treated as a surrogate foreign corporation.

(3) *Timing.* For purposes of this paragraph (h), the value of the holder's claim on the equity is determined—

(i) In the case of a domestic corporation or a domestic partnership, immediately before the acquisition described in section 7874(a)(2)(B)(i).

(ii) In the case of a foreign corporation or foreign partnership, immediately after the acquisition described in section 7874(a)(2)(B)(i).

(4) *Certain options disregarded.* The rules of paragraph (h)(1) of this section shall not apply to an option if—

(i) A principal purpose of the issuance or acquisition of the option is to avoid the foreign corporation being treated as a surrogate foreign corporation, or

(ii) At the time of the acquisition described in section 7874(a)(2)(B)(i), the probability of the option being exercised is remote.

(5) *Options and interests similar to an option.* For purposes of this paragraph (h), an option includes an interest similar to an option. Examples of options (including interests similar to options) include, but are not limited to, a warrant, a convertible debt instrument, an instrument other than debt that is convertible into stock or a partnership interest, a put, stock or a partnership interest subject to risk of forfeiture, a contract to acquire or sell stock or a partnership interest, and an exchangeable share or exchangeable partnership interest.

(6) *Multiple claims on equity.* Paragraph (h)(1) of this section shall not apply to an option to the extent treating the option as stock or a partnership interest would duplicate a shareholder's or partner's claim on the equity of the corporation or partnership by reason of holding stock in the corporation or an interest in the partnership. See *Example 15* of paragraph (k) of this section for an illustration of the rules of this paragraph (h)(6).

(i) *Interests treated as stock of a foreign corporation*—(1) *Stock or other interests.* If the conditions of paragraphs (i)(1)(i) and (ii) of this section are satisfied, then, for purposes of section 7874, any interest (including stock or a partnership interest) that is not otherwise treated as stock of a foreign corporation (including under paragraph (h) of this section) shall be treated as stock of the foreign corporation. See *Examples 17* and *18* of paragraph (k) of this section for illustrations of the rules of this paragraph (i)(1).

(i) The interest provides the holder distribution rights that are substantially similar in all material respects to the

distribution rights provided by stock in the foreign corporation. For this purpose, distribution rights include rights to dividends (or partnership distributions), distributions in redemption of the interest (in whole or in part), distributions in liquidation, or other similar distributions that represent a return on, or of, the holder's investment in the interest.

(ii) Treating the interest as stock of the foreign corporation has the effect of treating the foreign corporation as a surrogate foreign corporation under section 7874(a)(2)(B).

(2) *Creditor claims*—(i) *Domestic corporation.* For purposes of section 7874, if, immediately prior to the first date properties are acquired as part of an acquisition described in section 7874(a)(2)(B)(i), a domestic corporation is in a title 11 or similar case (as defined in section 368(a)(3)), or the liabilities of the domestic corporation exceed the value of its assets, then each creditor of the domestic corporation shall be treated as a shareholder of the domestic corporation and any claim of the creditor against the domestic corporation shall be treated as stock of the domestic corporation. See *Example 19* of paragraph (k) of this section for an illustration of the rules of this paragraph (i)(2)(i).

(ii) *Domestic or foreign partnership.* For purposes of section 7874, if, immediately prior to the first date properties are acquired as part of an acquisition described in section 7874(a)(2)(B)(i), a partnership (foreign or domestic) is in a title 11 or similar case (as defined in section 368(a)(3)), or the liabilities of the partnership exceed the value of its assets, then each creditor of the partnership shall be treated as a partner in the partnership and any claim of the creditor against the partnership shall be treated as an interest in the partnership.

(iii) *Treatment of creditor as shareholder or partner.* A creditor that is treated as a shareholder or partner under paragraph (i)(2)(i) or (ii) of this section shall be treated as a shareholder or partner for all purposes of section 7874. See, for example, § 1.7874–1(c) and paragraph (f) of this section. See *Example 19* of paragraph (k) of this section for an illustration of the rules of this paragraph (i)(2)(iii).

(j) *Application of section 7874(b)*—(1) *Conversion to a domestic corporation.* Except for purposes of determining whether a foreign corporation is treated as a surrogate foreign corporation, the conversion of a foreign corporation to a domestic corporation by reason of section 7874(b) shall constitute a reorganization described in section 368(a)(1)(F) that occurs at the later of the end of the day immediately preceding the first date properties are acquired as part of the acquisition described in section 7874(a)(2)(B)(i) or immediately after the formation of the foreign corporation. See, for example, §§ 1.367(b)–2 and 1.367(b)–3 for certain consequences of the reorganization. The treatment of all other aspects of the conversion shall be determined under the relevant provisions of the Code and general tax principles. See *Example 20* of paragraph (k) of this section for an illustration of the rules of this paragraph (j)(1).

(2) *Entity classification.* A foreign corporation that is treated as a domestic corporation under section 7874(b) is not an eligible entity as defined in § 301.7701–3(a), and therefore may not elect to be classified as other than an association (and thus cannot be treated as other than a corporation) for Federal tax purposes.

(3) *Application of section 367.* If a foreign corporation is treated as a domestic corporation under section 7874(b), section 367 shall not apply to any transfer of property by a United States person to such foreign corporation as part of the acquisition described in section 7874(a)(2)(B)(i). However, section 367 shall apply to the conversion of the foreign corporation to a domestic corporation. See paragraph (j)(1) of this section. See *Example 20* of paragraph (k) of this section for an illustration of the rules of this paragraph (j)(3).

(k) *Examples*—(1) *Assumed facts.* Except as otherwise stated, assume the following for purposes of the examples included in paragraph (k)(2) of this section.

(i) DC1 and DC2 are domestic corporations.

(ii) FA, FP, F1, F2, F3, and F4 are foreign corporations organized in Country A.

(iii) DPS is a domestic partnership that conducts a trade or business.

(iv) FPS is a foreign partnership that is not publicly traded.

(v) Under the terms of the partnership agreements of DPS and FPS, each partner's share in the partnership's items of income, gain, deduction, and loss is determined in accordance with the partner's partnership interest percentage in the partnership, as stated in the examples.

(vi) A, B, and C are unrelated individuals.

(vii) Each entity has a single class of equity outstanding and is unrelated to all other entities.

(viii) All transactions are completed pursuant to a plan.

(ix) All acquisitions of properties are completed after March 4, 2003.

(x) Section 7874(c)(4) does not apply, and no option is issued or acquired with a principal purpose to avoid a foreign corporation being treated as a surrogate foreign corporation.

(2) *Examples.* The following examples illustrate the rules of this section.

Example 1. Acquisition of stock of a domestic corporation. (i) *Facts.* FA acquires 25% of the outstanding stock of DC1.

(ii) *Analysis.* Under paragraph (c)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring 25% of the properties held by DC1 on the date of the stock acquisition.

Example 2. Acquisition of a partnership interest. (i) *Facts.* DPS wholly owns DC1. FA acquires a 40% interest in DPS.

(ii) *Analysis.* Under paragraph (c)(1)(ii) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring 40 percent of the DC1 stock held by DPS on the date of the acquisition of the partnership interest. Further, under paragraph (c)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring 40% of the properties held by DC1 on the date of the acquisition of the partnership interest.

Example 3. Acquisition of stock by a subsidiary. (i) *Facts.* FP wholly owns FA. FA acquires all the outstanding stock of DC1 in exchange solely for FP stock. FP and FA are members of the same expanded affiliated group after the acquisition.

(ii) *Analysis.* Under paragraph (c)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring 100% of the properties held by DC1 on the date of the stock acquisition. Further, under paragraph (c)(1)(iii) of this section, for purposes of section 7874(a)(2)(B)(i), FP is also treated as acquiring 100% of the properties held by DC1 on the date of the stock acquisition. The result would be the same if instead FA had directly acquired all the properties held by DC1 in exchange for FP stock.

Example 4. Acquisition of stock of a foreign corporation. (i) *Facts.* FP wholly owns DC1. FA acquires all of the outstanding stock of FP.

(ii) *Analysis.* Under paragraph (c)(2) of this section, for purposes of section 7874(a)(2)(B)(i), FA is not treated as acquiring any properties held by DC1 on the date of the acquisition of the FP stock.

Example 5. Acquisition of stock by multiple foreign corporations. (i) *Facts.* Pursuant to the same plan, the shareholders of DC1 transfer all of their DC1 stock equally to F1, F2, F3, and F4 in exchange solely for stock of each foreign corporation.

(ii) *Analysis.* Under paragraph (c)(1)(i) of this section, in the aggregate F1, F2, F3, and F4 are treated as acquiring substantially all of the properties held by DC1. Because the acquisition was pursuant to the same plan, under paragraph (d) of this section, F1, F2, F3, and F4 are each treated as acquiring substantially all of the properties held by DC1 for purposes of determining whether each foreign corporation shall be treated as a surrogate foreign corporation.

Example 6. Acquisition of assets by multiple foreign corporations. (i) *Facts.* Individual A wholly owns DC1. DC1 forms F1, F2, F3, and F4, and transfers an equal portion of its properties to each corporation in exchange solely for stock of the corporation. Pursuant to the same plan DC1 then distributes the stock of each foreign corporation to individual A.

(ii) *Analysis.* Because pursuant to the same plan F1, F2, F3, and F4 acquired, in the aggregate, substantially all of the properties held by DC1, under paragraph (d) of this section, F1, F2, F3, and F4 are each treated as acquiring substantially all of the properties held by DC1 for purposes of determining whether each foreign corporation shall be treated as a surrogate foreign corporation.

Example 7. Acquisition of multiple domestic corporations. (i) *Facts.* Individual A wholly owns DC1, and individual B wholly owns DC2. Pursuant to the same plan, individuals A and B transfer all of their DC1 stock and DC2 stock to FA, a newly formed corporation, in exchange solely for all 100 shares of FA stock outstanding.

(ii) *Analysis.* Under paragraph (c)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring all of the properties held by DC1 and DC2 on the date of the stock acquisition. Under paragraph (e) of this section, because pursuant to the same plan FA acquired substantially all of the properties held by DC1 and DC2, for purposes of determining whether FA shall be treated as a surrogate foreign corporation, DC1 and DC2 shall be treated as a single domestic corporation, of which individuals A and B are former shareholders. Thus, individuals A and B are treated as holding all 100 shares of the FA stock by reason of holding stock of such domestic corporation, and the ownership fraction under section 7874(a)(2)(B)(ii) is 100/100, or 100%.

Example 8. Exchange of stock and other property. (i) *Facts.* Individual A wholly owns DC1 and F1. DC1 has a $40x value and F1 has a $60x value. Individual A transfers all of the DC1 stock and F1 stock to FA, a newly formed corporation, in exchange solely for FA stock.

(ii) *Analysis.* Under paragraphs (f)(1)(i) and (f)(2)(i) of this section, for purposes of section 7874(a)(2)(B)(ii), individual A is considered to hold 40% of the FA stock by reason of holding stock in DC1 ($100x FA stock multiplied by $40x/$100x, the relative value of the DC1 stock to all the property transferred by A to FA).

Example 9. Stock received as a distribution. (i) *Facts.* Pursuant to a divisive reorganization described in section 368(a)(1)(D), DC1 contributes substantially all of its properties to FA, a newly formed corporation, in exchange solely for FA stock and then distributes the FA stock to its shareholders in a transaction qualifying under section 355.

(ii) *Analysis.* Under paragraph (f)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(ii), the FA stock received by the DC1 shareholders as a distribution with respect to the DC1 stock is considered held by reason of holding stock in DC1. The result would be the same if the transaction did not qualify as a reorganization (for example, if the distribution were subject to sections 301 and 311(b)).

Example 10. Incorporation of a partnership trade or business. (i) *Facts.* Individuals A and B equally own DPS. DPS transfers substantially all of its properties constituting a trade or business to FA, a newly formed corporation, solely in exchange for FA stock. DPS retains the FA stock after the transaction.

(ii) *Analysis.* Under paragraph (f)(1)(iii) of this section, for purposes of section 7874(a)(2)(B)(ii), individuals A and B are treated as holding a proportionate amount (that is, an equal amount) of the FA stock held by DPS by reason of holding an interest in DPS.

Example 11. Publicly traded foreign partnership treated as domestic corporation. (i) *Facts.* Pursuant to a plan, DC1 and individual B organize a limited liability company (HPS) under the law of Country A. DC1 owns 90% of the membership interests in HPS, and B owns 10% of the membership interests in HPS. HPS is a foreign eligible entity under § 301.7701–2, and DC1 and B make an election under § 301.7701–3 to treat HPS as a partnership for Federal tax purposes as of the date of the formation of HPS. HPS forms DC2. One day after the formation of HPS, DC2 merges with and into DC1. Pursuant to the merger agreement, the DC1 shareholders exchange their DC1 stock solely for membership interests in HPS. After the merger HPS wholly owns DC1, and the former shareholders of DC1 own a greater than 80% interest in HPS by reason of holding stock of DC1. Public trading of the HPS ownership interests begins the day after the date on which the merger is completed. HPS is not treated as a corporation under section 7704(a) by reason of section 7704(c). If HPS were a corporation, the condition of section 7874(a)(2)(B)(iii) would be satisfied.

(ii) *Analysis.* HPS is a publicly traded foreign partnership that is described in paragraph (g)(2) of this section. Therefore, under paragraph (g)(1) of this section, for purposes of section 7874, HPS is treated as a foreign corporation organized under the law of Country A and the membership interests in HPS are treated as stock of the foreign corporation. The foreign corporation is treated as a surrogate foreign corporation under section 7874(a)(2)(B) because, pursuant to the merger, HPS acquired substantially all of the properties held by DC1, the former shareholders of DC1 hold at least 60% of the stock of the foreign corporation by reason of holding stock of DC1, and the expanded affiliated group that includes the foreign corporation does not have substantial business activities in Country A when compared to the total business activities of the expanded affiliated group. Further, because the former shareholders of DC1 hold at least 80% of the stock of the foreign corporation by reason of holding stock of DC1, section 7874(b) applies to the surrogate foreign corporation, and therefore HPS is treated as a domestic corporation for purposes of the Code. Under paragraph (g)(6) of this section, except for purposes of determining whether HPS is a surrogate foreign corporation, at the end of the day immediately preceding the date of the merger of DC2 with and into DC1, HPS is treated as transferring all of its assets and liabilities to a new domestic corporation in exchange solely for stock of the domestic corporation. HPS is then treated as proportionately distributing such stock to its membership interest holders in liquidation of the partnership. In addition, as a result of the merger of DC2 with and into DC1, the former shareholders of DC1 shall be treated as receiving stock of a domestic corporation in exchange for their DC1 stock.

Example 12. Publicly traded foreign partnership not treated as a surrogate foreign corporation. (i) *Facts.* The facts are the same as in *Example 11* of this section, except that, after the acquisition, the expanded affiliated group that includes HPS (treated as a foreign corporation for this purpose) has substantial business activities in Country A when compared to the total business activities of the expanded affiliated group.

(ii) *Analysis.* Under paragraph (g)(1) of this section, for purposes of section 7874, HPS is treated as a foreign corporation and the membership interests in HPS are treated as stock of the foreign corporation. However, the foreign corporation is not treated as a surrogate foreign corporation under section 7874(a)(2)(B) because, after the acquisition, the expanded affiliated group that includes HPS has substantial business activities in Country A when compared to the total business activities of the expanded affiliated group. Therefore, under paragraph (g)(5) of this section, section 7874 does not apply and the status of HPS as a foreign partnership is not affected. In addition, DC1 is not treated as an expatriated entity under section 7874(a) by reason of the acquisition.

Example 13. Publicly traded foreign partnership treated as a surrogate foreign corporation but not as a domestic corporation. (i) *Facts.* FPS is a publicly traded foreign partnership organized in Country A that, by reason of section 7704(c), is not treated as a corporation under section 7704(a). FPS acquires all the stock of DC1 in exchange for partnership interests in FPS. After the acquisition, the former shareholders of DC1 hold a 75%-interest in FPS by reason of holding DC1 stock. After the acquisition, the expanded affiliated group that includes FPS (treated as a foreign corporation for this purpose) does not have substantial business activities in Country A when compared to the total business activities of the expanded affiliated group.

(ii) *Analysis.* Under paragraph (g)(1) of this section, for purposes of section 7874, FPS is treated as a foreign corporation and the partnership interests in FPS are treated as stock of the foreign corporation. FPS is treated as a surrogate foreign corporation because the conditions of section 7874(a)(2)(B) are satisfied. However, because the former shareholders of DC1 hold less than an 80%-interest in FPS by reason of holding DC1 stock, section 7874(b) does not apply to FPS. Therefore, under paragraph (g)(4) of this section FPS continues to be treated as a foreign partnership for purposes of the Code, but section 7874(a)(1) applies to DC1 and any other expatriated entity.

Example 14. Warrant to acquire stock from the foreign corporation. (i) *Facts.* Individual

A wholly owns DC1. DC1 has a $200x value. Individual B wholly owns FA. The value of B's FA stock is $400x. Individual C holds a warrant to acquire FA stock from FA at an exercise price of $20x. Individual A transfers all of its DC1 stock to FA in exchange solely for FA stock with a value of $200x. At the time of the transfer, the FA stock that individual C can acquire pursuant to the warrant has a $70x value.

(ii) *Analysis.* Under paragraphs (h)(1) of this section, for purposes of section 7874, individual C is treated as owning FA stock with a $50x value. This amount represents individual C's claim on the equity of FA after the acquisition ($70x value of FA stock that may be acquired pursuant to the warrant, less the $20x exercise price), without taking into account the $20x individual C would be required to provide to FA upon the exercise of the warrant. Thus, for purposes of section 7874, the value of the stock of FA immediately after the transaction is $650x ($600x of FA stock, plus C's $50x claim on the equity of FA). C's warrant is not taken into account for purposes of determining the voting power of FA under section 7874.

Example 15. Option to acquire stock from another shareholder. (i) *Facts.* The facts are the same as in *Example 14* except that, instead of holding a warrant issued by FA, individual C holds an option to acquire FA stock from individual B for an exercise price of $20x. At the time of the acquisition, the FA stock that individual C can acquire under the option has a $70x value.

(ii) *Analysis.* Under paragraph (h)(6) of this section, for purposes of section 7874, individual C is not treated as owning FA stock by reason of holding the option because treating the option as FA stock would have the effect of partially duplicating individual B's claim on the equity of FA at the time of the acquisition by reason of holding FA stock. However, all of the FA stock owned by individual B will be taken into account for purposes of section 7874. C's warrant is not taken into account for purposes of determining voting power of FA under section 7874.

Example 16. Warrant to acquire stock from the domestic corporation. (i) *Facts.* A DC1 employee holds a warrant to acquire DC1 stock from DC1. In connection with the acquisition by FA of substantially all of the properties held by DC1, the DC1 employee receives a warrant from FA to acquire 15 shares of FA stock in exchange for the warrant to acquire DC1 stock.

(ii) *Analysis.* Under paragraphs (h)(1) of this section, for purposes of section 7874, the warrant held by the DC1 employee is treated as DC1 stock with a value equal to the employee's claim on the equity of DC1 immediately before the acquisition. Further, for purposes of section 7874, the DC1 employee is treated as holding FA stock with a value equal to the employee's claim on the equity of FA after the acquisition by reason of holding the warrant to acquire DC1 stock (treated as DC1 stock for this purpose). The option held by the DC1 employee is not taken into account for purposes of determining the voting power of FA under section 7874.

Example 17. Stock in a subsidiary treated as stock of a foreign parent corporation. (i) *Facts.* (A) Individuals A and B equally own DC1. FA, a newly formed corporation, issues stock in a public offering for cash. FA contributes part of the cash from the public offering to DC2, a newly formed corporation, in exchange for all the stock of DC2. DC2 merges with and into DC1 with DC1 surviving. Pursuant to the merger agreement, individuals A and B exchange their DC1 stock for cash and shares of class B stock of DC1. Following the merger FA owns all the class A stock of DC1. FA does not hold significant assets other than the class A stock of DC1. Individuals A and B own all the class B stock of DC1. DC1 has no other class of stock outstanding.

(B) The class B stock entitles individuals A and B to dividend distributions approximately equal to any dividend distributions made by FA with respect to its publicly traded stock. In certain circumstances, the class B stock also permits individuals A and B to require DC1 to redeem the stock at fair market value. The class B stock does not provide individuals A and B voting rights with respect to FA.

(ii) *Analysis.* The dividend rights provided by the class B stock are substantially similar in all material respects to the dividend rights provided by the FA stock. In addition, because FA does not hold significant assets other than the class A stock, the value of the class B stock held by individuals A and B is approximately equal to the value of a corresponding amount of publicly traded FA stock. The distribution rights on liquidation (or redemption) provided by the class B stock, therefore, are substantially similar in all material respects to the distribution rights on liquidation (or redemption) provided by the FA stock. As a result, the distribution rights provided by the class B stock are substantially similar in all material respects to the distribution rights provided by the publicly traded FA stock. Thus, if treating the class B stock as FA stock would have the effect of treating FA as a surrogate foreign corporation, under paragraph (i)(1) of this section the class B stock will be treated as FA stock for purposes of section 7874.

Example 18. Partnership interest treated as stock of foreign acquiring corporation. (i) *Facts.* (A) Individuals A and B equally own DC1. FA, a newly formed corporation, issues stock in a public offering for cash. Individuals A and B and FA organize FPS. FA transfers part of the cash from the public offering to FPS in exchange for a class A partnership interest. FA does not hold any significant assets other than the class A partnership interest. Individuals A and B transfer their DC1 stock to FPS in exchange for class B partnership interests.

(B) The class B partnership interests entitle individuals A and B to cash distributions from FPS approximately equal to any dividend distributions made by FA with respect to its publicly traded stock. In certain circumstances, the class B partnership interests also permit individuals A and B to require FPS to redeem the interests in exchange for cash equal to the value of an amount of FA stock as determined on the redemption date. The class B partnership interests do not provide individuals A or B voting rights with respect to FA.

(ii) *Analysis.* The non-liquidating distribution rights provided by the class B partnership interests are substantially similar in all material respects to the dividend rights provided by the FA stock. Because FA does not hold any significant assets other than the class A partnership interest, the value of the class B partnership interests held by individuals A and B is approximately equal to a corresponding amount of FA stock. The distribution rights on liquidation (or redemption) provided by the class B partnership interests, therefore, are substantially similar in all material respects to distribution rights on liquidation (or redemption) provided by the FA stock. Thus, the distribution rights provided by the class B partnership interests are substantially similar in all material respects to the distribution rights provided by the publicly traded FA stock. As a result, if treating the class B partnership interests as FA stock would have the effect of treating FA as a surrogate foreign corporation, under paragraph (i)(1) of this section the class B partnership interests will be treated as FA stock for purposes of section 7874.

Example 19. Creditor treated as a shareholder. (i) *Facts.* Individuals A and B equally own DC1. The liabilities of DC1 exceed the value of its assets. Pursuant to a plan, FA, a newly formed corporation, acquires substantially all of the properties held by DC1 in exchange solely for FA stock. Pursuant to the plan, the DC1 stock held by individuals A and B is cancelled, and the creditors of DC1 receive all the FA stock in exchange for their claims against DC1.

(ii) *Analysis.* Because immediately before the first date on which properties are acquired as part of the acquisition described in section 7874(a)(2)(B)(i) the liabilities of DC1 exceed the value of its assets, under paragraph (i)(2)(i) of this section, for purposes of section 7874, the creditors of DC1 are treated as shareholders of DC1 and the creditors' claims against DC1 are treated as DC1 stock. Therefore, for purposes of section 7874(a)(2)(B)(ii), the FA stock received by the creditors of DC1 by reason of their claims against DC1 is considered held by former shareholders of DC1 by reason of holding DC1 stock.

Example 20. Conversion to a domestic corporation and application of section 367. (i) *Facts.* Individuals A and B are United States persons and equally own DC1. Pursuant to a plan, individuals A and B transfer their DC1 stock to FA in exchange solely for 80% of the outstanding FA stock. After the acquisition, the expanded affiliated group that includes FA does not have substantial business activities in Country A when compared to the total business activities of the expanded affiliated group.

(ii) *Analysis.* Under paragraph (c)(1)(i) of this section, for purposes of section 7874(a)(2)(B)(i), FA is treated as acquiring all of the properties held by DC1 on the date of the stock acquisition. After the acquisition, the former shareholders of DC1 own 80% of the stock of FA by reason of holding DC1 stock. Therefore, FA is a surrogate foreign corporation that is treated as a domestic corporation under section 7874(b). Under paragraph (j)(1) of this section, except for

purposes of determining whether FA is treated as a surrogate foreign corporation, the conversion of FA to a domestic corporation constitutes a reorganization described in section 368(a)(1)(F) that occurs at the end of the day immediately preceding the date of the stock acquisition. Section 367 applies to the conversion of FA to a domestic corporation. See, for example, §§ 1.367(b)–2 and 1.367(b)–3 for the consequences of the conversion. Under paragraph (j)(3) of this section, section 367 does not apply to the transfers of DC1 stock by individuals A and B to FA.

(l) *Effective/applicability date.* This section applies to acquisitions completed on or after June 7, 2012. For acquisitions completed prior to June 7, 2012, see § 1.7874–2T(o), as contained in 26 CFR part 1, revised as of April 1, 2012.

§ 1.7874–2T [Removed]

■ **Par. 5.** Section 1.7874–2T is removed.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: June 4, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–14237 Filed 6–7–12; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2012–0396]

Drawbridge Operation Regulations; Chelsea River, Chelsea and East Boston, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the P.J. McArdle Bridge across the Chelsea River, mile 0.3, between Chelsea and East Boston, Massachusetts. This deviation allows the bridge to remain in the closed position to facilitate the Chelsea River Revel and 5K Road Race. Vessels that can pass under the draw without a bridge opening may do so at all times.

DATES: This deviation is effective from 8 a.m. through 5 p.m. on June 16, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–0396 and are available online at *www.regulations.gov.* They are also available for inspection or copying two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call John McDonald, Project Officer, First Coast Guard District, at (617) 223–8364. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The owner of the bridge, the City of Boston, requested this temporary deviation. The P.J. McArdle Bridge, across the Chelsea River at mile 0.3, between Chelsea and East Boston, Massachusetts, has a vertical clearance in the closed position of 21 feet at mean high water and 30 feet at mean low water. The bridge opens on signal as required by 33 CFR 117.593. The waterway is transited by commercial users, tankers, tug and barge units.

This temporary deviation allows the P.J. McArdle Bridge to remain in the closed position from 8 a.m. through 5 p.m. on June 16, 2012. Vessels able to pass under the closed draw may do so at any time. Waterway users were advised of the requested bridge closure period and offered no objection.

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

Dated: May 31, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–14196 Filed 6–11–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0381]

Safety Zones; Recurring Events in Captain of the Port New York Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce various safety zones in the Sector New York area of responsibility on various dates and times. This action is necessary to ensure the safety of vessels and spectators from hazards associated with fireworks displays. During the enforcement period, no person or vessel may enter the safety zone without permission of the Captain of the Port (COTP).

DATES: The regulations for the safety zones described in 33 CFR 165.160 will be enforced on the dates and times listed in the table below.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Ensign Kimberly Farnsworth, Coast Guard; telephone 718–354–4163, email *Kimberly.A.Farnsworth@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone listed in 33 CFR 165.160 on the specified dates and times as indicated in Table 1 below. If the event is delayed by inclement weather, the regulation will be enforced on the rain date indicated in Table 1 below. These regulations were published in the **Federal Register** on November 9, 2011 (76 FR 69614).

TABLE 1

1. Intrepid Air and Sea Museum Fireworks (update), Pier 84 Hudson River Safety Zone, 33 CFR 165.160(5.9).	• Launch site: A barge located in approximate position 40°45′56.9″ N, 074°00′25.4″ W (NAD 1983), approximately 380 yards west of Pier 84, Manhattan, New York. • Date: May 23, 2012 • Rain Date: May 24, 2012 • Time: 9:30 p.m.–10:42 p.m.

TABLE 1—Continued

2. Midland Beach Sea Turtle Fireworks, Midland Beach Safety Zone, Staten Island, 33 CFR 165.160(2.11).	• Launch site: A barge located in approximate position 40°34′12″ N, 074°04′29.6″ W (NAD 1983), approximately 800 yards southeast of the Midland Beach. • Date: June 16, 2012 • Rain Date: June 17, 2012 • Time: 8:30 p.m.–9:48 p.m.
3. Wolfe's Pond Park, Wofle's Pond Park Safety Zone, Staten Island, 33 CFR 165.160(5.2).	• Launch site: A barge located in approximate position 40°30′52.1″ N, 074°10′58.8″ W (NAD 1983), approximately 540 yards east of Wolfe's Pond Park, Staten Island, New York. • Date: June 30, 2012 • Rain Date: July 1, 2012 • Time: 8:30 p.m.–9:48 p.m.
4. Fort Hamilton Independence Day, Fort Hamilton Safety Zone, 33 CFR 165.160(2.14).	• Launch site: A barge located in approximate position 40°36′00″ N, 074°01′42.5″ W (NAD 1983), approximately 1400 yards southeast of the Verrazano-Narrows Bridge. • Date: July 1, 2012 • Rain Date: July 2, 2012 • Time: 9:15 p.m.–10:35 p.m.

Under the provisions of 33 CFR 165.160, a vessel may not enter the regulated area unless given express permission from the COTP or the designated representative. Spectator vessels may transit outside the regulated area but may not anchor, block, loiter in, or impede the transit of other vessels. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.160(a) and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide mariners with advanced notification of enforcement periods via the Local Notice to Mariners and marine information broadcasts. If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated area.

Dated: May 11, 2012.

G.P. Hitchen,

Captain, U.S. Coast Guard, Acting Captain of the Port New York.

[FR Doc. 2012–14217 Filed 6–11–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0404]

RIN 1625–AA00

Safety Zone; USMMA Fireworks, Long Island Sound, Kings Point, NY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Long Island Sound in the vicinity of Kings Point, NY for a fireworks display. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with fireworks displays. This rule is intended to restrict all vessels from a portion of Long Island Sound before, during, and immediately after the fireworks event.

DATES: This rule will be effective from 9:00 p.m. on June 16, 2012 until 10:08 p.m. on June 17, 2012. This rule will be enforced from 9:00 p.m. until 10:08 p.m. on June 16, 2012, with a rain date of June 17, 2012 from 9:00 p.m. until 10:08 p.m.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–0404]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Kimberly Farnsworth, Coast Guard; Telephone (718) 354–4163, email *Kimberly.A.Farnsworth@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
COTP Captain of the Port

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b) (B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because sufficient information about the event was not received in time to publish a NPRM followed by a final rule before the effective date, thus making the publication of a NPRM impractical. The Coast Guard received the information about the event on May 3, 2012. Any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest, since immediate action is needed to provide for the safety of life and property on navigable waters from the hazards associated with fireworks including unexpected detonation and burning debris.

The event sponsor advised that the event is in correlation with the graduation ceremony of the United

States Merchant Marine Academy, where the graduating class, faculty, and family members are anticipating this event taking place as scheduled, therefore the sponsor is unable to cancel or delay the event date. In addition, any change to the date of the event would cause economic hardship on the event sponsor, negatively impacting other activities being held in conjunction with the event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The rule must become effective on the date specified in order to provide for the safety of spectators and vessels operating in the area near this event. Delaying the effective date of this rule would be contrary to the public interest and would expose spectators, vessels to the hazards associated with the fireworks event. Also a delay or cancellation of the fireworks event in order to allow for the publication in the **Federal Register** is contrary to the public's interest in having this event occur as scheduled.

B. Basis and Purpose

The legal basis for this rule is 33 U.S.C. 1231; 46 U.S.C Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

This temporary safety zone is necessary to ensure the safety of spectators and vessels from hazards associated with the fireworks display. The safety zone will be enforced starting at 9:00 p.m. which is a half hour before the launch time in order to ensure the barge can safely get in position. The fireworks launch will begin at 9:30 p.m. and last for approximately 8 minutes. The zone will continue to be enforced for 30 minutes after the display as a cool down for the barge, to ensure the safe movement as it transits back to homeport.

C. Discussion of the Final Rule

This rule establishes a temporary safety zone on the waters of Long Island Sound in the vicinity of Kings Point, NY. All persons and vessels shall comply with the instructions of the COTP New York or the designated representative during the enforcement of the temporary safety zone. Entering into, transiting through, or anchoring within the temporary safety zone is prohibited unless authorized by the COTP New York, or the designated representative.

Based on the inherent hazards associated with fireworks, the Captain of the Port (COTP) New York has determined that fireworks launches in close proximity to water crafts pose a significant risk to public safety and property. The combination of increased number of recreational vessels, congested waterways, darkness punctuated by bright flashes of light, and debris especially burning debris falling on passing or spectator vessels has the potential to result in serious injuries or fatalities. This temporary safety zone will restrict vessels from a portion of the Long Island Sound around the location of the fireworks launch platform before, during, and immediately after the fireworks display.

The Coast Guard determined that this regulated area will not have a significant impact on vessel traffic due to its temporary nature and limited size and the fact that vessels are allowed to transit the navigable waters outside of the regulated area.

Advanced public notifications will also be made to the local maritime community through appropriate means, which will include, but is not limited to, the Local Notice to Mariners as well as Broadcast Notice to Mariners.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The Coast Guard's implementation of this temporary safety zone will be of short duration and is designed to minimize the impact to vessel traffic on the navigable waters. This temporary safety zone will only be enforced for approximately 70 minutes. Due to the location, vessels will be able to transit around the zone in a safe manner.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in a portion of the navigable waters in the vicinity of the marine event during the effective period.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will be in effect for 68 minutes; late at night when vessel traffic is low. Vessel traffic could pass safely around the safety zone. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the waterway.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Marine safety, Navigation (water), Reporting and recordkeeping requirements, waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREA

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

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

■ 2. Add § 165.T01–0404 to read as follows:

§ 165.T01–0404 Safety Zone; USMMA Fireworks, Long Island Sound, Kings Point, NY.

(a) *Regulated Area.* The following area is a temporary safety zone: all navigable waters of the Long Island Sound within a 164-yard radius of the fireworks barge located in approximate position 40°48′44.69″ N, 073°46′7.69″ W, in the vicinity of Kings Point, NY, approximately 300-yards west of the Kings Point Marina.

(b) *Effective Dates and Enforcement Periods.* This rule will be effective from 9:00 p.m. on June 16, 2012 until 10:08 p.m. on June 17, 2012. This rule will be enforced from 9:00 p.m. until 10:08 p.m. on June 16, 2012, with a rain date of June 17, 2012 from 9:00 p.m. until 10:08 p.m.

(c) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(d) *Regulations.*

(1) The general regulations contained in 33 CFR 165.23, as well as the following regulations, apply.

(2) No vessels, except for fireworks barge and accompanying vessels, will be allowed to transit the safety zone without the permission of the COTP.

(3) All persons and vessels shall comply with the instructions of the COTP or the designated representative. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(4) Vessel operators desiring to enter or operate within the regulated area shall contact the COTP or the designated representative via VHF channel 16 or 718–354–4353 (Sector New York command center) to obtain permission to do so.

Dated: May 28, 2012.

G.P. Hitchen,

Captain, U.S. Coast Guard, Acting Captain of the Port New York.

[FR Doc. 2012–14219 Filed 6–11–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0037; FRL–9683–5]

Approval and Promulgation of Air Quality Implementation Plans; Minnesota; Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to the Minnesota State Implementation Plan (SIP) addressing regional haze for the first implementation period, extending through July 31, 2018. Minnesota submitted its regional haze plan on December 30, 2009. A draft supplemental submission was made on January 5, 2012, and in final on May 8, 2012. EPA proposed to approve this plan on January 25, 2012. In response to comments, EPA is deferring action on emission limitations that Minnesota intended to represent best available retrofit technology (BART) for taconite facilities. As proposed, EPA is also deferring action on the requirements for Xcel Energy's Sherburne County (Sherco) facility resulting from its certification as a source of reasonably attributable visibility impairment (RAVI). After reviewing the comments, EPA continues to believe approval is warranted for the remaining regional haze plan elements. This approval is being taken in accordance with the requirements of the Clean Air Act (CAA) and EPA's rules for states to prevent and remedy future and existing anthropogenic impairment of visibility in mandatory Class I areas through a regional haze program.

DATES: This final rule is effective on July 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2010–0037. 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, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What action did EPA propose?
II. What are EPA's responses to public comments it received?
III. What is EPA's plan to address RAVI BART for Sherco?
IV. What action is EPA taking?
V. Statutory and Executive Order Reviews

I. What action did EPA propose?

Minnesota submitted its regional haze plan on December 30, 2009, a draft supplement on January 5, 2012, and a final supplement on May 8, 2012. This plan is intended to address regional haze requirements for the first implementation period, which extends through July 31, 2018. These requirements are given in CAA section 169A, and are implemented in the Regional Haze Rule (RHR) as codified at 40 CFR 51.308. This rule was promulgated on July 1, 1999 (64 FR 35713), and subsequently amended on July 6, 2005 (70 FR 39156), and on October 16, 2006 (70 FR 60631). The July 6, 2005, rule provides guidance on provisions related to BART.

EPA proposed approval of the Minnesota regional haze plan on January 25, 2012 (77 FR 3681). The proposed rule described the nature of the regional haze problem and the statutory and regulatory background for EPA's review of Minnesota's regional haze plan. The proposed rule described the regional haze plan requirements including requirements for mandating BART, consultation with other states in establishing goals representing reasonable further progress in mitigating anthropogenic visibility impairment, and adoption of limitations as necessary to implement a long term strategy for reducing visibility impairment.

EPA received comments on several elements of the Minnesota regional plan, including comments on the BART determinations for both the electric generating units (EGUs) and the taconite facilities.

II. What are EPA's responses to public comments it received?

In response to its proposed rulemaking, EPA received comments from ArcelorMittal Minorca Mine, Incorporated (ArcelorMittal), Cliffs Natural Resources (Cliffs), Earthjustice, Fresh Energy, the Fond du Lac Band of Lake Superior Chippewa (Fond du Lac), National Park Service (NPS), Xcel Energy, and many citizens. Earthjustice commented on behalf of the National Parks Conservation Association (NPCA), the Minnesota Center for Environmental Advocacy, the Friends of the Boundary Waters Wilderness, Voyageurs National Park Association, and the Sierra Club. Fresh Energy is a Saint Paul, Minnesota based nonprofit organization that focuses on the development of clean energy policy. ArcelorMittal and Cliffs operate taconite facilities, while Xcel Energy operates EGUs in Minnesota. The Fond du Lac Band is a tribe based in Cloquet, Minnesota. The comments are included in the docket, EPA–R05–OAR–2010–0037. The following discussion provides a summary of the comments and provides EPA's responses.

Comment: Several commenters, including Earthjustice, Fond du Lac, and Fresh Energy, urged that EPA not allow participation in the Cross-State Air Pollution Rule (CSAPR) to serve as a substitute for meeting the requirements for source-by-source BART for EGUs. These commenters believe that reliance on CSAPR fails to meet the CAA requirements for BART, and have asserted that EPA's determination that CSAPR is better than BART is flawed both as a national rule and as applied to Minnesota.

Response: EPA disagrees with the commenters. The requirements for a BART alternative program, specific to trading programs in 40 CFR 51.308(e)(2), state that ''such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART.'' EPA has also completed an analysis and proposed CSAPR as an alternative to BART for EGUs located in the CSAPR states, which include Minnesota (76 FR 82219, December 30, 2011). In finalizing that rule on May 30, 2012, EPA responded to similar comments in the context of that rulemaking.

Comment: Several commenters stated that the emissions controls for the EGUs are inadequate and that EPA should require stricter emission limits.

Response: In a final rule signed on May 30, 2012, EPA finalized its

determination that CSAPR is an alternative program to source-specific BART for EGUs. This finding allows states to substitute participation in the CSAPR program for source-specific BART. Minnesota has elected to use CSAPR as an alternative to BART for sulfur dioxide (SO_2) and oxides of nitrogen (NO_X) emissions from its subject EGUs, as it is allowed to do. EPA is approving the CSAPR as an alternative means of satisfying the BART requirement for pertinent pollutants for Minnesota's EGUs.

Comment: Several commenters considered the emissions controls required for the taconite facilities to be inadequate and urged EPA to require stricter emission limits.

Response: Since proposing approval of Minnesota's regional haze plan, including the BART limits for taconite facilities, EPA has learned of control technology with the potential for further emission reductions from taconite facilities. EPA is now in the process of determining new BART emission limits for the BART-subject units at the taconite facilities. Therefore, EPA is deferring action on the proposed BART emission limits for the taconite facilities while proceeding with final approval of the other plan elements.

Comment: EPA received comments from a substantial number of citizens urging that EPA protect the air quality at Boundary Waters Canoe Wilderness, Isle Royale National Park, and Voyageurs National Park.

Response: EPA is committed to the goal of the regional haze program, that is, to achieve natural visibility conditions at mandatory Federal Class I areas by 2064. EPA is acting on the Minnesota regional haze plan for the first implementation period, which extends through July 31, 2018. Subsequent implementation periods are each for approximately 10 years. Future emission reductions will be evaluated by Minnesota and EPA during the midcourse review of Minnesota's regional haze plan and in future implementation periods. These further emission reductions in the future will result in better air quality. Minnesota has already developed its Northeast Minnesota Plan, which sets a target for the combined NO_X and SO_2 emissions in a six county area not to exceed 66,894 tons per year through 2018.

Comment: Earthjustice commented that the Sherco plant has been certified to impair visibility by the Department of Interior. Sherco is among the biggest contributors to visibility impairment in the state. The commenter believes that EPA needs to establish BART limits for Sherco that comply with Federal requirements.

Response: RAVI involves separate requirements from the requirements for regional haze, to be met on a different timetable. In a separate action, which will be subject to public notice and comment, EPA will respond to the RAVI certification for Sherco. See the discussion on planned EPA actions in Section III.

Comment: A citizen commenter stated that EPA should not approve a plan that is not acceptable to the Federal land managers (FLMs). EPA should give due weight to the views of the FLMs.

Response: EPA has provided multiple opportunities for consultation on the Minnesota regional haze plan with the FLMs, and has evaluated and responded to, FLM comments on the draft plan, the final plan, and our proposed approval. EPA has given careful consideration to the comments from the FLMs on the Minnesota regional haze plan. EPA has agreed with many of the comments made by the FLMs and, correspondingly, has worked with the state to make appropriate revisions to the SIP. Nevertheless, final responsibility for approving or disapproving the plan solely belongs to EPA.

Comment: Earthjustice, Cliffs, ArcelorMittal, and several citizens commented that EPA could not have adequately considered public comments made to Minnesota during the comment period for its regional haze plan supplement as EPA issued its proposed rule prior to the state finalizing the supplement. Plainly, according to Earthjustice, the public comment period was not considered meaningful by Minnesota given that it had already decided to submit the supplement to EPA and EPA had already proposed approval, thereby frustrating the very goal of public process.

Response: As stated in the proposed rule, EPA proposed to approve Minnesota's SIP addressing regional haze for the first implementation period provided it adopted and submitted administrative orders consistent with its proposed orders. Minnesota submitted its regional haze plan supplement on May 8, 2012, with the final administrative orders. The state had a public comment period prior to finalizing its supplement. EPA also held a public comment period on the proposed rule. EPA uses the process, known as parallel processing, when a final action is warranted on a more expedited schedule than would be achieved if EPA waits for the state to finalize its submission. The criteria for parallel processing are given in section 2.3 of appendix V to 40 CFR part 51. Further discussion of this procedure is provided in the rulemaking promulgating appendix V, published in final on February 16, 1990, at 55 FR 5824. In this approach, EPA applies a premise that the final state submission will be sufficiently similar to the draft submission such that no significant issues are expected to arise in the final submission that were not included in EPA's proposed action on the draft submission. In cases where this premise holds true, the public has adequate opportunity to comment on the pertinent issues, and a more efficient and more expeditious rulemaking is achieved. In cases where this premise does not hold true, EPA will issue a subsequent proposed rule to solicit comment on issues that it did not anticipate in its initial proposed action. By this means, everyone has an opportunity to comment on pertinent issues, as mandated under Federal law. In the specific case of the Minnesota regional haze plan, based on comments received on the proposed rule, EPA has changed what it is approving in the final rule. Thus, this process did not preclude EPA from receiving new information that affected its final action. Further, Minnesota supplemented the regional plan it submitted on December 30, 2009. The supplement updated the BART determinations for the EGUs and taconite facilities as well as the Northeast Minnesota Plan. All other elements of the regional haze plan have not been changed since being finalized in December 2009.

Comment: The Fond du Lac tribe and several citizens commented on plans to expand certain existing taconite facilities in northeastern Minnesota. New taconite facilities are also being planned in northeastern Minnesota. The commenters noted that the proximity of the state's six taconite facilities to Class I areas, along with the magnitude of their emissions of haze-causing pollutants and the potential new sources, makes northeastern Minnesota an area of concern with regard to visibility.

Response: EPA is approving the Northeast Minnesota Plan as part of the Minnesota regional haze plan. The Northeast Minnesota Plan is written to restrict the total combined SO_2 and NO_X emissions from a six county area. Minnesota will consider the Northeast Minnesota Plan emission targets before it issues permits for new and expanding sources. There are also best available control technology requirements for new or expanding sources (that exceed certain emissions criteria) to ensure sources use the appropriate emission

control technology. Minnesota will submit an updated regional haze plan for each approximately 10-year implementation period. These plans will include state updates to its long term strategy to plan and implement visibility protection. Further tracking of changes in visibility over time at its Class I areas will be provided in midcourse reviews required during each 10-year progress review. EPA is confident that the state's Northeast Minnesota Plan, the requirements on new sources, and the mandated updates to the regional haze plan will adequately address potential visibility impairment from new or expanded sources.

Comment: Earthjustice commented that EPA should issue a Minnesota regional haze plan that ensures clean air in the Boundary Water Canoe Wilderness Area and Isle Royale and Voyageurs National Parks. Earthjustice believes that EPA should not approve the state's plan and should promulgate a replacement plan that more fully improves visibility.

Response: EPA's evaluation of the Minnesota regional haze plan led to the conclusion that many plan elements can be approved in accordance with the requirements of the RHR, and thus EPA has finalized its approval of those elements in this rule. As noted, EPA is not acting on the BART emission limits for taconite facilities. EPA is evaluating the appropriate emission controls for the taconite facilities. Once that is determined, EPA will go through a public notice and comment rulemaking on the BART emission limits for taconite facilities. When those BART emission limits are finalized, that will complete approval of the regional haze plan for the first implementation period.

Comment: Earthjustice commented that Minnesota has failed to demonstrate that it is unreasonable to achieve the Uniform Rate of Progress (URP). Minnesota will not attain natural visibility by 2064. Minnesota has proposed a reasonable progress goal (RPG) that will attain natural visibility conditions in Boundary Waters in 2093 and in Voyageurs in 2177. The state will consider the reductions that would be necessary to achieve the URP and demonstrate why such reductions are unreasonable.

Response: EPA's Reasonable Progress Guidance states that the URP is not a presumptive target for the RPG. The state followed the proper approach in setting its RPGs through 2018. Minnesota considered the four factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A). The factors are considered when selecting the RPGs for the best and worst days for each Class I area. Minnesota considered the costs of compliance, the time needed for compliance, the energy and non-air quality environmental impacts, and the remaining useful life of the facility. Minnesota also investigated additional control options. It investigated additional SO_2 and NO_X control on EGUs, SO_2 and NO_X control on industrial boilers, NO_X control from turbines, and mobile source NO_X reductions. The visibility improvement at issue here is the visibility improvement for the first implementation period, which extends until July 31, 2018. New control programs in the future that reduce emissions may be implemented, which would hasten visibility improvement and possibly yield an earlier year to achieve natural conditions. Minnesota will include any additional control measures it finds reasonable along with any additional measures implemented by contributing states in the next implementation period. For the first implementation period, EPA finds adequate Minnesota's assessment of reasonable measures for its long term strategy.

Comment: Earthjustice commented that Minnesota's 2009 source-specific BART determinations are wholly inadequate, because Minnesota failed to engage in a proper five-factor analysis as required by the BART guidance. The BART guidance provides a methodology that assures a careful and detailed analysis of the criteria as well as consistency within the regional haze program. Further, Earthjustice made specific comments on the BART determinations for the North Shore Mining—Silver Bay, Sherco, Minnesota Power—Taconite Harbor, Minnesota Power—Boswell, and Rochester—Silver Lake.

Response: Minnesota has elected in its supplement to use CSAPR participation in place of the source-specific BART determinations submitted in 2009, supplemented by the submission of limits for Sherco. EPA has determined in a final rule signed on May 30, 2012, that CSAPR is an alternative program to source-specific BART. Therefore, it is acceptable for Minnesota to substitute participation in the CSAPR trading programs for source-specific BART determinations it had originally submitted for the EGUs. Thus, aside from the limits for Sherco, the original BART determinations for the EGUs are thus replaced and no longer at issue. As for Sherco, EPA in this rulemaking is not evaluating whether the submitted limits would represent BART on a source-specific basis. Instead, EPA views the limits for Sherco as an enhancement that make the Minnesota's submission more stringent than it would be if it simply relied on CSAPR to address EGU BART requirements. EPA notes that while this finding applies to BART requirements with respect to regional haze, EPA is separately evaluating the RAVI BART requirement as it applies to Sherco. EPA will consider the comments on the BART determination for Sherco during this process.

Comment: Earthjustice commented that the taconite facilities in Northern Minnesota, due to their discrete location and the size of this industry, have not been subject to many of the control requirements that have been imposed on other industrial sectors, such as power plants, cement kilns, or refineries. The taconite industry is responsible for a significant share of visibility impairment in Boundary Waters and Voyageurs, due to their proximity to the Class I areas and high NO_X and SO_2 emissions. Earthjustice commented that these facilities should be subject to adequate BART determinations and controls, and that neither Minnesota's 2009 regional haze plan submission nor the plan supplement provide for valid BART determinations that will result in any real reductions in pollution coming from taconite facilities.

Earthjustice further commented that ''Minnesota has not done proper BART analyses for the taconite facilities and therefore the emission limits require no real pollution reductions and do not satisfy BART requirements.'' Earthjustice further asserted that Minnesota failed to conduct an adequate BART determination and rejected potential control technologies without an adequate explanation. Earthjustice commented that selective catalytic reduction (SCR) must be considered for controlling NO_X at taconite facilities and that low NO_X burners must be considered the absolute minimum NO_X control at taconite facilities.

Response: In response to this and other similar comments, EPA is reevaluating the emission controls that are warranted to satisfy the BART requirements at the taconite facilities in Michigan and Minnesota.

Comment: Earthjustice commented that because Minnesota calculated emission limits at a 99% confidence limit, on a 30-day rolling average, it is unlikely that pollution reduction will be achieved.

Response: EPA's reevaluation of the taconite facility emission limits will include a reassessment of appropriate

statistics to use in determining the appropriate limits.

Comment: Earthjustice echoed comments made by the NPS to EPA that the taconite facilities are major causes of visibility impairment in several Class I areas. Earthjustice (as well as NPS) further commented that US Steel recently installed modern emission monitoring systems and has proposed to install, or has already installed, emission controls for SO_2, NO_X, and mercury. Data from US Steel's Minntac facility demonstrate that low NO_X burners are economically achieving 70% reductions of NO_X at the facility. In its comments, Earthjustice encouraged Minnesota and EPA to apply this data to require taconite facilities to meet lower emission limits that reflect the capabilities of available technology.

Response: In light of this comment and related new information, EPA is reviewing the control technology proposed for the taconite facilities. EPA is also studying potential controls for each facility. Once this review is complete, EPA will propose a rule with the appropriate controls for those units of taconite facilities that are subject to BART. Thus, EPA is not taking final action on the taconite BART limits of the Minnesota regional haze plan.

Comment: Earthjustice commented that it does not agree that CSAPR is better than source-specific BART in Minnesota. Earthjustice commented that the U.S. Forest Service analysis (January 13, 2012 letter) shows that the predicted effect of CSAPR in 2014 is an increase in emissions over 2012 actual emissions and above what Minnesota proposed as source-specific BART and what FLMs proposed as source-specific BART. Earthjustice asserts that source-specific BART to be far superior to CSAPR.

Response: This comment pertains to a separate rulemaking where EPA proposed CSAPR as an alternative program to source-specific BART for EGUS in the CSAPR region. The rulemaking was made on May 30, 2012. A complete response to this and similar comments is provided in that rule and the associated response to comments document.

Comment: In its comments, Xcel Energy agrees with EPA's conclusion that, if implemented, CSAPR will achieve greater environmental improvement than BART. Based on the emission reductions already achieved on Xcel's units, including emission controls installed on Sherco Units 1 and 2, and the broad reductions that will be achieved if CSAPR is implemented in Minnesota, Xcel Energy concludes that compliance with CSAPR is superior to unit specific requirements under section 169A. Nonetheless, because of the uncertain status of EPA's rulemakings and challenges to the CSAPR, Xcel Energy believes it is premature to rely solely on CSAPR for meeting BART requirement in Minnesota. In its comments, Xcel Energy urged Minnesota and EPA to eliminate the risks associated with one or more of these rules not proceeding by approving both the source-specific BART determinations and the BART alternative compliance option. If the alternative option could not go forward for any reason, the Minnesota regional haze plan would still contain the source-specific BART limits that source could use to satisfy their BART obligations without requiring Minnesota and EPA to undertake further SIP revisions. Xcel Energy asserts that Minnesota's BART determination is fully approvable, because Minnesota's December 2009 determination for Sherco Units 1 and 2 fully satisfies all applicable BART requirements. Xcel Energy believes that the BART determination for these units should be retained.

Response: EPA proposed approving CSAPR participation as a BART alternative for SO_2 and NO_X emissions from EGUs. Minnesota requested in its supplement to the regional haze plan to use the CSAPR participation as an alternative to the previously submitted source specific BART determination for EGUs. Thus, EPA did not propose approving source-specific BART determinations for the EGUs. EPA nevertheless believes that it can take final action to approve the new limits for Sherco units 1 and 2, as set in the May 2, 2012, administrative order, as a SIP strengthening measure. First, EPA received numerous comments urging substantial tightening of the limits for this plant, and even the source requested EPA approval of the tightened emission limits. In that respect, this final action may be considered to be in response to public comments. Second, EPA's action reflects a limited evaluation of the administrative order, evaluating only whether approving the order would result in a more stringent SIP. Although the order includes a statement that the state and the company find the limits to represent BART, EPA has not evaluated whether these limits would represent BART on a source-specific basis. EPA is expressly not rulemaking on this question. While the administrative order that EPA is approving states the opinion of Xcel Energy and Minnesota that the limits represent BART, EPA's approval of the administrative order should not be construed as rendering any EPA opinion as to whether the limits would satisfy BART on a source-specific basis. Third, EPA intends to act in the future concerning the BART requirements that apply to Sherco as it has been certified as a source of RAVI. Rulemaking on that matter will provide an opportunity for public comment on the appropriate limits for Sherco.

Comment: Xcel Energy commented on its Metropolitan Emission Reduction Program projects, toward which Xcel Energy has invested one billion dollars to modernize and reduce emissions from three coal-fired generating stations, reducing NO_X and SO_2 emissions from those plants by approximately 90%. Xcel Energy's customers are paying for these reductions and the reductions are key to environmental progress in Minnesota. Xcel Energy further commented that it has installed the pollution controls for NO_X indicated by Minnesota's BART determination for Sherco. Furthermore, Xcel Energy is moving forward with the upgrades to its scrubbers to reduce SO_2 emissions from Sherco. Xcel Energy asserts that these projects achieve substantial improvements in visibility.

Response: Reductions in NO_X and SO_2 emissions from Minnesota EGUs will aid the state in improving visibility. The emission reductions will also provide health benefits resulting from the improved air quality. EPA acknowledges the emission reductions resulting from these investments and EPA is approving the limits submitted by Minnesota as strengthening the SIP. Nevertheless, EPA plans further rulemaking to address whether this plant has addressed its RAVI obligations.

Comment: In its comments, Xcel Energy asserts that it relied on EPA's statements in the proposed rule that requirements of the RAVI regulations, potentially applicable to Sherco, are not being addressed in the proposed rule. Xcel Energy has reviewed the RAVI regulations and seeks to reserve the right to comment to EPA on the interpretation of the RAVI requirements. Xcel Energy also noted that RAVI involves different analyses and applies different BART guidelines. Further, Xcel Energy commented that given that almost ten years have passed since the modeling baseline was developed for the Minnesota regional haze plan and emissions have declined significantly in the interim, EPA will need to commence a new RAVI analysis and implementation planning process for Minnesota.

Response: EPA has decided to address the RAVI BART emission requirements for Sherco separately from the regional haze program elements. EPA will offer a comment period during the Sherco RAVI BART rulemaking. Xcel Energy and other interested parties will be able to comment on the RAVI BART determination for Sherco at that time. During subsequent rulemaking on RAVI, EPA will take steps to solicit any further information that Xcel Energy wishes to provide for purposes of determining BART under RAVI.

Comment: In its comments, ArcelorMittal expresses its concern that EPA published its January 25, 2010, proposed rule before Minnesota had completed its public comment period and Citizens' Board meeting on the regional haze plan supplement.

Response: EPA's rulemaking is premised on Minnesota submitting a final supplement that is sufficiently similar to its proposed supplement such that the proposed rule provides adequate notice for comments. In fact, the final supplement does not propose any new issues, and therefore, EPA believes that its rulemaking on Minnesota's plan provided sufficient opportunity for public comment on the relevant issues to merit EPA granting final approval with respect to most SIP elements without requiring an amended proposed rule. Note, however, that on the issues most likely of concern to ArcelorMittal, that is BART for taconite plants, EPA plans further rulemaking with further opportunity for ArcelorMittal and other interested parties to comment.

Comment: ArcelorMittal commented that it worked extensively with Minnesota to gather the data necessary to propose appropriate BART limits for the taconite industry. ArcelorMittal commented that there is still significant work to be done to generate appropriate numeric BART limits for the taconite industry. It urged EPA to postpone action on Minnesota's SIP to give the state more time to fully evaluate the appropriate emission limits for the taconite industry and to extend the Federal comment period to allow a reasonable period of time for the public to comment.

Response: EPA agrees that more effort is needed to set apposite BART limits for the taconite facilities. EPA is studying potential controls for each taconite facility. Once this review is complete, EPA will propose a rule requiring the appropriate controls for the units subject to BART at the taconite facilities. There will be an opportunity for public comment during the rulemaking process.

Comment: Cliffs commented that it has worked extensively with Minnesota for the purpose of developing BART limits for the taconite industry. Cliffs commented that although Minnesota has identified BART determinations, developed and implemented administrative orders to gather emission information, and has proposed numeric emission limits, there is still significant work to be done to generate appropriate numeric limits for the taconite industry. Cliffs requested that Minnesota receive an opportunity to complete its SIP process before EPA proposed a Federal implementation plan (FIP) for applicable facilities in the taconite industry in Minnesota.

Response: EPA is evaluating the BART determinations for the taconite facilities in light of new information. EPA agrees that considerable work remains in determining the correct BART limits. EPA will continue to work with Minnesota in determining the correct limits. Once that is resolved, EPA and Minnesota will select the appropriate course of action for setting the final BART limits for taconite facilities.

Comment: Cliffs commented that it is inappropriate to approve Minnesota's SIP before all public comments have been submitted and considered, and asserts that EPA offered no indication as to how this parallel processing can comply with the procedural requirements of the CAA, the Administrative Procedures Act, and Minnesota law.

Response: Appendix V to 40 CFR part 51 provides relevant guidance on the completeness of SIP submittals. Section 2.3 of this appendix outlines the criteria for parallel processing. Further discussion of this procedure is provided in the rulemaking promulgating appendix V, published in final on February 16, 1990, at 55 FR 5824. That rulemaking addresses in more detail how parallel processing is consistent with the CAA and the Administrative Procedures Act. In the parallel process, EPA presumes that the final state submission will be sufficiently similar to the draft submission such that no significant issues would be expected to arise in the final submission that had not already been raised in the proposed rule. Where the premise is correct, the public has adequate opportunity to comment on the pertinent issues, and a more efficient and more expeditious rulemaking is achieved. Where the premise is not correct, EPA will issue a subsequent proposed rule to solicit comment on those issues that were not included in the initial proposed action. By this process, commenters are provided an opportunity to comment on all pertinent issues, as mandated under Federal law.

In this particular case, EPA believed that the circumstances warranted parallel processing. EPA anticipated a final state regional haze plan supplement similar to the proposed supplement, such that a parallel processing approach would provide the public with an opportunity for comment on the pertinent issues. EPA followed this process in order to expedite action on Minnesota's plan. However, several of the comments that EPA received have led EPA to believe that more effective emission control at taconite plants is warranted. EPA intends to issue another proposed rule on emission limits for taconite plants to provide the public the opportunity to comment on EPA's revised views regarding taconite facility emission controls. Therefore, the commenter's concern about having an adequate opportunity to comment on EPA's proposed action on a final state submission is fully addressed.

Comment: In its comments, Cliffs asserts that the numeric limits that were included in the proposed Administrative Orders for the Cliffs' facilities in Minnesota's supplement were erroneously derived and do not reflect the application of BART. Cliffs asserts that alternate product lines, fuel flexibility, and other considerations must be included in developing numeric limits that Cliffs will be required to meet on a continuous basis.

Response: EPA is considering new information on the BART emission limits for taconite facilities. EPA will issue a subsequent proposed rule before taking final action on the emission limits for taconite facilities. EPA will consider information from Cliffs regarding its taconite facilities before taking final action.

Comment: In its comment letter, Cliffs states as follows,

> ''Minnesota is clearly under pressure from EPA to rush the SIP submission to the detriment of Cliffs and the rest of Minnesota's taconite industry. Rather than wait for Minnesota's SIP to be complete, EPA is proposing the highly unusual step of conditionally approving Minnesota's SIP before Minnesota has had a chance to gather all necessary data, let alone finalize its SIP. EPA should take all necessary steps to relax its own negotiated deadlines to relieve the pressure on Minnesota, so that the collaborative process that has brought us this far is not scuttled by an unfortunate and arbitrary rush to codify numeric limits before they have completed the critical public review process with adequate time and resources for reasoned consideration of those comments.''

Response: The July 1, 1999 RHR (64 FR 35714) required states to submit a regional haze plan by December 17, 2007. However, many states still submitted regional haze plans late, including Minnesota, which submitted its plan on December 30, 2009. Therefore, the taconite industry clearly had sufficient time to work with Minnesota in setting appropriate BART limits. Nevertheless, comments on the proposed rule have yielded information indicating that greater control of taconite facilities is feasible and warranted. Consistent with the commenter's recommendation, EPA has negotiated additional time to perform a review of pollution control options for taconite facilities. EPA will issue another proposed rule before taking final action on emission limits for the taconite industry. This process will provide an adequate opportunity to review any information that the commenter provides EPA.

III. What is EPA's plan to address RAVI BART for Sherco?

On October 21, 2009, the Department of Interior certified that a portion of the visibility impairment in Isle Royale National Park and Voyageurs National Park is caused by emissions from Sherco, and thus certified that Sherco causes RAVI at these Class I areas. The RAVI requirements that were due prior to this certification were addressed by a Federally promulgated plan because Minnesota did not submit a plan addressing these requirements. See 40 CFR 52.1236. In its notice of proposed rulemaking, EPA stated its intention to act on RAVI requirements in separate rulemaking action. EPA is continuing to defer action in response to this certification of RAVI for Sherco.

EPA's final rule, signed on May 30, 2012, finding that CSAPR addresses pertinent EGU BART requirements predominantly addresses BART as a requirement for regional haze plans but also includes limited discussion of BART as a requirement for RAVI sources. In light of the fact that the pertinent notice of proposed rulemaking did not request comment on the interplay of the RAVI requirements in 40 CFR 51.302–306 with the requirements of the RHR and because EPA had not proposed any revisions to the applicable regulatory text, EPA did not adopt any clarifying interpretations of the applicable rules in that rulemaking. As a result, neither that final rule nor this final action on the regional haze SIP for Minnesota alters the authority of a FLM to certify RAVI nor the obligation of states (or EPA) to respond to a RAVI certification under 40 CFR part 51 subpart P (Protection of Visibility). EPA expects at a later date to clarify the scope of the RAVI requirements through a rule amendment, general guidance, or action on a SIP or FIP in the context of a specific RAVI case, such as that of Sherco. Whatever the form, we intend to provide an opportunity for public comment before applying a new interpretation.

EPA, in fact, intends to conduct further rulemaking regarding RAVI BART for Sherco within the next few months. EPA expects that this rulemaking will address the particular circumstances for Sherco. This rulemaking may also discuss the general criteria and considerations that apply in determining RAVI BART as compared to BART for regional haze purposes. Of note here is a letter sent on June 6, 2011, from Douglas Aburano, Chief of the Control Strategies Section of EPA Region 5. This letter states that to the extent that source-specific BART is required, the available evidence suggests that source-specific BART for this facility would include installation and operation of SCR of NO_X emissions. The contemplated rulemaking regarding RAVI BART for Sherco will provide full opportunity for public review of both the general issues regarding the relationship between BART for RAVI purposes and BART for regional haze purposes, as well as the particular, current facts regarding the circumstances at Sherco.

Xcel Energy commented on EPA's proposal for this final rule that if EPA concluded that source-specific BART was necessary and that if stricter limits than those submitted by the state (reflecting combustion controls) were required, Xcel Energy requested the opportunity to evaluate alternative strategies to achieve the emission reductions needed to satisfy such a BART requirement. Under this scenario, EPA would honor this request and would conduct discussions with the state and with Xcel Energy to assure both that the environmental objectives of the applicable visibility regulations are achieved and that alternate approaches allowed by these regulations are fully considered.

IV. What action is EPA taking?

EPA is approving Minnesota's regional haze plan as satisfying the applicable requirements in 40 CFR 51.308, except for BART emission limits for the taconite facilities. These requirements include identifying affected Class I areas, calculating the baseline and natural visibility, establishing RPGs, mandating BART emission reductions for the five subject to BART EGUs (in this case through participation in CSAPR), adopting a long term strategy for making reasonable progress toward visibility goals, providing a monitoring strategy, and consulting with other states and the FLMs before adopting its regional haze plan.

EPA is deferring action on the BART emission limits for the taconite facilities. In the proposed rule, we stated that the taconite processing facilities are a small, unique industry with little known about potential emission controls. EPA received significant information about NO_X controls at one of the Minnesota taconite facilities in comments on EPA's proposed rulemaking. EPA has elected to defer acting on the BART determinations for the taconite facilities with the other regional haze plan elements. This allows EPA time to evaluate properly additional potential emission controls for the taconite facilities. Under a schedule mandated by NPCA consent decree, EPA plans additional review of the taconite BART determinations leading to a subsequent proposed rule by July 13, 2012, and a final rule by November 15, 2012. Once suitable limits satisfying BART requirements for taconite plants are established, all requirements for the first implementation period for regional haze for Minnesota will be satisfied.

As proposed, EPA intends to act on RAVI BART in a separate action. A BART determination under the RAVI is similar to, but independent from the BART determination made under the RHR. EPA views Minnesota's plan as addressing regional haze as regulated under 40 CFR 51.308 and not RAVI as regulated under 40 CFR 51.302 to 51.306. This rulemaking only addresses the regional haze requirements and does not address whether the plan addresses requirements that apply as a result of the certification of Xcel Energy's Sherco power plant as a RAVI source. Thus, EPA is not acting on RAVI BART for Sherco in this rule. EPA will address the requirements that apply based on Sherco's RAVI certification in a separate action. Further, while Minnesota provided emission limits for Sherco units 1 and 2, we are approving these limits solely as a SIP strengthening measure. EPA is not acting on any source-specific BART determinations in this rule.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 13, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, and Sulfur oxides.

Dated: May 30, 2012.

Susan Hedman,

Regional Administrator, Region 5.

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.*

■ 2. Section 52.1220 is amended by adding an entry in alphabetical order in the table in paragraph (d) for ''Xcel Energy—Northern States Power Company, Sherburne County Generating Station'' and by adding an entry in alphabetical order in the table in paragraph (e) for ''Regional Haze Plan'' to read as follows:

§ 52.1220 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED MINNESOTA SOURCE-SPECIFIC PERMITS

Name of source	Permit No.	State effective date	EPA approval date	Comments
*	*	*	*	*
Xcel Energy—Northern States Power Company, Sherburne County Generating Station.	Administrative Order	05/02/12	6/12/2012, [Insert page number where the document begins].	See Final Rule for details.
*	*	*	*	*

* * * * *

(e) * * *

EPA-APPROVED MINNESOTA NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date	Comments
*	*	*	*	*
Regional Haze Plan	statewide	12/30/2009 and 5/8/2012	6/12/2012, [Insert page number where the document begins].	Includes all regional haze plan elements except BART emission limitations for the taconite facilities.
*	*	*	*	*

* * * * *

[FR Doc. 2012–14101 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0394; FRL–9684–9]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Permit To Construct Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Maryland State Implementation Plan (SIP). The revisions pertain to sources which are exempt from preconstruction permitting requirements under Maryland's New Source Review (NSR) program. EPA is approving these revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on August 13, 2012 without further notice, unless EPA receives adverse written comment by July 12, 2012. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0394 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0292, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0394. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814–2117, or by email at *talley.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On October 17, 2011, the Maryland Department of the Environment (MDE) submitted a formal revision (#11–07) to its State Implementation Plan (SIP). The SIP revision consists of the addition of an exemption from preconstruction permitting requirements for insignificant sources of volatile organic compounds (VOC's).

II. Summary of SIP Revision

Regulation .10 under COMAR 26.11.02 (Permits, Approvals, and Registration) contains exemptions for certain sources that are not required to obtain approvals or permits to construct prior to the construction or modification of the affected source. Specifically, COMAR 26.11.02.10X (as it currently exists in the Maryland SIP) provides such an exemption for sources that emit less than one (1) ton per year (tpy) of each pollutant which is a Class II toxic air pollutant, or a pollutant for which there is a federal ambient air quality standard. Regulation .10X also provides such an exemption for sources that emit less than one (1) pound per day of a

Class I toxic air pollutant. Maryland's proposed revisions add sources of VOC's to the list of sources eligible for the 1 tpy exemption under section .10X. Additionally, the revisions clarify that the thresholds for exemption apply to a source's ''pre-control potential-to-emit.''

The revisions to COMAR 26.11.02.10X were effective in Maryland on August 11, 2011. The MDE submitted them to EPA for approval into the SIP on October 17, 2011. EPA's review of the SIP submittal finds the revisions consistent with CAA requirements.

III. Final Action

EPA is approving MDE's October 17, 2011 SIP submittal. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register,** EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on August 13, 2012 without further notice unless EPA receives adverse comment by July 12, 2012. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the 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.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 13, 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register,** rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking.

This action pertaining to permit to construct exemptions under Maryland's NSR program may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2) of the CAA.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 1, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

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 V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by revising the entry for COMAR 26.11.02.10 to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS, TECHNICAL MEMORANDA, AND STATUTES IN THE MARYLAND SIP

Code of Maryland administrative regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.1100
*	*	*	*	*
26.11.02 Permits, Approvals, and Registration				
*	*	*	*	*
26.11.02.10	Sources Exempt from Permits to Construct and Approvals.	8/11/11	6/12/12 *[Insert page number where the document begins]*.	Revised .10X
*	*	*	*	*

* * * * *

[FR Doc. 2012–14103 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52

[EPA–R03–OAR–2011–0680; FRL–9685–5]

Determination of Failure To Attain by 2005 and Determination of Current Attainment of the 1-Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing two separate and independent final determinations related to the Baltimore 1-hour ozone nonattainment area. First, EPA is determining that the Baltimore area previously failed to attain the 1-hour ozone National Ambient Air Quality Standard (NAAQS) by its applicable attainment deadline of November 15, 2005 (based on complete, quality-assured and certified ozone monitoring data for 2003–2005). Second, EPA is also determining that the Baltimore area is currently attaining the now revoked 1-hour ozone NAAQS based on complete, quality-assured and certified ozone monitoring data for 2008–2010 and continuing for 2009–2011. Thus, quality-assured ozone monitoring data in the Air Quality System (AQS) show that the area has been attaining the revoked 1-hour ozone standard since 2008. EPA's determination that the area has attained the 1-hour ozone standard obviates the need for submission of any contingency measures for failure to attain that revoked standard.

DATES: This final rule is effective on July 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0680. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, 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 for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by email at *cripps.christopher@epa.gov*.

SUPPLEMENTARY INFORMATION:

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Table of Contents

I. What actions EPA is taking?
II. What is the background for these actions?
III. What comments were received on these actions and what are EPA's responses?
IV. Final Actions
V. Statutory and Executive Order Reviews

I. What actions EPA is taking?

EPA is issuing two separate and independent determinations for the Baltimore area related to implementation of anti-backsliding requirements for the 1-hour ozone NAAQS.[1]

A. Determination of Failure To Attain the 1-Hour Ozone NAAQS by the Applicable Attainment Date

Pursuant to EPA's authority to ensure implementation of 1-hour ozone anti-backsliding requirements and section 301 of the Clean Air Act (CAA), EPA is determining that complete, quality-assured and certified data for 2003–2005 show that the Baltimore area previously failed to attain the 1-hour ozone standard by its applicable November 15, 2005 attainment deadline.

B. Determination of Current Attainment of the 1-Hour Ozone NAAQS

EPA is determining that the Baltimore area is currently attaining the 1-hour ozone standard. EPA's determination is based on the most recent three-year periods of complete, quality-assured and certified data, 2008–2010 and continuing in 2009–2011. Moreover, complete, quality-assured and certified data show that the Baltimore area has attained the 1-hour ozone standard since the 2006–2008 monitoring period and for every three-year period since that time. Pursuant to EPA's interpretation, as set forth in its Clean Data Policy[2] and the cases and regulations that embody it, EPA has determined that the Baltimore area is no longer obliged to submit and implement the 1-hour ozone contingency measure requirement of CAA section 172(c)(9).

In order to determine the area's air quality status for purposes of this action, EPA reviewed ozone monitoring

[1] Hereafter the term ''1-hour ozone NAAQS'' may be expressed either as ''1-hour ozone NAAQS'' or as ''1-hour ozone standard.''

[2] *See* ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' (Clean Data Policy) dated May 10, 1995.

air quality data from the states, in accordance with 40 CFR 50.9, 40 CFR part 50 appendix H, and EPA policy and guidance, as well as data processing, data rounding and data completeness requirements. EPA's review of the air quality data and related rationale for these determinations are explained in the Notice of Proposed Rulemaking (NPR) published in the **Federal Register** on February 1, 2012 (77 FR 4940) (hereafter ''the NPR for this action'' or ''the February 1, 2012 NPR'') and will not be restated here.

II. What is the background for these actions?

The Baltimore area is composed of Baltimore, Carroll, Harford and Howard Counties and the City of Baltimore.[3] The 1-hour ozone standard designations were established by EPA following the enactment of the 1990 Amendments to the CAA. *See* 56 FR 56694, November 6, 1991. Each area of the country that was designated nonattainment for the 1-hour ozone NAAQS was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area's air quality problem. (*See* CAA sections 107(d)(1)(C) and 181(a)). The Baltimore area was designated nonattainment under the 1-hour ozone NAAQS and classified as severe-15, with an applicable attainment date of November 15, 2005.

On July 18, 1997, (62 FR 38856), EPA promulgated a new, more protective standard for ozone based on eight-hour average concentrations (the ''1997 eight-hour ozone NAAQS''). EPA designated and classified most areas of the country under the eight-hour ozone NAAQS in an April 30, 2004 final rule (69 FR 23858). In this April 30, 2004 final rule EPA designated the Baltimore area nonattainment under the 1997 eight-hour ozone NAAQS and classified the area as moderate.[4]

On April 30, 2004 (69 FR 23951), EPA also issued a final rule entitled ''Final Rule To Implement The 8-hour Ozone National Ambient Air Quality Standard—Phase 1,'' referred to as the Phase 1 Rule. Among other matters, this rule revoked the 1-hour ozone NAAQS in most areas of the country, effective June 15, 2005. (*See* 40 CFR 50.9(b); 69 FR at 23996; and 70 FR 44470 (August 3, 2005)). The Phase 1 Rule also set forth how anti-backsliding principles will ensure continued progress toward attainment of the eight-hour ozone NAAQS by identifying which 1-hour ozone requirements remain applicable in an area after revocation of the 1-hour ozone NAAQS.

Although EPA revoked the 1-hour ozone standard (effective June 15, 2005), eight-hour ozone nonattainment areas remain subject to certain 1-hour anti-backsliding requirements based on their 1-hour ozone classification. Initially, EPA's Phase 1 rule to address the transition from the 1-hour to the eight-hour ozone standard did not include 1-hour nonattainment area contingency measures or major source penalty fee programs among the measures retained as 1-hour ozone anti-backsliding requirements. However, on December 23, 2006, the United States Court of Appeals for the District of Columbia Circuit determined that EPA should not have excluded these requirements (and certain others not relevant here) from its anti-backsliding requirements. *South Coast Air Quality Management District* v. *EPA,*[5] 472 F.3d 882 (D.C. Cir. 2006), *reh'g denied* 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). Thus, the Court vacated the provisions that excluded these requirements. As a result, states must continue to meet the obligations for 1-hour ozone NAAQS contingency measures. On May 14, 2012 (77 FR 28424), EPA issued a final rule that, among other things, removed the vacated provisions of 40 CFR 51.905(e) and addressed the anti-backsliding requirement for contingency measures for failure to attain or make reasonable further progress toward attainment of the 1-hour ozone standard. *See* 74 FR 2936, January 16, 2009 (proposed rule); 74 FR 7027, February 12, 2009 (notice of public hearing and extension of comment period); and 77 FR 28424, May 14, 2012. On February 1, 2012, EPA proposed the determinations that are the subject of this final rulemaking action.[6]

III. What comments were received on these actions and what are EPA's responses?

We received comments from the Sierra Club, which opposed aspects of both actions and contended that the proposed rule was incomplete. Below, EPA summarizes those comments and sets forth EPA's responses.

A. Comments on the Determination of Attainment of the 1-Hour Ozone NAAQS

Comment 1: The commenter claimed that a finding that Baltimore has attained since 2008 is premature because monitored data for years since 2008 are for years that are not reflective of the historic trend of emissions. In support of their position, the commenter cite *Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks,* 1990–2010, (February 2012) to support the proposition that reductions in emissions of NO_X and VOC[7] in 2008 and 2009 are due in part to nonpermanent reductions in electricity demand and other emissions related activities resulting from the economic recession. The commenter also noted that the same draft inventory stated that CO_2 emissions rose by 3.7 percent—the largest increase in a 21 year period—which should correlate to increasing NO_X and VOC emissions from all sectors as well. The commenter contends that EPA is required in this rulemaking to further determine that the emissions decreases were due to pollution controls and not the economic downturn and cited section 107(d)(3)(E)(iii) of the CAA, which states: ''The Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions.'' The commenter argues that EPA is precluded here from making a determination of attainment based on monitored air quality, unless EPA makes an additional analysis and determination that air quality is due to permanent and enforceable reductions from enforceable limits and control measures.

Response 1: EPA disagrees with the comment. EPA's determination of attainment in this final rule is properly based on monitored air quality, and it complies with the statutory and regulatory procedures that govern the making of a determination of attainment for the purposes of comparison to the 1-hour NAAQS. *See* 40 CFR 50.9 and Appendix H. This determination is by definition solely focused on monitored air quality concentrations and does not

[3] These same counties were designated nonattainment under the 1997 8-hour ozone NAAQS and the 2008 ozone NAAQS. *See* 40 CFR 81.321 and 77 FR 30088 at 30127, May 21, 2012.

[4] Subsequently, pursuant to section 181(b)(2), EPA reclassified the Baltimore area as a serious ozone nonattainment area due to the area's failure to attain 1997 eight-hour ozone NAAQS on time. *See* 77 FR 4901, February 1, 2012.

[5] Hereafter this decision will be called ''*South Coast.*''

[6] EPA's February 1, 2012 **Federal Register** NPR was captioned as potentially affecting 40 CFR parts 52 and 81. Because the final action does not change the classification or other provisions relating to the Baltimore area codified in 40 CFR part 81, this action as finalized results only in revision of 40 CFR part 52.

[7] NO_X is an abbreviation for ''nitrogen oxides;'' VOC is an abbreviation for ''volatile organic compounds.''

involve an assessment of causes for those concentrations. Thus it is separate and independent of the inquiry into the origins of the reduced monitored ambient concentrations. The commenter conflates EPA's obligations when making a determination of attainment, which is based solely on monitored air quality concentrations, with separate and additional obligations that apply only when EPA is evaluating a request to redesignate an area from nonattainment to attainment—a process that is not being undertaken here. The statutory provision cited by commenter, section 107(d)(3)(E)(iii) of the CAA, applies only in the context of a redesignation request, and explicitly lists specific criteria that must be met for redesignation, which are separate from and in addition to the criteria that must be met when making a determination of attainment.

In the quite different context of a redesignation, section 107(d)(3)(E)(iii) of the CAA requires EPA to determine, among other things, that attainment of a NAAQS resulted from permanent and enforceable emissions reductions under the applicable SIP and Federal rules. Section 107(d)(3(E)(i) of the CAA lists a determination of attainment as an independent factor, separate and apart from the other criteria for approving a redesignation request. Section 107(d)(3)(E)(iii) of the CAA applies only when EPA proposes to redesignate an area from nonattainment of a NAAQS to attainment. In our February 1, 2012 NPR, EPA did not propose to redesignate the Baltimore area to attainment of the 1-hour ozone NAAQS. Moreover, after revocation of the 1-hour ozone NAAQS in 2005, EPA no longer redesignates areas to attainment of the 1-hour ozone NAAQS. Nor as the commenter claimed, did EPA propose to ''reclassify'' the Baltimore area.[8] Instead, the February 1, 2012 NPR proposed only to determine that the Baltimore area has attained the 1-hour ozone NAAQS based upon quality-assured and certified data for each consecutive 3-year period from 2006 to 2008 and through 2008 to 2010. EPA also proposed to determine that the area continues to attain during the most recent 3-year period for which data are available, 2009–2011, based upon data available for 2011. As EPA notes elsewhere in its responses to comments, these 2011 data have now been certified and quality-assured, and thus establish that the area continues in attainment for the 1-hour ozone standard. In accordance with the statute and EPA's regulations, EPA's determination of attainment is based solely upon monitored air quality data which establish that the area's air quality has attained the revoked 1-hour ozone NAAQS. EPA's determination therefore meets regulatory requirements for the clearly defined purpose for which it is made. The commenter's concerns and contentions, therefore, are inaccurate, and do not in any way detract from the sound basis for EPA's final determination that Baltimore has attained the 1-hour ozone standard.

Comment 2: The commenter urges the importance of showing that the improvement in air quality is not due to the economic downturn is important because the air quality data indicate that the Baltimore area is at the upper limit of what can be considered attainment (3.1 expected exceedances over 2009 to 2011) under the 1-hour ozone NAAQS. The commenter suggests that the air quality improvement and continued attainment may be due to economic factors and not to pollution controls and argues that the Baltimore area may quickly slip back into nonattainment as the economy recovers, and that any ''redesignation of the area to attainment will not be valid.''

Response 2: EPA disagrees with the comment. As set forth in EPA's response to Comment 1, as is appropriate, EPA here is making only a determination of attainment for the 1-hour ozone standard based on monitored air quality. EPA is not redesignating the area to attainment for that standard—nor could the Agency do so, in view of the fact that the 1-hour ozone standard has been revoked since 2005. EPA's clearly defined determination of attainment here is consistent with the regulations that apply, and is based upon three years of complete, quality-assured monitoring data. For each NAAQS, EPA establishes through regulation procedures for the requisite level (in this case 0.12 ppm[9]), form (averaging periods, etc.) and, minimum data quality and handling conventions necessary to distinguish compliance from noncompliance. Although the 1-hour ozone NAAQS as promulgated in 40 CFR 50.9 includes no discussion of specific rounding conventions regarding rounding measured ambient air quality data or the expected number of exceedances for a year or over a consecutive three year period, our publicly articulated position and the approach long since universally adopted by the air quality management community is that the interpretation of the 1-hour ozone standard requires rounding ambient air quality data consistent with the stated level of the standard. Section 1.0 of Appendix H to 40 CFR part 50 explains how to determine when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is equal to or less than 1. Section 1.0 of Appendix H refers to ''Guideline for Interpretation of Ozone Air Quality Standards''[10] for an ''expanded discussion of these procedures and associated examples.'' In section 2.1—Interpretation of Expected Number, this ''Guideline for Interpretation of Ozone Air Quality Standards'' says as long as ''this arithmetic average remains 'less than or equal to 1' the area is in compliance. As far as rounding conventions are concerned, it suffices to carry one decimal place when computing the average.'' In the 1990 amendments to the CAA, Congress expressly recognized the continuing validity of EPA guidance. *See* generally, *H Comm. Rep.* 101–490 pp. 197, 232 (1990) (House Energy and Commerce Committee Report). Under EPA regulations, a sum of 3.1 expected exceedances over a consecutive 3-year period complies with the standard because the average is 3.1 divided by 3 or 1.0333 * * * that when rounded to carry one decimal place is 1.0 which does not exceed 1. The fractional value of the amount of expected exceedances arises due to missed monitoring days and derives from calculations pursuant to Appendix H to 40 CFR part 50. The form of the standard itself in terms of average number of ''expected exceedances'' is grounded in statistical considerations because the term ''expected exceedances'' is a statistical term. *See* section 2.0 of ''Guideline for Interpretation of Ozone Air Quality Standards.'' This fractional part of ''expected exceedances'' for a year or for a consecutive 3-year period arises from the calculation required using the procedures of Appendix H to 40 CFR part 50 to account for the number of days for which no valid data difference between the required number of required monitoring days in the year and the actual number of days with valid data with an allowance for the number of days a state may assume to

[8] After revocation of the 1-hour ozone standard, EPA no longer reclassifies areas under that standard. Moreover, even prior to revocation, the statute did not provide for reclassification of severe areas upon a failure to attain the standard by the applicable attainment date. *See* section 181(b)(2).

[9] The abbreviation ''ppm'' stands for parts per million.

[10] ''Guideline for the Interpretation of Ozone Air Quality Standards,'' EPA–450/4–79–003, OAQPS No. 1.2–108, January 1979, docket item number EPA–R03–OAR–2011–0680–0003 in the docket for this action.

be less than the standard level. These calculations were provided in Appendix A to ''Technical Support Document—Determination of Failure to Attain by 2005 and Determination of Attainment by 2008 for the 1-Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland.[11]'' Thus, the form of the 1-hour ozone NAAQS restricts the level of uncertainty, in the form of missed monitoring data as expressed, in the case of the 2011 data for one monitor, as 3.1 expected exceedances over a three-year period.

This fractional number is not an indication that the area is not attaining the standard, but rather takes into consideration and accounts for missing data. Moreover, EPA determines whether the area is in attainment through the procedures and definitions supplied in the regulations and under long standing interpretations. EPA does not distinguish degrees of attainment. Once an area's monitored concentrations show that it is below the level of concentrations defined as ''attainment'' of the standard, EPA considers the area to be in attainment of that standard.

Comment 3: The comments assert that EPA cannot determine that the Baltimore area is attaining the 1-hour ozone NAAQS for the period 2009 to 2011 unless and until EPA has determined the 2011 data meet the data quality standards of 40 CFR 50.9 and Appendix H for use in compliance determinations. The commenter stated that the data for 2011 reflect 209 out of 214 required monitoring days, with ''three days assumed less than the standard,'' and contends that EPA must show that the missing days are not contributing to nonattainment for 2009–2011, according to the applicable calculation methods.

Response 3: EPA agrees that a determination of attainment of the revoked 1-hour ozone standard should be consistent with relevant regulatory requirements. EPA has determined that the 2011 data meet the quality assurance and certification requirements for use to determine compliance with the 1-hour ozone NAAQS through 2011. In making a determination of attainment, EPA relies on the most recent three years of complete, quality-assured data, and also reviews subsequent data that become available and that suggest consistency with continued attainment. On February 1, 2012 (77 FR 4940), EPA proposed a determination that the Baltimore area has attained the 1-hour ozone NAAQS, and included data showing that the area had attained the standard since 2008. Although at that point the 2011 data had not yet been certified by the State of Maryland, the data for prior years had been previously certified and showed continuous attainment, and available data for 2011 were consistent with continued attainment. On April 12, 2012, the Maryland Department of the Environment certified the 2011 air quality monitoring data for ozone as complete and quality-assured. EPA has reviewed the certified 2011 1-hour ozone monitoring data and determined that the certified 2011 data matches and is the same as that used to support the February 1, 2012 NPR. Because data for 2011 have now have been certified as complete and quality-assured, this final rule determining that the Baltimore area is attaining the 1-hour ozone NAAQS is based upon the most recent three years of complete, quality-assured, certified air quality monitoring data for 2009 to 2011. As discussed in the previous response, the form of the 1-hour ozone NAAQS and Appendix H to 40 CFR part 50 (which contains the interpretation and procedures to calculate the number of expected exceedances for a year) account for any days for which valid data are missing. For this reason, EPA can determine the Baltimore area is attaining the 1-hour ozone NAAQS now that the 2011 data have been certified.

Comment 4: The comments asserted that the 2008 1-hour ozone data for the Edgewood monitor is missing as evinced by an Ozone Monitor Report 2008 obtained from EPA's Web page *http://www.epa.gov/airdata/ad_rep_mon.html.* Thus, the comments assert EPA needs to provide these data and verify that there actually were no values at the Edgewood monitor in 2008 above the 125 ppb level, and EPA needs to explain why the 2008 1-hour data for Edgewood, which is the critical monitoring data for determining attainment, is missing from its Web page. The comments expressed concern that the 8-hour averages are also very high which suggests that there may have been 1-hour levels above 125 ppb.

Response 4: In response to this comment, EPA re-checked the 2008 1-hour ozone monitoring data for the Edgewood monitor (AQS ID number 24–025–1001). Although the 2008 data were complete and available through the portal EPA uses to access AQS, EPA learned that the data for 2008 had not been completely available through the public portal access. The 2008 1-hour ozone air quality data were and are recorded in EPA's Air Quality Data (AQS) system, which is EPA's official repository for air quality data to be used for determinations of compliance with a NAAQS. In preparation for the February 1, 2012 NPR, on March 3, 2011, EPA viewed and retrieved the data in AQS for the 2008 (as well as the 2004 through 2007, and 2009 through 2010 years) ozone air quality data, and used this data in the compliance calculations for the proposed rule.[12] These calculations were provided in the Technical Support Document (TSD)—''Determination of Failure to Attain by 2005 and Determination of Attainment by 2008 for the 1–Hour Ozone National Ambient Air Quality Standards in the Baltimore Nonattainment Area in Maryland,'' dated January 26, 2012'' for the proposed rule. *See* docket item EPA–R03–OAR–2011–0680–0008.[13] After receiving the Sierra Club's comment on this issue, EPA re-checked and downloaded a ''Monitor values Report'' dated April 16, 2012, for the same 2008 data for the Edgewood monitoring site via the public access portal of ''Air Data Mart.'' [14] From an examination of this April 16, 2012 ''Monitor Values Report,'' EPA learned that all the data for the ozone monitors in Harford County could not be accessed through that portal and that in fact the 2008 data were in AQS. The April 16, 2012 ''Monitor Values Report'' indicated that there were 4850 ''observations'' (data points) in AQS for the Edgewood monitoring site which equals the same number of observations as for the 202 valid days of monitoring data for the Edgewood monitor in 2008 used in the compliance calculations prepared for the February 1, 2012 NPR.[15] [16] Upon investigation EPA determined that there was a minor fault in the Air Data Mart public access portal system and has corrected the problem. EPA has verified that the complete 2008 data can now be accessed via the ''Air Data Mart.'' On May 1, 2012, EPA retrieved a copy from the ''Air Data Mart'' and placed a copy of the output which displays the 2008

[11] Docket item number EPA–R03–OAR–2011–0680–0008 in the docket for this action.

[12] There are several levels of access to AQS such as the public access portal ''*http://www.epa.gov/airdata/ad_rep_mon.html*'' and various restricted access portals used by States and EPA to enter or correct data and to print reports. EPA used a restricted access portal to obtain the 2008 data presented in the January 26, 2012, TSD.

[13] Refer to the ''Quicklook Criteria Parameters,'' Report Request ID 843146, Report Code AMP450, dated March 3, 2011, found in Attachment to Appendix A to the TSD dated January 26, 2011.

[14] *http://www.epa.gov/airdata/ad_rep_mon.html.*

[15] The required ozone monitoring season in Maryland is 214 days (from April 1st to October 30th). *See* Table D–3 to Appendix D of 40 CFR Part 58.

[16] Refer to the ''Monitor Values Report'' from U.S. EPA Air Data *http://www.epa.gov/airdata,* generated April 16, 2012. A copy of this report has been placed in the docket for this action.

data in the docket for this action.[17] EPA has verified that the 2008 data for the Edgewood monitor now available through the ''Air Data Mart'' portal do not affect its determination of attainment for the area during any period that included 2008 data because the data available on May 1, 2012 via the ''Air Data Mart'' portal is the same as that EPA obtained on March 3, 2011 for use in the compliance calculations prepared for the February 1, 2012 NPR. These data values were thus considered by EPA and do not affect EPA's determinations for any attainment period that included the 2008 data. Moreover, EPA has also determined here that the area is attaining the standard for the most recent three years of complete, quality-assured data, 2009–2011. EPA's determination for this most recent period does not include or require reliance upon any data for 2008.

EPA recognizes that, for the 1997 ozone NAAQS, the 8-hour ozone values in the Baltimore area exceed that NAAQS, and EPA has taken action accordingly:

1. On February 1, 2012, EPA determined that the Baltimore 1997 8-hour moderate ozone nonattainment area had failed to attain the 1997 8-hour NAAQS by its applicable attainment date, and the Baltimore area was reclassified as a serious ozone nonattainment area.[18] *See* 77 FR 4901, February 1, 2012.

2. On April 30, 2012, the EPA Administrator signed a final rule that designated areas as nonattainment or attainment for 2008 ozone NAAQS, which is codified at 40 CFR 50.15. The Baltimore, MD area was included as a nonattainment area. *See* 77 FR 30088 at 30127, May 21, 2012.

B. Comments Concerning Effect of Determination of Baltimore Area's Failure to Attain the 1-Hour Ozone NAAQS

Comment 1: The comments express support for EPA's statement that the Baltimore area's failure to attain by its statutory 1-hour attainment date of November 15, 2005 bears on obligations with respect to two 1-hour ozone anti-backsliding requirements whose implementation would be triggered by a finding of failure to attain: contingency measures for failure to attain and section 185 major stationary source fee programs. However, the commenter disagrees with the proposed rule's discussion of the effect of the determination on these 1-hour ozone anti-backsliding requirements. Specifically, the commenter criticizes EPA's statements below:

1. ''If this determination [of current 1-hour attainment of ozone NAAQS] is finalized, then even if EPA finalizes its proposed determination that the area failed to attain the 1-hour ozone standard by the 2005 deadline, it will not result in any 1-hour ozone contingency measure obligations for the area.'' *See* 77 FR 4940 at 4943.

2. ''A final determination of failure to attain by the area's 1-hour attainment date would trigger the 1-hour anti-backsliding obligation to implement the penalty fee program under section[s] 182(d)(3)[,] 182(f) and 185, unless that obligation is terminated.'' *See* 77 FR 4940 at 4943.

The comments assert that under the *South Coast* decision EPA is obligated to enforce contingency and fee measures in areas that fail to attain the 1-hour ozone NAAQS by their attainment dates and is not authorized to release the area from its contingency obligations or to terminate the obligation to pay the section 185 and other fees

With respect to the section 185 fee requirement, the commenter states that the Baltimore area failed to attain by November 15, 2005, and that the Baltimore area did not receive an extension of its attainment date (section 181 (a)(5) of the CAA). The commenter contends that therefore the area is subject to 185 fees on its major sources of VOCs and NOx for the time period 2005–2008.

Response 1: First, we wish to emphasize, as EPA stated in its proposal, that the purpose of this rulemaking notice is to make specific air quality determinations regarding whether the Baltimore area attained the revoked 1-hour ozone standard. While EPA's proposal stated that these determinations bear on 1-hour anti-backsliding requirements for contingency measures and CAA section 185 penalty fees, this notice does not attempt to address or resolve all the implementation issues regarding those requirements. Thus, Sierra Club's position that EPA's specific rulemakings on air quality determinations must also include resolutions of all anti-backsliding implementation issues that may flow from them is incorrect. While EPA recognizes that the anti-backsliding requirements for 1-hour ozone contingency measures and section 185 fees are linked to the determination of failure to meet the attainment deadline for that standard, EPA's rulemakings here regarding those determinations do not, and are not required to, dispose of all implementation issues for those requirements or for others, such as those raised in Sierra Club's comments regarding milestones and additional planning.

Nevertheless, EPA sets forth below its views on points raised by the commenter. First, with respect to contingency measures, EPA believes that, as EPA explains in its response below in the context of the requirement for section 185 penalty fees, it is EPA's final determination that the area failed to attain by its attainment date that triggers the requirement to implement these. Since EPA is also finalizing here its determination that the area is currently attaining the 1-hour ozone standard, the obligation to submit or implement any measures is suspended. This would be the case, moreover, even if the obligation for contingency measures had been triggered at an earlier date because the purpose of nonattainment contingency measures for failure to attain is to provide for progress towards attainment. Once attainment has been reached, this purpose is satisfied. EPA's Clean Data Policy and the many Courts which have upheld it, including *National Resources Defense Council* v. *EPA,* 571 F.3d 1249 (D.C. Cir. 2009), support this rationale.[19] Contrary to commenter's complaint, EPA is not here unlawfully refusing to effectuate the anti-backsliding requirement for contingency measures. Nor is EPA unlawfully releasing the area from its anti-backsliding obligation with respect to contingency measures. To the contrary, EPA is following the long-established legal path to determining that the contingency measure requirement has been satisfied by a determination, after notice-and-comment rulemaking, of attainment of the 1-hour ozone standard. In making the determination that the area failed to attain the 1-hour ozone standard by its applicable attainment date, and concurrently making the determination that the area has been attaining the 1-hour ozone standard since 2008, and that it continues to attain that standard, EPA is enforcing the anti-backsliding requirement. The Baltimore area is not backsliding on the 1-hour ozone standard; as EPA has determined, the Baltimore area has attained that standard, and continues to attain it.

[17] Refer to the ''Monitor Values Report'' from U.S. EPA Air Data *http://www.epa.gov/airdata,* generated May 1, 2012.

[18] The boundaries of the ''Baltimore'' nonattainment areas are the same under both the 1-hour and 1997 8-hour (40 CFF 50.10) NAAQS.

[19] *See also Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Cir.1996); *Sierra Club* v. *EPA,* 375 F.3d 537(7th Cir. 2004); and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) (memorandum opinion). *See* the additional cases listed in footnote 7 of the February 1, 2012 NPR (77 FR 4940 at 4943).

EPA also points out that in these circumstances EPA is not required to show the causes or amounts of the reductions that have brought the area into attainment over the last years. EPA's discussion of the contributions that the 1997 ozone controls have made to 1-hour ozone attainment was aimed at showing that 1-hour attainment has occurred in the context of ongoing reductions for a more stringent ozone standard. This showing is not necessary to and is not relied upon in EPA's determination that the obligation to submit 1-hour ozone contingency measures has been satisfied.

In its comments, Sierra Club argues that EPA's determination that the Baltimore area failed to attain by its 1-hour ozone attainment deadline also requires EPA to decide here that it must retroactively collect penalties under section 185 for the period before EPA made its determination.[20] We disagree. Neither EPA's determination, nor the *South Coast* case, compels EPA to reach this conclusion or even to decide that issue here. EPA intends to address issues regarding 1-hour anti-backsliding requirements in future rulemakings on implementation of the section 185 requirements for the Baltimore area. Nevertheless, we wish to express our preliminary views on Sierra Club's comments below. EPA's preliminary views, as set forth below, are not necessary to and are independent of its air quality determinations regarding nonattainment and attainment that are contained in this notice of final rulemaking.

Sierra Club's comments quote at length from *South Coast,* 472 F.3d at 902–903. While EPA acknowledges that this decision established that section 185 fee requirements were to be included as anti-backsliding measures, the Court in that case did not direct any specific means of enforcement of these requirements, nor the method for determining whether an area failed to attain by its attainment date. That decision established only that the section 185 and contingency measure requirements were ''applicable.'' It did not establish or even address how those requirements were to be implemented.[21]

The D.C. Circuit, however, has previously upheld EPA's longstanding practice of making determinations of an area's failure to meet attainment deadlines solely through notice and comment rulemaking. *See Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002). In that case, which similarly arose from a determination of failure of a 1-hour ozone nonattainment area to meet its attainment deadline, the D.C. Circuit rejected a litigant's[22] demand to make the consequences of that determination retroactive to the time period before EPA made the determination. *See Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002).[23] In that case, Sierra Club similarly argued that EPA's overdue determination that the St. Louis 1-hour ozone nonattainment area failed to attain by its attainment deadline should apply retroactively, and that the Court should require retroactive reclassification of the area. The Court rejected Sierra Club's contention that an EPA rulemaking was not required to determine a failure to attain.

''No matter what the Sierra Club thinks the Clean Air Act or the APA required of EPA, the fact remains that 'EPA's established practice for making a final decision concerning nonattainment and reclassification is to conduct a rulemaking under the APA, not to issue a letter, a list, or some other informal document.' * * * [citations omitted.]'' The Court concluded: ''In other words, if there has not been a rulemaking there has not been an attainment determination.'' 285 F.3d at 66.

The Court also refused to accept Sierra Club's assertion that the Court should compel EPA to give retroactive effect to its determination, resulting in reclassification as of the area's attainment date. The Court stated: ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the states, which would face fines and suits for not implementing air pollution prevention plans [earlier], even though they were not on notice at the time.'' 285 F.3d at 68.

While it is true that the Clean Air Act provides that both reclassification and penalty fees are consequences of failure to attain the ozone standard, the D.C. Circuit in *Sierra Club* recognized that these weighty consequences are not triggered until EPA makes a determination, after notice and comment rulemaking, of failure to attain. In that case, the Court also rejected the view that adverse consequences from the determination should be imposed retroactively, especially if it would, as here, subject the states to additional burdens caused by retroactive requirements that they were not given notice of prior to conclusion of the rulemaking process.

Several features of our rulemaking for Baltimore provide additional grounds for application of a similar position to that taken by the court in the St. Louis *Sierra Club* case. In the case of St. Louis, when the question of retroactive application arose, the area remained in nonattainment of the 1-hour ozone standard, which was also still the only standard in effect at the time of the Court's decision. Here, unlike St. Louis, EPA has determined that the Baltimore area is currently attaining the 1-hour ozone standard, and thus there is significantly less reason to consider imposing retroactive penalties that are intended to bring about the attainment that has already occurred.

Sierra Club here argues, unpersuasively, that the *South Coast* opinion supports retroactive imposition of penalties, quoting the Court's statement that, unless section 185 requirements were applicable, '' a state could go unpenalized without ever attaining even the original NAAQS. * * *'' 472 F.3d at 903. Here, however, this possibility does not exist. EPA's final determination in this rulemaking establishes that the Baltimore area has in fact attained the 1-hour ozone standard.

Sierra Club quotes the Court's statement in *South Coast* that ''Congress set the penalty deadline well into the future, giving states and industry ample notice and sufficient incentives to avoid the penalties.'' 372 F.3d at 903. Notice of the existence of penalty provisions, however, is not the same as notice that these provisions have been triggered. As the D.C. Circuit recognized in *Sierra Club* v. *Whitman,* only when EPA issues a final notice determining that an area has failed to attain by the attainment date can that failure be definitively established. The case of Baltimore presents a particularly compelling context in which to apply this principle. The Baltimore area has been attaining the 1-hour ozone standard since 2008. No incentives—and certainly no penalties—are required for the area to

[20] As explained above and elsewhere in our response to comments, EPA disagrees with Sierra Club's contentions regarding retroactive collection of fees. As a technical point, however, we note that under section 185, the earliest year for which fees could ever have been required to be paid is *the calendar year following* the attainment date, November 15, 2005. Thus, it is clear that under no circumstances would fees be due for 2005.

[21] Moreover, as EPA explained above, those issues are ancillary to the determination of failure to attain the 1-hour ozone standard that EPA is finalizing in this rulemaking.

[22] In that case, also Sierra Club.

[23] *Sierra Club* v. *Whitman* was discussed and distinguished in a recent D.C. Circuit decision that addressed retroactivity in a quite different context, where, unlike here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n* v. *EPA.* 630 F.3d 145, 163 (D.C. Cir. 2010), *rehearing denied* 643 F.3d 958 (D.C. Cir. 2011), *cert denied* 132 S. Ct. 571 (2011).

reach attainment,[24] a goal that the area has met and preserved. Under these circumstances, and based on the D.C. Circuit's and EPA's long held position on the issue of retroactive consequences of determinations of failure to attain, EPA cannot see a reason to impose penalties on sources in Baltimore. As explained above, EPA is determining that the area is currently, and has for some time been, attaining the 1-hour ozone standard. Thus no anti-backsliding purpose is served by retroactive imposition of fees for a failure to meet a deadline for a revoked standard, under circumstances that existed years ago, which have since been eclipsed by continuous attainment. EPA believes that forcing the states and sources to address old penalties now would also divert attention and resources from efforts to achieve current, forward-looking environmental goals, including the stricter 2008 ozone standard. In these circumstances, giving retroactive effect to EPA's determination of failure to attain the standard here would be unreasonable, and it would, as the Court held in *Sierra Club* v. *Whitman,* ''only mak[e] the situation worse.''

Comment 2: The commenter asserts under *South Coast* (at 903–904) that, ''anti-backsliding'' considerations require that 1-hour contingency measures must remain in place even after transitioning away from the 1-hour ozone standard. The commenter asserts that because EPA has not yet approved contingency measures for failure to attain for the Baltimore area, EPA must take remedial action either under 42 U.S.C. 7410(k)(5) to issue a call for a plan revision for the required contingency measures or under 42 U.S.C. 7410(k)(6) to correct its final action on the SIP for the Baltimore area by disapproving the submission [25] for lack of the contingency measures. The comments assert that EPA must issue a Federal Implementation Plan (FIP) that includes the required contingency measures.

Response 2: Even if there existed any outstanding SIP submission requirement for contingency measures for failing to meet the deadline to attain the revoked 1-hour ozone standard, EPA's final determination here that the area has attained the 1-hour ozone standard suspends that requirement. Pursuant to EPA's Clean Data Policy, EPA's determination that the area has attained the 1-hour ozone standard means that attainment has been reached, and thus the purpose of the contingency measures is fulfilled.

Comment 3: The commenters claim that any contingency measures now needed must be from ''current emissions'' and that crediting reductions from measures in the reasonable further progress (RFP) for 2008 under the 1997 ozone NAAQS is not supported by any statutory authority. In addition, the commenters claim that use of the RFP reductions in the RFP plan for 2008 is arbitrary for two reasons:

The commenters claim that the 2008 RFP plan does not provide enough reductions of VOC emissions and that EPA cannot rely on substituting NOx reductions because there is no direct NOx to VOC trade-off. The comments assert that the 1-hour contingency requirement is 13.77 tons per day (tpd) of VOC reductions whereas the RFP plan required 2.05 tpd of VOC reductions to leave a shortfall of 11.72 tpd of VOC reductions. The comments claim the contingency plan cannot rely on the ''1997'' ozone NAAQS [26] requiring more NO_X reductions than the 1-hour contingency requirement ''because there is no such thing as a direct NOx to VOCs trade off'' and that ozone formation is more complicated than that. The comments further contend because EPA has not demonstrated that the RFP reductions have been achieved EPA cannot credit them towards the contingency requirement.

Response 3: EPA disagrees with this comment. EPA believes that EPA's determination that the Baltimore area attained the 1-hour ozone NAAQS in 2008 and has continued to attain this NAAQS suspends the requirement for submission of 1-hour ozone contingency measures. EPA's final determination of attainment for the 1-hour ozone standard removes the need at this time to further address any comments or objections related to the contingency measure requirement. EPA's determination that the area has been attaining the 1-hour ozone standard since 2008, and continues to attain the standard, provides independent and sufficient grounds for concluding that the 1-hour contingency measure anti-backsliding requirement is satisfied. No additional reductions from contingency measures—or any other measures—are needed to bring about attainment of the 1-hour ozone standard or reasonable progress toward that attainment, which has already been achieved.

Thus it is not necessary for the purpose of finalizing this notice to address the commenter's critique of EPA's discussion, in its proposed rulemaking, of emissions reductions that may have contributed to attainment. In the February 1, 2012 NPR, EPA included a discussion of emissions reductions that had occurred in Baltimore in the period after the area's 1-hour ozone attainment deadline. EPA's discussion described certain emissions reductions that served the same function as contingency measures would have done, whether or not the measures that brought about those reductions had formally been approved as contingency measures. The commenter addresses EPA's discussion and criticizes its analysis of post-2005 reductions. While EPA disagrees with the commenter's views of these reductions, and believes that they reflect a misunderstanding of the CAA requirements, EPA finds it unnecessary to respond specifically to them in this rulemaking. The purpose of contingency measures is to bring about attainment, and EPA's determination that the area has attained the 1-hour ozone standard shows that this purpose has been achieved. In these circumstances, it is not necessary to reach agreement on calculations regarding the emissions reductions that brought the area into attainment. Attainment of the 1-hour ozone standard has been reached, and thus no contingency measures are required to reach attainment. This is all the more true for an area subject to ongoing implementation of additional control measures for the 1997 8-hour ozone standard. The decision of the DC Circuit in *South Coast* did not address or invalidate the Clean Data Policy, which was upheld by that Circuit in *Natural Resources Defense Council* v. *EPA.*

Comment 4: The commenter claims that the contingency measures should have come into place in 2005 when the area was violating, and, therefore, EPA cannot use the Clean Data Policy to suspend the requirement because, the commenter argues: (1) The FIP clock should have long since passed and a clean data determination cannot excuse EPA from its FIP obligation; (2) to use the Clean Data Policy would effectively remove the contingency measure requirement and create a backslide by removing a requirement that should have been in place before the clean data determination. The commenter claims that the Court in *South Coast* precludes EPA from removing requirements that

[24] Sierra Club appears to recognize this, since it does not request EPA to impose penalties for the time period after the area attained the standard (2010 to the present).

[25] The comments used the phrase ''disapprove the submit.''

[26] *See* 40 CFR 50.10.

were required before this clean data determination.[27]

Response 4: As set forth in EPA's response to comments above, prior to this final rulemaking EPA had not determined that the area failed to attain by its attainment deadline, and thus, contrary to the commenter's contention, no contingency measures for failure to attain had been triggered. *See Sierra Club* v. *Whitman,* cited above in EPA's Response to Comment. Moreover, as explained elsewhere in this notice and in EPA's proposed rulemaking, EPA is also making here a final determination that the area has attained the 1-hour ozone standard. This determination establishes that the purpose of the contingency measures has been fulfilled. This is the case even if it is determined that the area previously failed to attain by the applicable deadline. A determination that the area has attained and continues to attain the standard, whenever it is issued, logically means that no contingency measures need be adopted to reach attainment. Thus there is no legal or common sense justification for a retroactive imposition of ozone contingency measures intended to achieve attainment of the revoked 1-hour ozone standard, a goal that has already been reached.

EPA's prior rulemakings demonstrate that its interpretation under the Clean Data Policy applies after revocation of the 1-hour ozone standard, and after the *South Coast* decision (*See* 74 FR 13166 (March 26, 2009) and 75 FR 6570 (February 10, 2010). Moreover, since there was and is no state obligation to adopt one- hour contingency measures, there is no FIP obligation. Because no SIP deficiency exists with respect to 1-hour ozone contingency measures, no FIP requirement based upon it exists either. Contrary to commenter's claim, EPA's interpretation under the Clean Data Policy does not act to remove an anti-backsliding requirement; rather, as the Courts have held, even when the 1-hour ozone standard was in effect, it is an interpretation that the requirement is satisfied by attainment. *Sierra Club* v. *EPA* (10th Cir. 1996). Contingency measures have no meaning while an area is attainment.

C. Comments Concerning Revised State Implementation Plan for 1-Hour Ozone

Comment 1: The commenter asserts that section 182 of the CAA requires EPA to require Maryland to submit a ''revised SIP'' for ozone for the Baltimore area. To support this proposition, the commenter cites the opening paragraph of section 182(d).[28] The commenter states that the plans required by sections 182(c) and (d) of the CAA include but are not limited to ''enhanced monitoring, attainment and reasonable further progress[29] demonstrations, NOx control, and contingency provisions, as well as the enforcement of fees under ''section 182(d)(3)'' (that is the section 185 fees).

Response 1: EPA disagrees that Maryland must submit additional SIP revisions for attainment and reasonable further progress demonstrations, NOx control, and contingency provisions as a consequence of EPA's determination that the Baltimore area failed to attain the revoked 1-hour ozone standard by November 15, 2005. EPA does not agree with commenter's view regarding requirements for a severe nonattainment area that fails to meet its attainment deadline to revise its SIP to provide for additional RFP demonstrations and contingency measures under CAA section 182. Nor does EPA believe that section 181(b)(4) of the CAA imposes any requirements for the revoked 1-hour ozone standard, because no further 1-hour ozone planning requirements under that provision or any other, applicable to an area such as Baltimore, were preserved in anti-backsliding.

After a standard has been revoked, there is no requirement to revise an initial attainment demonstration for a severe area after the area fails to attain by the statutorily applicable attainment date.[30] We disagree with the commenter's claim that EPA's determination here triggers the Baltimore area's obligations to adopt and submit a broad variety of additional SIP revisions for the revoked 1-hour ozone standard. A plan revision under section 181(b)(4) of the CAA is not an applicable anti-backsliding requirement under EPA's anti-backsliding regulations. As EPA has explained in other rulemakings, only those anti-backsliding requirements that were specifically retained by the anti-backsliding rule, 40 CFR 51.905, and by the decision in *South Coast* are applicable, and others cited by the commenter are not included. *See* 76 FR 82133 at 82139–140 (December 30, 2011). As EPA stated in its proposal, the only anti-backsliding measures that pertain to this determination of failure to meet the 1-hour deadline are 1-hour contingency measures for failure to attain and section 185 penalty fees.

Moreover, as set forth above, under EPA's Clean Data Policy, EPA's determination that the area is currently attaining the 1-hour ozone standard obviates the need for submission of any planning requirements related to attainment of the standard. Section 181(b)(4) of the CAA, cited by the commenter, was not preserved as an anti-backsliding requirement for the 1-hour ozone standard. In the February 1, 2012 NPR, EPA stated that its determination ''relates [solely] to effectuating the anti-backsliding requirements that are specifically retained.'' *See* 77 FR 4940 at 4942, February 1, 2012.

Comment 2: The comments state that if EPA maintains that the Baltimore area has attained the 1-hour ozone standard, EPA must require a new SIP under ''42 U.S.C. § 7505s(a)''[31] which would provide for ''the maintenance of the national primary ambient air quality standard for such area in the area concerned for at least 10 years after the redesignation.''

Response 2: EPA disagrees with the comment for several reasons. Section 175A of the CAA requires that a state submit a ''maintenance plan[32]'' for the area for which redesignation to attainment is sought.

Section 175A of the CAA applies in conjunction with a state's request to redesignate an area from nonattainment to attainment pursuant to section 107(d)(3) of the CAA. The maintenance plan referred to takes effect after EPA approves the area's redesignation to attainment. Until a state submits such a request for redesignation of a nonattainment area, section 175A by its

[27] The comments contend that the Baltimore area is still experiencing ''exceedances'' of the 1-hour ozone NAAQS. An exceedance of the standard does not constitute a violation of that standard. EPA responses elsewhere in this document show that the 1-hour ozone NAAQS defines an area as attaining the standard if it has fewer than or equal to 3.1 expected exceedances over any consecutive 3-year period. As EPA has shown, for the past four years, since 2008, the Baltimore area has not monitored a violation of the 1-hour ozone NAAQS.

[28] This paragraph states: ''Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) [i.e., section 182(c)] of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection [section 182(d)].'' (with clarifying citations added)

[29] ''RFP'' hereafter.

[30] As noted in the February 1, 2012 NPR, EPA has fully approved into the Maryland SIP a 1-hour ozone attainment demonstration, reasonably available control measures and reasonable further progress (RFP) plans, and RFP contingency measures for the Baltimore area. *See* 77 FR 4940 at 4942–4943, February 1, 2012.

[31] Based upon context, EPA concludes the citation to § 7505s(a) in the comment letter is a scrivener's error and should be to 42 U.S.C. section 7505a(a) (section 175A(a)).

[32] A maintenance plan is a SIP revision to provide for maintenance of the NAAQS in question for a period of ten years after the area is redesignated to attainment. *See,* 42 U.S.C. 7505a(a).

own terms does not require submission of any SIP revision.

Section 175A(a) of the CAA provides that each state which submits a request for redesignation of an area to attainment ''shall also submit'' a maintenance plan under section 175A of the CAA. In context ''shall also submit'' means that the state must submit a maintenance plan under section 175A only when it requests redesignation under section 107(d)(3)(E) of the CAA. Thus section 175A compels submission of a maintenance plan if and only if the state submits a request for redesignation of a nonattainment area to attainment. Sections 107(d)(3)(E) and 175A of the CAA do not require submission of a request to redesignate an area to attainment, nor do they require submission of a maintenance plan in the absence of a redesignation request. As set forth in EPA's responses above, EPA no longer redesignates areas for the revoked 1-hour ozone standard.

EPA no longer redesignates areas to attainment of the 1-hour ozone NAAQS because EPA revoked that NAAQS on June 15, 2005, as a result of implementation of the more protective 1997 ozone NAAQS. EPA notes that the Baltimore area is designated as serious nonattainment for the 1997 ozone NAAQS and has been designated classified as moderate nonattainment for the 2008 ozone NAAQS.[33] For all the reasons set forth above, no requirement for a 1-hour ozone maintenance plan under section 175A of the CAA is applicable to the Baltimore area.

IV. Final Actions

EPA is making two separate and independent determinations related to the Baltimore 1-hour ozone nonattainment area. These determinations are based upon complete, quality-assured and certified ozone monitoring data.

A. Determination of Failure To Attain the 1-Hour Ozone NAAQS by the Applicable Attainment Date

With respect to the 1-hour ozone standard, and pursuant to EPA's authority to ensure implementation of 1-hour ozone anti-backsliding requirements and under CAA section 301, EPA is determining that data for 2003–2005 show that the Baltimore area previously failed to attain the 1-hour ozone standard by its applicable November 15, 2005 attainment deadline.

B. Determination of Current Attainment of the 1-Hour Ozone NAAQS

EPA is determining that the Baltimore area is currently attaining the 1-hour ozone standard. EPA's determination is based on the most recent three years of complete, quality-assured and certified data for 2009–2011. In addition complete, quality assured and certified data show that the Baltimore area has attained since the 2006–2008 monitoring period and for every three-year period since that time. Pursuant to EPA's interpretation, as set forth in its Clean Data Policy and the cases and regulations that embody it, EPA has determined that the Baltimore area is no longer obligated to submit and implement the 1-hour ozone contingency measure requirement of CAA section 172(c)(9).

V. Statutory and Executive Order Reviews

A. General Requirements

This action makes determinations of attainment and nonattainment based on monitored air quality data and does not impose additional requirements beyond those imposed by statute or regulation. For that reason, this action:

- Is not ''significant regulatory actions'' 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 economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, these final actions regarding attainment of the 1-hour ozone NAAQS in the Baltimore area do 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.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 13, 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 regarding determinations concerning attainment of the 1-hour ozone NAAQS in the Baltimore area may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by

[33] Subsequent to June 15, 2005, EPA has issued a revised ozone NAAQS (the 2008 ozone NAAQS codified at 40 CFR 50.15) for which the level of the standard, 0.075 ppm—lower than the 0.08 ppm of the 1997 ozone NAAQS. A May 21, 2012 (77 FR 30088 at 30127) final rule designated and classified the Baltimore area as moderate nonattainment under the 2008 ozone NAAQS.

reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 30, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

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 V—Maryland

■ 2. Section 52.1076 is amended by adding paragraph (y) to read as follows.

§ 52.1076 Control strategy plans for attainment and rate-of-progress: Ozone.

* * * * *

(y) Determination—EPA has determined that, as of July 12, 2012, the Baltimore 1-hour ozone nonattainment area has attained the 1-hour ozone standard and that this determination obviates the requirement for Maryland to submit for the Baltimore area the 1-hour ozone contingency measure requirements of section 172(c)(9) of the Clean Air Act.

■ 3. Section 52.1082 is amended by adding paragraphs (f) and (g) to read as follows.

§ 52.1082 Determinations of attainment.

* * * * *

(f) Based upon EPA's review of the air quality data for the 3-year period 2003 to 2005, EPA determined, as of July 12, 2012, that the Baltimore 1-hour ozone nonattainment area did not attain the 1-hour ozone standard as of its applicable 1-hour ozone attainment date of November 15, 2005.

(g) Based on 2009–2011 complete, quality-assured ozone monitoring data at all monitoring sites in the Baltimore 1-hour ozone nonattainment area, EPA determined, as of July 12, 2012, that the Baltimore 1-hour ozone nonattainment area has attained the 1-hour ozone standard.

[FR Doc. 2012–14141 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2010–0523; FRL–9683–7]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Illinois; Redesignation of the Illinois Portion of the St. Louis, MO–IL Area to Attainment for the 1997 8-hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a request from the State of Illinois to redesignate the Illinois portion of the St. Louis, MO–IL area to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard). The St. Louis area includes Jersey, Madison, Monroe, and St. Clair Counties in Illinois and St. Louis City and Franklin, Jefferson, St. Charles, and St. Louis Counties in Missouri. The Illinois Environmental Protection Agency (IEPA) submitted this request on May 26, 2010, and supplemented its request on September 16, 2011. EPA proposed to approve this submission on December 22, 2011, and provided a 30-day review and comment period. On January 20, 2012, EPA extended the public comment period for an additional 30 days. The comment period closed on February 22, 2012. EPA received comments submitted on behalf of Sierra Club. In addition to approving the redesignation request EPA is taking several other related actions. EPA is approving, as a revision to the Illinois State Implementation Plan (SIP), the State's plan for maintaining the 1997 8-hour ozone standard through 2025 in the area. EPA is approving the 2002 emissions inventory, submitted by IEPA on June 21, 2006, and supplemented on September 16, 2011, as meeting the comprehensive emissions inventory requirement of the Clean Air Act (CAA) for the Illinois portion of the St. Louis area. Finally, EPA finds adequate and is approving the State's 2008 and 2025 Motor Vehicle Emission Budgets (MVEBs) for the Illinois portion of the St. Louis area.

DATES: *Effective Date:* This rule is effective on June 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2010–0523. All documents in the docket are listed on the *www.regulations.gov* Website. 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, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this rule?
II. What comments did we receive on the proposed rule?
III. What actions is EPA taking?
IV. Statutory and Executive Order Reviews

I. What is the background for this rule?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857). In that rulemaking, the St. Louis area was designated as nonattainment for the 1997 8-hour ozone standard and classified as a moderate nonattainment area under subpart 2 of the CAA.

On May 26, 2010, IEPA requested redesignation of the Illinois portion of the St. Louis area to attainment of the 1997 8-hour ozone standard based on ozone data for the period of 2007–2009. On September 16, 2011, IEPA supplemented the original ozone redesignation request, revising the mobile source emission estimates using EPA's on-road mobile source emissions model, MOVES, and extending the demonstration of maintenance of the ozone standard through 2025, with new MVEBs, but without relying on emission reductions resulting from

implementation of EPA's Clean Air Interstate Rule (CAIR) or Cross-State Air Pollution Rule (CSAPR).

On June 9, 2011 (76 FR 33647), EPA issued a final rulemaking determining that the entire St. Louis, MO–IL area has attained the 1997 8-hour ozone NAAQS based on three years of complete, quality-assured ozone data for the period of 2008–2010.[1]

On December 22, 2011 (76 FR 79579), EPA issued a rulemaking action proposing to approve Illinois' request to redesignate the Illinois portion of the St. Louis area to attainment of the 1997 8-hour ozone standard, as well as proposing to approve Illinois' maintenance plan for the area, Volatile Organic Compound (VOC) and nitrogen oxides (NO_X) MVEBs, and VOC and NO_X emissions inventories. This proposed rulemaking sets forth the basis for determining that Illinois' redesignation request meets the CAA requirements for redesignation to attainment for the 1997 8-hour ozone NAAQS. Air quality monitoring data in the St. Louis area for 2007–2009, 2008–2010, and 2009–2011 show that this area is currently attaining the 1997 8-hour ozone NAAQS.

The primary background for today's action is contained in EPA's December 22, 2011, proposal to approve Illinois' redesignation request, and in EPA's June 9, 2011, final rulemaking determining that the area has attained the 1997 8-hour ozone NAAQS, based on complete, quality-assured monitoring data for 2008–2010, and continuing through 2011. In these rulemakings, we noted that under EPA regulations at 40 CFR 50.10 and 40 CFR part 50, appendix I, the 1997 8-hour ozone standard is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm at all ozone monitoring sites in the area. See 69 FR 23857 (April 30, 2004) for further information. To support the redesignation of the area to attainment of the NAAQS, the ozone data must be complete for the three attainment years. The data completeness requirement is met when the 3-year average of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness, as determined in accordance with appendix I of 40 CFR part 50. Under the CAA, EPA may redesignate a nonattainment area to attainment if sufficient, complete, quality-assured data are available demonstrating that the area has attained the standard and if the state meets the other CAA redesignation requirements specified in section 107(d)(E) and section 175A.

The December 22, 2011, proposed redesignation rulemaking provides a detailed discussion of how Illinois' ozone redesignation request meets the CAA requirements for redesignation of the Illinois portion of the St. Louis area. With the final approval of its VOC and NO_X emissions inventories, Illinois has met all applicable CAA requirements for redesignation to attainment for the 1997 8-hour ozone NAAQS. Air quality monitoring in the St. Louis area for 2009–2011 shows that this area continues to attain the 1997 8-hour ozone NAAQS. Illinois has demonstrated that attainment of the 1997 8-hour ozone NAAQS will be maintained through 2025 with or without the implementation of CAIR or CSAPR. In addition, modeling conducted by EPA during the CSAPR rulemaking demonstrates that in both 2012 and 2014, even without taking into account reductions associated solely with CAIR or CSAPR, the counties in the St. Louis MO–IL nonattainment area will have air quality that attains the 1997 ozone NAAQS. Finally, Illinois has adopted 2008 and 2025 MVEBs that are supported by Illinois' ozone maintenance demonstration and adopted ozone maintenance plan.

II. What comments did we receive on the proposed rule?

EPA initially provided a 30-day comment period for the December 22, 2011, proposed rule. On January 20, 2012, EPA extended the comment period for an additional 30 days. During the comment period, we received comments from one individual representing the Sierra Club. These comments are summarized and addressed below.

Comment 1: The commenter contends that it is inappropriate to redesignate the Illinois portion of the St. Louis nonattainment area to attainment of the 1997 8-hour ozone standard when EPA intends to designate the St. Louis area as nonattainment under the 2008 8-hour ozone standard, yet the EPA is illegally delaying the implementation of the 2008 8-hour ozone standard.

Response 1: On May 21, 2012 EPA published its designations for the 2008 standard. 77 FR 30088, 30116. EPA designated the St. Louis-St. Charles-Farmington, MO–IL area as nonattainment, with a classification of marginal. The area's status with respect to the 2008 standard, however, does not affect or prevent redesignation of the area to attainment for the 1997 standard. The 1997 standard currently remains in effect, and thus EPA continues to evaluate the area's designation status with respect to that standard. Until the 1997 8-hour ozone standard is revoked, it remains in effect and independent of the 2008 8-hour ozone standard, and EPA continues to evaluate and act upon states' requests for redesignation with respect to the 1997 standard.

EPA has in the past continued to redesignate areas under existing standards even after the adoption of new standards for the same pollutant. After adopting the 1997 8-hour ozone standard, EPA continued to redesignate areas for the 1-hour ozone standard until that standard was revoked. See, for example, Cincinnati, Ohio redesignation, 70 FR 35946 (June 21, 2005). Subsequent to the adoption of the 2008 8-hour ozone standard, EPA has continued to redesignate for the 1997 8-hour ozone standard those areas attaining that ozone standard and otherwise meeting redesignation requirements. See, for example, Detroit, Michigan redesignation, 74 FR 30950 (June 29, 2009); Clearfield and Indiana Counties, Pennsylvania redesignation, 74 FR 11674 (March 19, 2009); Kewaunee County, Wisconsin redesignation 73 FR 29436 (May 21, 2008), and Door and Manitowoc Counties, Wisconsin redesignation, 75 FR 39635 (July 12, 2010).

Comment 2: The commenter states that the Jerseyville, Nilwood, Maryville, Wood River, and East St. Louis ozone monitors all show upward trends in the annual fourth highest daily maximum 8-hour ozone concentrations over the 2009–2011 three year period.

Response 2: The CAA sets forth the criteria for redesignating a nonattainment area to attainment. Section 107(d)(3)(E) provides for approval of a redesignation request if, among other things, the Administrator determines that the area has attained the applicable NAAQS. A determination that an area has attained the standard is based on a review of monitored air quality data that meet regulatory quality-assurance requirements for the specific purpose of comparison to the NAAQS. See 40 CFR part 50.10 and appendix I and 40 CFR part 58. A determination of attainment for ozone is

[1] Certified ozone data for 2011 demonstrates that the area continued to attain the 1997 8-hour ozone standard in 2011. EPA recognizes that the ozone data for 2007–2009 as well as 2010 and 2011 data are impacted by the Clean Air Interstate Rule (CAIR) which was promulgated in 2005, but remanded to EPA in 2008. The fact that the data reflect some reductions associated with the remanded and therefore not permanent CAIR, however, is not an impediment to redesignation in the circumstances presented here where IEPA's demonstration and EPA's own modeling demonstrates that the area does not need reductions associated with the CAIR to attain the 1997 ozone NAAQS.

based on a 3-year average of data, and does not consider monitoring data trends or statistical analyses as criteria for determining attainment in evaluating a redesignation request. As discussed in detail in the proposed rule, the St. Louis area has monitored attainment of the 1997 8-hour ozone standard. See 76 FR 79582–79583 (December 22, 2011).

Furthermore, EPA considers data collected over a 3-year period for determining attainment, but not for statistically determining a ''trend.'' It is expected that there will be year-to-year variations in ozone concentrations due to meteorological influences. A review of annual fourth highest daily maximum 8-hour ozone concentrations and design values over a longer time period, from 2001 (designations under the 1997 8-hour ozone standard was based on air quality monitoring data from 2001–2003) through 2011, shows an overall downward trend at each of the monitors. Moreover, in its maintenance demonstration the State has shown that the 1997 8-hour ozone standard can be maintained in the area through 2025.

Comment 3 General: The commenter contends that, to demonstrate that the observed improvement in ozone air quality is due to the implementation of permanent air quality controls, EPA has relied on several emission control programs that are not permanent and enforceable. The commenter sets out several specific points to support this contention, which are discussed below in 3a–3d.

Response 3 General: It is not necessary for every change in emissions between the nonattainment year and the attainment year to be permanent and enforceable. Rather, the improvement in air quality necessary for the area to attain the relevant NAAQS must be reasonably attributable to permanent and enforceable reductions in emissions. As discussed in the proposed rule at 76 FR 79586–79588 (December 22, 2011), Illinois and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and resulted in a corresponding improvement in air quality.

Comment 3a: The commenter contends that EPA cannot rely on the implementation of CSAPR, which has been stayed by court order. The commenter objects to EPA claims that IEPA has met its obligation under section 110(a)(2)(D), in part, via emission control programs established through CSAPR, and also objects to inclusion of CSAPR as a potential contingency measure in Illinois' ozone maintenance plan. In addition, EPA credits Illinois with NO_X emission reduction in upwind areas that are projected to result from the implementation of CSAPR. Since CSAPR was stayed by the United States Court of Appeals for the District of Columbia Circuit on December 30, 2011, CSAPR is not enforceable. In addition, CSAPR cannot be assumed to be permanent because EPA cannot conclude that CSAPR will survive the litigation challenge to be subsequently decided by the court. Further, any attempt by EPA to claim it will replace CSAPR is of no moment because courts have repeatedly told EPA that it cannot use the promise of future action to meet current emission control requirements. See, e.g., *Sierra Club* v. *EPA,* 356 F.3d 296, 298 (DC Cir. 2004).

Response 3a: Illinois has not relied on CSAPR to demonstrate that attainment was due to permanent and enforceable emissions reductions or to demonstrate that it will maintain the standard. While we did note in the proposal that emissions reductions resulting from the implementation of CSAPR would aid in maintenance of the standard, that statement did not provide the basis for our action. Further, contrary to the commenter's assertion, EPA did not credit Illinois with NO_X emissions reductions from the implementation of CSAPR, nor did the State take credit for any such emissions reductions when demonstrating maintenance.

In addition, modeling performed by EPA during the CSAPR rulemaking process also demonstrates that the counties in the St. Louis MO–IL ozone nonattainment area will have ozone levels below the 1997 8-hour standard in both 2012 and 2014 without emission reductions from CSAPR or CAIR, with the highest average value for any monitor in the area projected to be 79.6 ppb. See ''Air Quality Modeling Final Rule Technical Support Document,'' App. B, B–10, B–11, and B–18, which can be found at *http://www.epa.gov/crossstaterule/pdfs/AQModeling.pdf.* Ozone modeling performed by the Lake Michigan Air Directors Consortium also concludes that the St. Louis area will be able to maintain the ozone standard throughout the maintenance period without considering emission reductions from implementation of the CAIR or CSAPR.[2]

Although Illinois did list the ''Clean Air Transport Rule, after promulgation by USEPA'' as a possible contingency measure in the maintenance plan, this measure is only one of many that may be selected should the contingency plan be triggered. EPA has concluded, in its consideration of the maintenance plan contingency measures, that there are other contingency measures sufficient to satisfy the requirements of 175A, without consideration of CSAPR.

The commenter also claims that EPA relies, in part, on emission control programs established through CSAPR to determine that IEPA has met its obligation under section 110(a)(2)(D). Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. While EPA noted in the proposed rule that programs such as the NO_X SIP Call, CAIR, and CSAPR were established to address transport of air pollutants, we also clearly stated that the section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification. Further, EPA concludes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. Therefore, because the section 110(a)(2)(D) requirements apply to a state regardless of the designation of any one particular area in the state, EPA further concludes that these requirements should not be construed to be applicable requirements for purposes of redesignation. EPA is not taking any action, in this rulemaking, to determine whether the State of Illinois has satisfied the requirements of 110(a)(2)(D) with respect to the 1997 ozone NAAQS.

Comment 3b: The commenter asserts that EPA erred in concluding that emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable. The commenter asserts that the NO_X SIP Call cannot satisfy a requirement that requires reductions to be permanent and enforceable because this program has been replaced and therefore effectively no longer exists. The commenter also asserts that because the NO_X SIP Call is a cap-and-trade program no actual reductions are required from the emission sources in the St. Louis nonattainment area. The commenter argues that to the extent any reductions were once required, they could have happened only in areas downwind that have little to no impact on the St. Louis area nonattainment.

[2] The Lake Michigan Air Directors Consortium modeling was conducted prior to EPA's promulgation of CSAPR. The subsequent modeling conducted by EPA during the CSAPR rulemaking provides a more detailed analysis of the impact upwind state emissions would, in the absence of CAIR, have on downwind areas projected to have difficulty attaining or maintaining the standard.

Finally the commenter asserts that the DC Circuit Court of Appeals recently held that EPA cannot use cap-and-trade programs to satisfy an area-specific statutory mandate. See *NRDC* v. *EPA,* 571 F.3d 1245, 1257 (DC Cir. 2009).

Response 3b: EPA disagrees with the commenter's position that emission reductions associated with the NO_X SIP Call cannot be considered to be permanent and enforceable. The commenter's first argument—that the reductions are not permanent and enforceable because the NO_X SIP Call has been replaced—is based on a misunderstanding of the relationship between CAIR and the NO_X SIP Call. While the CAIR ozone-season trading program replaced the ozone-season NO_X trading program developed in the NO_X SIP Call (70 FR 25290), nothing in CAIR relieved states of their NO_X SIP Call obligations. In fact, in the preamble to CAIR, EPA emphasized that the states and certain units covered by the NO_X SIP Call but not CAIR must still satisfy the requirements of the NO_X SIP Call. EPA provided guidance regarding how such states could meet these obligations.[3] In no way did EPA suggest states could disregard their NO_X SIP Call obligations. (70 FR 25290). For NO_X SIP Call states, the CAIR NO_X ozone season program provides a way to continue to meet the NO_X SIP Call obligations for electric generating units (EGUs) and large non-electric generating units (nonEGUs). In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP Call, including the statewide NO_X emission budgets, continue to apply. In sum, the requirements of the NO_X SIP Call remain in force. They are permanent and enforceable as are state regulations developed to implement the requirements of the NO_X SIP Call.

EPA also disagrees with the commenter's second argument—that the reductions associated with the NO_X SIP Call cannot be considered permanent and enforceable because the NO_X SIP Call is a trading program. There is no support for the commenter's argument that EPA must ignore all reductions achieved by the NO_X SIP Call simply because the mechanism used to achieve the reductions is an emissions trading program. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce the total emissions allowed by sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules or Federal Implementation Plans (FIPs). Any purchase of allowances and increase in emissions by a utility necessitates a corresponding sale of allowances and reduction in emissions by another utility. Given the regional nature of ozone, the emission reductions will have an air quality benefit that will compensate, at least in part, for the impact of any emission increase.

In addition, the case cited by the commenter, *NRDC* v. *EPA,* 571 F.3d 1245 (DC Cir. 2009), does not support the commenter's position. That case addressed EPA's determination that the nonattainment Reasonably Available Control Technology (RACT) requirement was satisfied by the NO_X SIP Call trading program. The court held that because EPA had not demonstrated that the trading program would result in sufficient reductions within a nonattainment area, its determination that the program satisfied RACT (a nonattainment area requirement) was not supported. *Id.* 1256–58. The court explicitly noted that EPA might be able to reinstate the provision providing that compliance with the NO_X SIP Call satisfies NO_X RACT for EGUs for particular nonattainment areas if, upon conducting a technical analysis, it could demonstrate that the NO_X SIP Call results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area. *Id.* at 1258. In this case, EPA's comparison of emissions in 2002 and 2008 in this rulemaking necessarily looked only at changes in emissions ''in the nonattainment area.'' As such, the commenter's reliance on *NRDC* v. *EPA* is misplaced.

Comment 3c: The commenter contends that the Illinois State rules are not permanent and enforceable. The commenter asserts that Illinois' consumer products and Architectural and Industrial Maintenance Coatings (AIM) rules are not permanent and enforceable components of the Illinois SIP. The commenter contends that these rules have only been adopted by the State, and that EPA has not yet approved them into the Illinois SIP. The commenter claims that, until they are approved by EPA and incorporated into the SIP, they cannot be relied upon for the purposes of redesignation to attainment of the standard. The commenter claims that for EPA to rely on these rules for the redesignation, it must approve them into the SIP in conjunction with the redesignation.

Response 3c: It is not necessary for every change in emissions between the nonattainment year and the attainment year to be permanent and enforceable. Rather, the improvement in air quality necessary for the area to attain must be reasonably attributable to permanent and enforceable reductions in emissions. As discussed in the proposed rule at 76 FR 79586–79588 (December 22, 2011), Illinois and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and resulted in a corresponding improvement in air quality sufficient to demonstrate attainment and maintenance. Even if EPA does not finalize action on the Illinois consumer products and AIM rules before completing action on the redesignation, these emissions reductions are not necessary to demonstrate that the improvement in air quality is reasonably attributable to permanent and enforceable reductions in emissions. It should be noted, however, that EPA proposed to approve the Illinois consumer products and AIM rules on October 27, 2011, at 76 FR 66663. EPA received no comments on the proposal and we are currently in the process of finalizing action on the rules.

Comment 3d: The commenter asserts that the use of 2008 air quality data is inappropriate to demonstrate that the attainment of the 1997 8-hour ozone standard is due to the implementation of permanent and enforceable emission reductions. EPA documented the changes in emissions between 2002 and 2008 to demonstrate that the observed ozone air quality improvement is due to permanent and enforceable emissions reduction during this period. The commenter claims that this is unacceptable for a number of reasons.

First, the commenter asserts that EPA has done nothing to connect the emissions and air quality impacts, and EPA has not conducted analyses to prove that emission reductions between 2002 and 2008 have led to reduced ozone concentrations and attainment of the 1997 8-hour ozone standard.

Second, the commenter argues that using a single attainment year, 2008, is arbitrary because the impact of cap-and-trade emission control programs, such as the NO_X SIP Call and CSAPR, can cause emissions to vary over time as sources buy, sell, and trade emission allowances.

Third, the commenter claims that the choice of 2008 is further problematic because 2008 was the beginning of a large economic recession. The commenter contends that this resulted in decreased electricity demand, decreased automobile, truck and shipping traffic, and decreased factory

[3] EPA guidance regarding the NO_X SIP Call transition to CAIR can be found at *http://www.epa.gov/airmarkets/progsregs/cair/faq-10.html.* EPA guidance regarding the NO_X SIP Call transition for CSAPR can be found at *http://www.epa.gov/crossstaterule/faqs.html.*

production. The commenter objects to EPA's conclusion that monitored changes in ozone levels between 2002 and 2008 were due to the implementation of permanent and enforceable emission controls rather than to changes in meteorology, economic conditions, or temporary or voluntary (not enforceable) emissions reductions. The commenter contends that EPA has not provided an analysis showing that the recession was not the cause of the 2002–2008 emission reduction and observed air quality improvement.

Finally, the commenter claims that EPA has not shown that the 2008 emissions inventory reflects permanent and enforceable emission reductions occurring between 2002 and 2008, and states that the 2008 emissions inventory appears to be the ''actual'' or the ''projected'' emissions from an unidentified group of sources. The commenter argues that there is a significant difference between what sources actually emit and what sources are allowed to emit, and that the IEPA and EPA have incorrectly assumed allowable emissions are equal to actual emissions.

Response 3d: EPA's conclusion here is fully supported by the facts and applicable legal criteria. EPA's longstanding practice and policy [4] provides for states to demonstrate permanent and enforceable emissions reductions by comparing nonattainment area emissions occurring during the nonattainment period (represented by emissions during one of the years during the 3-year nonattainment period on which the area's nonattainment designated was based,[5] in this case 2002) with emissions in the area during the attainment period (represented by emissions during one of the 3 attainment years, in this case 2008, which is included in the 3-year period, 2007–2009, that the State used to show attainment with 1997 8-hour ozone standard). A determination that an area has attained the 1997 8-hour ozone standard is based on an objective review of air quality data in accordance with 40 CFR 50.10 and part 50, appendix I, based on 3 complete, consecutive calendar years of quality-assured air quality monitoring data. In the State's redesignation request, Illinois considered data for the 2007–2009 time period to demonstrate attainment. In EPA's determination of attainment and proposed approval of the redesignation request, EPA considered data for the 2008–2010 time period, which was the most recent quality-assured, certified data available. See 76 FR 33647 (June 9, 2011), 76 FR 79582–79583 (December 22, 2011). In this final rulemaking, EPA is also considering continued attainment based on complete, quality-assured certified data for 2009–2011. Therefore, selecting 2008 as a representative attainment year, and comparing emissions for this year to those for a representative year during the nonattainment period, 2002, is an appropriate and long-established approach that demonstrates the occurrence of emission reductions in the area between the years of nonattainment and attainment. These reductions therefore, can be seen to account for the observed air quality improvement.

With respect to the commenter's assertion that EPA has conducted no analyses to prove that emission reductions between 2002 and 2008 led to reduced ozone concentrations, as noted above, comparing emissions for a representative nonattainment year to emissions for a representative attainment year is consistent with longstanding practice and EPA policy for making such a demonstration. The CAA does not specifically require the use of modeling in making any such demonstration and it has not been the general practice to do so.

EPA disagrees with the commenter's contention that using a single attainment year is arbitrary due to year-to-year variations in emissions levels resulting from cap-and-trade programs. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce the total emissions allowed by sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules or FIPs. Any purchase of allowances and increase in emissions by a utility necessitates a corresponding sale of allowances and reduction in emissions by another utility. Given the regional nature of ozone, the emission reduction will have an air quality benefit that will compensate, at least in part, for the impact of any emission increase.

With respect to NO_X SIP Call reductions within the St. Louis area, there is no evidence of significant temporal variation in emissions levels. In fact, actual emissions from NO_X SIP Call sources in the St. Louis area have not varied much from year-to-year over the 2003–2011 time period. The largest emitters in the St. Louis area that are covered by the NO_X SIP Call are operating near full capacity. Even if all of the large EGUs and large nonEGUs begin emitting at full capacity, emissions would not increase significantly. Further, these sources do not have the type of emissions controls that can simply be ''shut off.''

While the commenter expressed concerns that an economic downturn was responsible for the improvement in air quality, the commenter has made no demonstration that the reduction in emissions and observed improvement in air quality is due to an economic recession, changes in meteorology, or temporary or voluntary emissions reductions. Also, as noted previously, the CAA does not require modeling to make any such demonstration.

Finally, longstanding practice and EPA policy support the use of actual emissions when demonstrating permanent and enforceable emissions reductions. Actual emissions are more reflective of emissions that in reality contribute to monitored ozone concentrations. Sources seldom, if ever, emit at maximum allowable levels and assuming that all sources operate at maximum capacity at the same time would grossly overestimate emissions levels. For this reason EPA believes actual emissions are the appropriate emissions to consider when comparing nonattainment year emissions with attainment year emissions.

Comment 4: The commenter claims that EPA has not conducted an adequate analysis of the effect that redesignation to attainment will have on attainment and maintenance of other NAAQS under section 110(l) of the CAA. The commenter asserts that EPA has failed to conduct an adequate analysis of the ozone redesignation impacts with respect to the 1997 annual fine particulate ($PM_{2.5}$) NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_X (NO_2) NAAQS, the 1-hour sulfur dioxide (SO_2) NAAQS, and the 2008 8-hour ozone NAAQS.

Response 4: Section 110(l) provides in part: ''The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of this chapter.'' As a general matter, EPA must and does consider section 110(l) requirements for every SIP revision, including whether the revision would ''interfere with'' any applicable requirement. *See, e.g.,* 70 FR 53, 57 (January 3, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 28429, 28431 (May 18, 2005); and 70 FR 58119, 58134 (October 5, 2005). The Illinois

[4] See September 4, 1992 memorandom from John Calcagni entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' pp. 4 and 8–9.

[5] The nonattainment designation of the St. Louis area for the 1997 8-hour ozone standard was based on 2001–2003 ozone data.

redesignation request and maintenance plan for the 1997 8-hour ozone standard neither revises nor removes any existing emissions limit for any NAAQS, nor does it alter any existing control requirements. On that basis, EPA concludes that the redesignation will not interfere with attainment or maintenance of any of these air quality standards. The commenter does not provide any information in its comment to indicate that approval of this redesignation would have any impact on the area's ability to comply with the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_2 NAAQS, the 1-hour SO_2 NAAQS, or the 2008 8-hour ozone NAAQS. In fact, the maintenance plan provided with the State's submission demonstrates a decline in ozone precursor emissions over the timeframe of the initial maintenance period. As a result, the redesignation does not relax any existing rules or limits, nor will the redesignation alter the status quo air quality.[6] The commenter has not explained why the redesignation might interfere with attainment of any standard or with satisfaction of any other requirement, and EPA finds no basis under section 110(l) for EPA to disapprove the SIP revision at issue or to disapprove the requested redesignation.

Comment 5a: The commenter asserts that the 2002 emissions inventory that EPA is proposing to approve as meeting the emission inventory requirement of section 182(a)(1) of the CAA is inadequate and EPA cannot approve this emissions inventory. The commenter notes that the emissions inventory is 10 years old. In addition, the commenter states that portions of the emissions inventory were estimated, as opposed to being actual emissions, and claims that EPA has not included a ''comprehensive'' emissions inventory in the docket, EPA has only included a summary of the emissions inventory. The commenter asserts that EPA must place a comprehensive emissions inventory, which includes information for each point source, in the docket to allow the public to review the inventory and comment on it.

Response 5a: Illinois developed a 2002 comprehensive inventory to meet the requirement of section 182(a)(1) of the CAA in accordance with EPA's November 18, 2002, policy memorandum from Lydia N. Wegman entitled ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, $PM_{2.5}$ and Regional Haze Programs,'' and EPA's policy Phase 2 ozone implementation rule published on November 29, 2005 (70 FR 71612, 71664). EPA notes that Illinois submitted the 2002 inventory on June 21, 2006, and at that time, 2002 was the most current emissions inventory available for the nonattainment area.

The commenter observes that portions of the emissions inventory were estimated. This is entirely consistent with accepted EPA procedures for emissions inventory development procedures. It is common practice, and consistent with EPA emissions inventory guidance, for states to estimate emissions for any given year using related activity factors or to project emissions based on information from prior years and associated activity growth factors. See ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' dated August 2005. For mobile sources, it is standard and accepted practice for states to estimate emissions using an EPA- approved emissions model coupled with the output of a transportation model, which provides traffic levels by roadway and activity type. The commenter provided no information or specific details that show that the 2002 inventory was inaccurate.

With respect to the commenter's concern regarding the availability of the emissions inventory submittal in the docket, we acknowledge that the inventory was unintentionally omitted from the electronic docket at *www.regulations.gov*. However, the document was available to the public in hard copy at the EPA Region 5 office, and had the commenter contacted the Region, the inventory could have been provided. The inventory has since been added to the electronic docket.

While we believe the 2002 inventory submitted by the State meets the inventory requirements of both section 182(a)(1) and section 172(c)(3) of the CAA, EPA notes that the State also submitted a comprehensive 2008 emissions inventory to serve as the attainment year inventory as part of the maintenance plan. EPA's longstanding view, as set forth in the September 4, 1992 memorandom from John Calcagni entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment'' (Calcagni memorandum) is that the ''requirements for an emission inventory [under section 172(c) or 182(a)(1)] will be satisfied by the inventory requirements of the maintenance plan.'' See Calcagni memorandum at 6.

When preparing the comprehensive 2008 emissions inventory, Illinois compiled point source information from the 2008 annual emissions reports submitted to IEPA by sources and EPA's Clean Air Markets Division database for electric utilities. Area source emissions were calculated using the most recently available methodologies and emissions factors from EPA along with activity data (population, employment, fuel use, etc.) specific to 2008. Non-road mobile source emissions were calculated using EPA's NONROAD emissions model. In addition, emissions estimates were calculated for commercial marine vessels, aircraft, and railroads, three non-road categories not included in the NONROAD model. On-road mobile source emissions were calculated using EPA's MOVES emissions model with 2008 Vehicle Miles Traveled (VMT) data provided by Illinois Department of Transportation (IDOT).

Therefore, in actuality, the State has more than satisfied the CAA inventory requirements by its submittal of two inventories that meet the applicable emissions inventory requirement.

Comment 5b: The commenter asserts that emissions calculations for on-road mobile sources fail to consider the use of gasoline containing up to 15 volume percent ethanol (E15).

Response 5b: In 2010 and 2011, EPA granted partial waivers for use of E15 in model year (MY) 2001 and newer light-duty motor vehicles (75 FR 68094 and 76 FR 4662). As discussed in the waiver decisions, there may be some small emission impacts from the use of E15. E15 is expected to cause a small immediate emissions increase in NO_X emissions. However, due to its lower volatility than the E10 currently in-use, its use is also expected to result in lower evaporative emissions. Other possible emissions impacts may be from the misfueling of E15 in vehicles or engines for which its use is not approved, i.e., MY2000 and older motor vehicles, heavy-duty engines and vehicles, motorcycles and all nonroad engines, vehicles, and equipment. EPA has promulgated a separate rule dealing specifically with the mitigation of misfueling to reduce the potential emissions impacts from misfueling (76 FR 44406).

However, the E15 partial waivers do not require that E15 be made or sold and it is unclear if and to what extent E15 may even be used in Illinois. Even if E15 is introduced into commerce in Illinois, considering the likely small and

[6] EPA notes that the St. Louis area does not have violating monitors for the 1997 annual $PM_{2.5}$ NAAQS, 2006 24-hour $PM_{2.5}$ NAAQS, or the 1-hour NO_X NAAQS, and that this area has not been designated nonattainment for 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour NO_X NAAQS, or the 1-hour SO_2 NAAQS.

offsetting direction of the emission impacts, the limited set of motor vehicles approved for its use, and the measures required to mitigate misfueling, EPA believes that any potential emission impacts of E15 will be less than the maintenance plan safety margin by which Illinois shows maintenance.

Comment 6: The commenter contends that EPA cannot approve the ozone redesignation because Illinois' VOC RACT rules have not been approved in conjunction with the approval of the ozone redesignation. The commenter pointed to EPA's statement in the proposed approval of the redesignation that it would take action on Illinois' VOC RACT rules in a separate rulemaking. The commenter states that approval ''in a separate rule'' is not approval ''in conjunction'' with rulemaking on a redesignation, and that this would be a departure from EPA's previous practice of approving needed SIP revisions in the same final rule as a redesignation. The commenter also points to the Sixth Circuit Court of Appeals decision in *Wall* v. *EPA,* in which the Court stated that ''the EPA abused its discretion when it determined that it could redesignate the Cincinnati metropolitan area as achieving attainment before Ohio had fully adopted all RACT rules of Part D, Subpart 2 of the CAA.'' *Wall* v. *EPA,* 265 F.3d 426,442 (6th Cir. 2001). The commenter claims that RACT measures must be contained in SIPs submitted with respect to redesignation requests.

Response 6: EPA disagrees with the commenter's position that VOC RACT rules must be approved in the same final rule as the redesignation. The commenter's contention is without basis in either the law or common sense. EPA acknowledged in its proposed redesignation at 76 FR 79585, that approval of IEPA's VOC RACT submittal is a prerequisite for approval of the redesignation of the Illinois portion of the St. Louis area to attainment of the 1997 8-hour ozone standard. This simply requires that EPA approve the VOC RACT rules on or before finalizing approval of the redesignation. EPA approved the Illinois VOC RACT submittal on March 23, 2012 (77 FR 16940). Therefore, this prerequisite to redesignation has been met.

Comment 7: The commenter contends that EPA cannot approve the State's ozone redesignation request because the State and EPA have not satisfied all part D requirements. The specific points of contention raised by the commenter are discussed separately below.

Comment 7a: The commenter disagrees with EPA's conclusion that an area can be redesignated to attainment of a NAAQS regardless of the status of the State's SIP relative to the requirements of section 110(a)(2) of the CAA. The commenter argues that EPA's position does not make sense given that the State's infrastructure SIP will apply to the ''former'' nonattainment area once it is redesignated to attainment. To the commenter, it is clear that Congress wanted to ensure that there is a valid infrastructure SIP in place to protect areas that are being redesignated to attainment.

Response 7a: EPA stands by its position that section 110 elements that are not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. A state remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania ozone redesignation (66 FR 50399, October 19, 2001), and in the St. Louis 1-hour ozone redesignation 68 FR 25418, 25426–27 (May 12, 2003). Both the 6th and 7th Circuits have agreed that the CAA provides EPA with leeway to determine what is an ''applicable requirement'' for purposes of redesignation. *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding EPA's interpretation of ''applicable requirements'' with respect to conformity.

In any event, on July 13, 2011, EPA approved elements of the Illinois submittal to meet the infrastructure requirements of sections 110(a)(1) and (2) of the CAA for the 1997 8-hour ozone standard. See 76 FR 41075. Specifically, EPA approved the following infrastructure elements: emission limits and other control measures, ambient air quality monitoring and data system, enforcement of SIP measures, interstate and international pollution abatement, adequate resources, stationary source monitoring system, emergency power, future SIP revisions, consultation with government officials, public notification, air quality modeling and data, permitting fees, and consultation and participation by affected local entities. Also note that Federally promulgated Prevention of Significant Deterioration (PSD) rules are in place in Illinois. For all these reasons, EPA concludes that the SIP elements applicable for purposes of redesignation have been approved by EPA.

Comment 7b: The commenter contends that EPA cannot redesignate the Illinois portion of the St. Louis nonattainment area to attainment of the 1997 8-hour ozone standard because section 172(c) of the CAA requires SIPs to include a Reasonable Further Progress (RFP) plan, an ozone attainment demonstration, contingency measures, nonattainment New Source Review (NSR) rules, and Reasonably Available Control Measures (RACM)/RACT rules and EPA has not approved these items into the SIP for the Illinois portion of the St. Louis ozone nonattainment area. The commenter disagrees with EPA's conclusions that these CAA requirements are no longer applicable to an area after it has achieved attainment of the NAAQS. In addition, the commenter disagrees with EPA's conclusion that, for an ozone nonattainment area, the CAA section 172(c)(3) SIP requirement for a comprehensive, accurate, and current emissions inventory is superseded by the section 182(a)(1) emission inventory requirement. Therefore, the commenter believes that the EPA has not adequately addressed this SIP requirement when it concludes that Illinois has met all SIP requirements applicable to the Illinois portion of the St. Louis ozone nonattainment area for purposes of redesignation to attainment of the 1997 8-hour ozone standard.

Response 7b: Under EPA's Clean Data regulation, 40 CFR 51.918 (1997 8-hour ozone), an EPA rulemaking determination that an area is attaining the relevant standard suspends the area's obligations to submit an attainment demonstration, RACM, RFP, contingency measures, and other planning requirements related to attainment for as long as the area continues to attain. See 70 FR 71702 (November 29, 2005). This regulation, which embodies EPA's interpretation under its ''Clean Data Policy,'' has been

upheld by the DC Circuit. *NRDC* v. *EPA,* 571 F.3d 1245 (DC Cir. 2009).[7]

Because EPA determined that the St. Louis area has attained the 1997 8-hour ozone standard (see 76 FR 33647, June 9, 2011) and because the area continues to meet that standard, the State is not currently obligated to submit an attainment demonstration, RACM, RFP, contingency measures, and other planning requirements related to attainment.

In addition, in the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. For example, in the General Preamble for implementation of Title 1 of the CAA 1990 amendments EPA stated that:

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas. ''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990,'' (General Preamble) 57 FR 13498, 13564 (April 16, 1992).

See also Calcagni memorandum at 6 (''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.'').

With respect to the RACT requirement, EPA approved the Illinois VOC RACT submittal on March 23, 2012 (77 FR 16940), and granted Illinois a waiver from the requirement to submit RACT rules under section 182(f) of the CAA on February 22, 2011 (76 FR 9655).

With respect to emissions inventories, by meeting the section 182(a)(1) emission inventory requirement, the State has also met the section 172(c)(3) requirement for a comprehensive, accurate, and current emissions inventory. Further, redesignation policy states that emissions inventory requirements of section 172(c) of the CAA are satisfied by the inventory requirements of the maintenance plan. See the Calcagni memorandum at 6.

With respect to the nonattainment NSR requirement, the issue is moot because EPA has approved the Illinois nonattainment NSR SIP. Nonetheless, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a part D NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without a part D NSR program. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment'' (Nichols memorandum). Illinois has demonstrated that the St. Louis area will be able to maintain the 1997 8-hour ozone standard without a part D NSR program in effect; therefore, the State need not have a fully approved part D NSR program prior to approval of the redesignation request. This issue is discussed in greater detail below in response to Comment 7d. Upon redesignation, the PSD program will apply. See *Greenbaum* v. *EPA,* 370 F.3d 527, 536 (6th Cir. 2004) (''It would make little sense for [part D NSR] to be included in the post-attainment SIP, as the Clean Air Act * * * explicitly states that attainment area SIPs must include a PSD program.'')

Comment 7c: With further regard to contingency measure requirements of the CAA, the commenter contends that EPA is incorrect to conclude that contingency measures are inapplicable once an area reaches attainment of the NAAQS. The commenter asserts that contingency measures must be in place so that, if an area monitor shows a violation of the NAAQS in the future, that violation of the NAAQS is quickly addressed, minimizing the number of people that will be harmed by air quality levels above the NAAQS.

Response 7c: As set forth in detail in Response 7b, the nonattainment area contingency measure requirements of section 172(c)(9) are directed at ensuring RFP and attainment by the applicable date. These nonattainment area requirements no longer apply after an area has attained the standard and the area has been redesignated to attainment. Under section 175A of the CAA, maintenance plans must contain contingency provisions, ''as deemed necessary by the Administrator,'' and it is these contingency measures that apply to the area after redesignation to attainment. Illinois included such provisions in its maintenance plan which EPA is approving in this action.

Comment 7d: The commenter, although acknowledging that EPA has certified that it has approved Illinois' nonattainment NSR rules, takes issue with EPA's related conclusion that an area being redesignated to attainment of a NAAQS need not have fully approved part D NSR rules, since PSD requirements of the CAA would apply after redesignation to attainment. The commenter contends that this EPA conclusion was explicitly rejected by the Court in *Greenbaum* v. *EPA,* 370 F.3d 527, 534 (6th Cir. 2004). The commenter asserts that without an approved NSR program, there can be no redesignation to attainment of the NAAQS. The commenter believes that this is true, because if a redesignated area violates the NAAQS in the future, all provisions that are contained in the state's nonattainment SIP, including NSR rules, would need to become applicable again.

Response 7d: Part D NSR would not be retained in the SIP as a section 175A(d) contingency measure. As clearly stated in the Nichols memorandum, ''EPA believes it is reasonable to interpret 'measure,' as used in section 175A(d), not to include part D NSR.'' Congress used the undefined term ''measure'' differently in different provisions of the CAA, which indicates that the term is susceptible to more than one interpretation and that EPA has the discretion to interpret it in a reasonable manner in the context of section 175A. See *Greenbaum* v. *United States EPA,* 370 F. 3d 527, 535–38 (6th Cir. 2004). (Court ''find[s] persuasive the EPA's argument that the very nature of the NSR permit program supports its interpretation that it is not intended to be a contingency measure pursuant to section 175A(d).'') It is reasonable to interpret ''measure'' to exclude part D NSR in this context because PSD, a program that is the corollary of part D NSR for attainment areas, goes into effect in lieu of part D NSR upon redesignation. PSD requires that new sources demonstrate that emissions from their construction and operation will not cause or contribute to a violation of any NAAQS or PSD increment. The State has demonstrated that the area will be able to maintain the standard without part D NSR in effect, and the State's PSD program will become effective in the area upon redesignation to attainment. See the rationale set forth at length in the Nichols Memorandum. See also the discussions of why full approval and retention of NSR is not required in redesignation actions in the following redesignation rulemakings: 60 FR 12459, 12467–12468 (March 7, 1995) (Redesignation of Detroit, MI); 61 FR 20458, 20469–20470 (May 7, 1996) (Cleveland-Akron-Lorrain, OH); 66 FR 53665, 53669 (October 23, 2001)

[7] See also *Sierra Club* v. *EPA,* 99 F. 3d 1551 (10th Cir. 1996); *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004); and *Our Children's Earth Foundation* v. *EPA,* No. 04–73032 (9th Cir. June 28, 2005) (memorandum opinion).

(Louisville, KY); 61 FR 31831, 31836–31837 (June 21, 1996) (Grand Rapids, MI). Contrary to the commenter's assertion, the *Greenbaum* court declined to reach the issue of whether full approval of a part D NSR program is required prior to redesignation. See *Greenbaum,* 370 F. 3d at 534–35.

Comment 8: The commenter generally asserts that Illinois lacks a fully approved maintenance plan complying with the requirements of section 175A of the CAA. The commenter's specific arguments supporting this assertion follow.

Comment 8a(1): The commenter asserts that the contingency measures contained in Illinois' maintenance plan do not provide for prompt correction of violations of the 1997 8-hour ozone standard. The commenter believes that neither the ''Level I'' nor the ''Level II'' response occurs on a prompt schedule as required by section 175A of the CAA, and that several of the potential contingency measures are inappropriate, inadequate, or unacceptably vague. The commenter notes that after the determination of a Level I trigger [8] event, Illinois has committed to adopt needed emission control measures within 18 months and has committed to implement the adopted emission control measures within 24 months after adoption. The commenter also notes that after the determination of a Level II trigger [9] event, the maintenance plan contains no specific emission control commitments, but that Illinois will work with Missouri to conduct a study to determine the causes of the ozone standard violation and the emission control measures necessary to mitigate the air quality problem, with implementation of adopted emission controls to occur within 18 months of the determination of the Level II event. The commenter contends that the implementation schedules for the Level I and II triggers are unacceptably long and not in keeping with the prompt response timing required by section 175A of the CAA.

Response 8a(1): The commenter overlooks the provisions of the CAA applicable to contingency measures. Section 175(A(d) provides that ''[e]ach plan revision submitted under this section shall contain such contingency provisions as *the Administrator deems necessary* to assure that the state will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area.'' (emphasis added). Thus Congress gave EPA discretion to evaluate and determine the contingency measures EPA ''deems necessary'' to assure that the state will promptly correct any subsequent violation. EPA has long exercised this discretion in its rulemakings on section 175A contingency measures in redesignation maintenance plans, allowing as contingency measures commitments to adopt and implement in lieu of fully adopted contingency measures, and finding that implementation within 18 months of a violation complies with the requirements of section 175A. See recent redesignations, e.g. Indianapolis, IN $PM_{2.5}$ annual standard (76 FR 59512), Lake and Porter Counties, IN 8-hour ozone standard (75 FR 12090), and Northwest Indiana $PM_{2.5}$ annual standard (76 FR 59600). Section 175A does not establish any deadlines for implementation of contingency measures after redesignation to attainment. It also provides far more latitude than does section 172(c)(9), which applies to a different set of contingency measures applicable to nonattainment areas. Section 172(c)(9) contingency measures must ''take effect * * * without further action by the State or [EPA].'' By contrast, section 175A confers upon EPA the discretion to determine what constitutes adequate assurance, and thus permits EPA to take into account the need of a state to assess, adopt and implement contingency measures if and when a violation occurs after an area's redesignation to attainment. Therefore, in accordance with the discretion accorded it by statute, EPA may allow reasonable time for states to analyze data and address the causes and appropriate means of remedying a violation. In assessing what ''promptly'' means in this context, EPA also may take into account time for adopting and implementation of the appropriate measure. In the case of the St. Louis area, EPA reasonably concluded that, 18 months constitutes a timeline consistent with prompt correction of a potential monitored violation. This timeframe also conforms with EPA's many prior rulemakings on acceptable schedules for implementing section 175A contingency measures as noted above.

Comment 8a(2): The commenter contends that several of Illinois' contingency measures, ''NO_X RACT'' and ''Broader geographic applicability of existing measures,'' are too vague. The commenter asserts that the vagueness of these contingency measures provides no evidence that the maintenance plan will provide enough emission controls to correct ozone standard violations.

Response 8a(2): As discussed above in response to Comment 8a (1), the CAA does not specify the requisite nature, scope, specificity, or number of contingency measures to be included in a maintenance plan under section 175A. It is for EPA to determine whether the State has given adequate assurance that it can promptly correct a violation. Illinois has submitted contingency measures that EPA deems adequate. They have committed to remedy a future violation, and have included measures to address potential violations from a range of sources and a timeline for promptly completing adoption and implementation. The State has identified measures that are sufficiently specific but which allow for latitude in potential scope. This will enable the State to address a range of potential sources and differing degrees and types of violations. EPA believes that the contingency measures set forth in the submittal, combined with the State's commitment to an expeditious timeline and process for implementation, provide assurance that the State will promptly correct a future potential violation. Given the uncertainty as to timing, degree and nature of any future violation, EPA believes that the contingency measures set forth adequately balance the need for flexibility in the scope and type of measure to be implemented with the need for expeditious state action.

Comment 8a(3): The commenter contends that several of the potential contingency emission control measures are inappropriate or inadequate. The commenter states that several of the contingency emission control measures, including the Tier 2 vehicle emission standards, low sulfur fuel standards, heavy duty diesel standards, and low sulfur diesel standards are Federal emission control measures that EPA is already implementing. The commenter contends that EPA cannot both credit these emission control measures with existing emission reductions and allow IEPA to include them as potential contingency measures in the ozone maintenance plan. The commenter states that this approach would amount to double counting the effects of these emission control measures.

Response 8a(3): As discussed above in response to Comment 8a(2), the CAA

[8] A Level I response is triggered in the event that: (1) The annual fourth highest daily maximum 8-hour ozone concentration at any monitoring site in the St. Louis area exceeds 84 parts per billion (ppb) in any year; or, (2) VOC or NO_X emissions increase more than 5 percent above the levels contained in the attainment year (2008) emissions inventory for the Illinois portion of the St. Louis ozone nonattainment area.

[9] A Level II response is triggered in the event that a violation of the 1997 8-hour ozone standard is monitored at any monitoring site in the St. Louis area.

does not specify the requisite nature, scope, specificity, or number of contingency measures to be included in a maintenance plan under section 175A. EPA has considered that the maintenance plan includes adequate state contingency measures, and that these are sufficient for the purpose of maintenance. EPA considers that the state measures themselves constitute adequate contingency measures, and that the Federal measures included also bolster maintenance to the extent that they provide reductions that were not counted in the maintenance plan's demonstration as explained below.

EPA also disagrees with the commenter's contention that EPA is double counting emissions reductions. The fact that some emissions reductions may have already been realized by a control measure does not prevent the control measure from resulting in greater reductions in future years. Further, as stated in the proposed rule (76 FR 79591), ''[t]o qualify as a contingency measure, emissions reductions from that measure must not be factored into the emissions projections used in the maintenance plan.'' This prevents possible double counting of emissions reductions during the maintenance period. Should the contingency plan be triggered, the state would be required to choose a contingency measure that meets this criterion. Any control measure listed in the contingency plan that fails to meet this criterion would not be considered to be an eligible contingency measure at that time and the state would be required to choose one that does.

Comment 8b: The commenter asserts that EPA, in assessing the adequacy of Illinois' ozone maintenance demonstration, has credited the state with NO_X emission reductions in upwind areas that are the products of the NO_X SIP call and CSAPR. These rules develop cap-and-trade programs that the commenter argues cannot satisfy the maintenance plan requirement. In addition, CSAPR has been stayed by the Court and may not be relied upon to provide NO_X emission reductions.

Response 8b: As discussed in Response 3b, EPA disagrees with the commenter's position that emission reductions associated with the NO_X SIP Call cannot be considered to be permanent and enforceable simply because they result from an emissions trading program. In addition, as discussed in Response 3a, Illinois has not relied on CSAPR to demonstrate attainment or maintenance of the standard.

Comment 8c: The commenter contends that Illinois' maintenance plan fails to consider additional emissions expected to occur from the Prairie State electrical power plant, which is currently under construction. This power plant is expected to commence operation during the ozone maintenance period. This power plant is expected to be a major source of NO_X emissions. The commenter asserts that EPA cannot presume that, because the Prairie State power plant has obtained a PSD source permit, it will not cause or contribute to a violation of the 1997 8-hour ozone standard. EPA must review the PSD record and include the relevant portions in the administrative record for this ozone redesignation rulemaking.

Response 8c: Neither the CAA nor EPA redesignation policy requires that EPA review and take into consideration construction permits as a criterion for redesignation. Consistent with EPA's redesignation policy as articulated in the September 4, 1992, Calcagni memorandum, the State demonstrated maintenance of the standard by showing that future emissions in the area will not exceed the level of emissions in the attainment inventory for the area. The Prairie State power plant under construction is located in Washington County, which is not part of the St. Louis area. Thus emissions from this facility do not factor into the attainment or maintenance inventories for the area. EPA, in its proposed redesignation and elsewhere in our responses to comments in this final rule, has addressed and considered issues pertaining to the potential impact of emissions from outside the St. Louis area on the area's maintenance of the 1997 ozone standard.

Finally, under title I, part C of the CAA, the PSD preconstruction permit program requires an air quality analysis to demonstrate that emissions from construction or operation of a proposed major stationary source or major modification will not cause or contribute to a violation of any applicable NAAQS or PSD increment. CAA section 165(a)(3); see also 40 CFR 51.166(k) (providing that the owner or operator of a proposed source or modification ''shall demonstrate that allowable emissions increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction * * * would not cause or contribute to air pollution in violation of'' any NAAQS or PSD increment). Therefore, the effect of the emissions from a proposed source on the maintenance of the NAAQS is addressed through the PSD permitting program before the facility is authorized to build and operate. Neither the CAA nor EPA policy require EPA to include the record from an independent PSD proceeding in the record for a redesignation action or to reopen permitting issues as part of a redesignation action. In addition, the commenter has not provided data indicating that the Prairie State plant will cause or contribute to a NAAQS or increment violation in the St. Louis area.

Comment 9: The commenter asserts that EPA has not accounted for the effects of weather in its modeling. The commenter notes that EPA's analysis of Illinois' ozone redesignation request is devoid of weather-adjusted considerations of ambient ozone levels. For this reason, this commenter believes that EPA cannot approve Illinois' ozone redesignation request. In addition, the commenter believes that EPA has erred in not considering the impacts that climate change will have on future ozone formation during the maintenance period.

Response 9: A determination that an area has attained the 1997 8-hour ozone standard is based on a review of monitored air quality data that meets regulatory requirements for purposes of comparison to the NAAQS, and it is not derived from modeling. An area is considered to be in attainment of the 1997 8-hour ozone standard if the 3-year average of the fourth highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year does not exceed 0.084 ppm. Three years of air quality data are used to allow for year-to-year variations in meteorology. As discussed in detail in the proposed rule, the St. Louis area is monitoring attainment of the 1997 8-hour ozone standard. See 76 FR 79582–79583 (December 22, 2011).

In addition, a maintenance demonstration need not be based on modeling. See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), and 68 FR 25413, 25430–25432 (May 12, 2003). EPA policy and longstanding practice allows states to demonstrate maintenance by preparing an attainment emissions inventory corresponding to the period during which the area monitored attainment and to project maintenance by showing that future emissions are projected to remain below this level for the next ten years. See Calcagni memorandum. Holding emissions at or below the level of attainment is adequate to reasonably assure continued maintenance of the standard. See 65 FR 37879, 37888 (June

19, 2000). Since the St. Louis action is not based on modeling, EPA concludes that weather related impacts, including climate change, on modeling are not relevant. Impacts of weather on monitored data are accounted for by the three years of data used for the attainment determination.

III. What actions is EPA taking?

EPA is approving a request from the State of Illinois to redesignate the Illinois portion of the St. Louis, MO–IL area to attainment of the 1997 8-hour ozone standard. EPA is also taking several other related actions. EPA is approving, as a revision to the Illinois SIP, the State's plan for maintaining the 1997 8-hour ozone standard through 2025 in the area. EPA is approving the 2002 emissions inventory as meeting the comprehensive emissions inventory requirement of the CAA for the Illinois portion of the St. Louis area. Finally, EPA finds adequate and is approving the State's 2008 and 2025 MVEBs for the Illinois portion of the St. Louis area.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for these actions to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction,'' and section 553(d)(3) which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' The purpose of the 30 day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the state of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for these actions to become effective on the date of publication of these actions.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. These actions do not impose additional requirements beyond those imposed by state law and the CAA. For that reason, these actions:

- Are not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Do 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 13, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 30, 2012.

Susan Hedman,

Regional Administrator, Region 5.

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.*

■ 2. Section 52.726 is amended by adding paragraphs (ll) and (mm) to read as follows:

§ 52.726 Control strategy: Ozone.

* * * * *

(ll) *Approval*—On May 26, 2010, and September 16, 2011, Illinois submitted a request to redesignate the Illinois portion of the St. Louis, MO–IL area to attainment of the 1997 8-hour ozone standard. The St. Louis area includes Jersey, Madison, Monroe, and St. Clair Counties in Illinois and St. Louis City and Franklin, Jefferson, St. Charles and St. Louis Counties in Missouri. As part of the redesignation request, the State submitted a plan for maintaining the 1997 8-hour ozone standard through 2025 in the area as required by section 175A of the Clean Air Act. Part of the section 175A maintenance plan includes a contingency plan. The ozone maintenance plan establishes 2008 motor vehicle emissions budgets for the Illinois portion of the St. Louis area of 17.27 tpd for volatile organic compounds (VOC) and 52.57 tpd for nitrogen oxides (NO_X). In addition the maintenance plan establishes 2025 motor vehicle emissions budgets for the Illinois portion of the St. Louis area of 5.68 tpd for VOC and 15.22 tpd for NO_X.

(mm) *Emissions inventories for the 1997 8-hour ozone standard*—

(1) *Approval*—Illinois' 2002 emissions inventory satisfies the emissions inventory requirements of section 182(a)(1) of the Clean Air Act for the Illinois portion of the St. Louis, MO–IL area under the 1997 8-hour ozone standard.

(2) [Reserved]

PART 81—[AMENDED]

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

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

■ 4. Section 81.314 is amended by revising the entry for St. Louis, MO–IL in the table entitled ''Illinois-Ozone (8–Hour Standard)'' to read as follows:

§ 81.314 Illinois.

* * * * *

ILLINOIS—OZONE (8-HOUR STANDARD)

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
* * *	*	*	*	*
St. Louis, MO-IL:				
Jersey County	6/12/2012	Attainment.		
Madison County	6/12/2012	Attainment.		
Monroe County	6/12/2012	Attainment.		
St. Clair County	6/12/2012	Attainment.		
* * *	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. 2012–14102 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA–HQ–OAR–2009–0491; FRL–9672–4]

RIN 2060–AR35

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action on revisions to the final Transport Rule (Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, published August 8, 2011). EPA is revising the 2012 and 2014 state budgets for Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, and revising the new unit set-asides for Arkansas, Louisiana, and Missouri. These revisions are in addition to the revisions to the final Transport Rule published on February 21, 2012.

DATES: This final rule is effective on August 13, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR–EPA–HQ–OAR–2009–0491. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed on the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. This Docket Facility is open from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (929)566–1742, fax (202) 566–1741.

FOR FURTHER INFORMATION CONTACT: Jeremy Mark, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343–9087, email at *mark.jeremy@epa.gov.* Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/airmarkets.*

SUPPLEMENTARY INFORMATION:

I. Glossary of Terms and Abbreviations

The following are abbreviations of terms used in final rule:

CFR Code of Federal Regulations
EGU Electric Generating Unit
FIP Federal Implementation Plan
FR Federal Register
EPA U.S. Environmental Protection Agency
ICR Information Collection Request
NAAQS National Ambient Air Quality Standards
NODA Notice of Data Availability
NO_X Nitrogen Oxides
SIP State Implementation Plan
OMB Office of Management and Budget
$PM_{2.5}$ Fine Particulate Matter, Less Than 2.5 Micrometers
PM Particulate Matter
RIA Regulatory Impact Analysis
SO_2 Sulfur Dioxide

TSD Technical Support Document

II. General Information

A. Does this action apply to me?

Regulated Entities. Entities regulated by this action primarily are fossil fuel-fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

Category	NAICS code	Examples of potentially regulated industries
Industry	2211, 2212, 2213	Electric service providers.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine the applicability criteria in §§ 97.404, 97.504, and 97.604 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the transport rule Web site *http://www.epa.gov/airtransport.*

C. How is this preamble organized?

I. Glossary of Terms and Abbreviations
II. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
C. How is the preamble organized?
III. Executive Summary
IV. Response to General Comments
V. Specific Revisions in This Final Action
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Judicial Review

III. Executive Summary

In this action, EPA is revising specific aspects of the Transport Rule promulgated by EPA on July 6, 2011 (76 FR 48208, Aug. 2, 2011) (the July 6, 2011 final rule). Specifically, EPA is revising the 2012 and 2014 state budgets for Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, revising the new unit set-asides for Arkansas, Louisiana, and Missouri, and making associated changes to variability limits.[1] EPA originally proposed the Transport Rule on July 6, 2010, (75 FR 45210) and subsequently issued three related notices of data availability (NODAs). The first NODA, published on September 1, 2010, addressed updates to power sector modeling and data (75 FR 53613). The second NODA, published on October 27, 2010, addressed updates to emissions inventory data (75 FR 66055). The third NODA, published on January 7, 2011, addressed the data basis for unit-level allowance allocation methodologies (76 FR 1109). EPA then finalized the Transport Rule on July 6, 2011 (76 FR 48208).

After the final Transport Rule was published, EPA identified discrepancies in certain data assumptions that affected the calculation of a few states' budgets and new unit set-asides in the July 6, 2011, final rule; as a result, on October 14, 2011, EPA published proposed revisions to Transport Rule state budgets in Florida, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New York, Texas, and Wisconsin, as well as new unit set-asides in Arkansas and Texas (76 FR 63860). In that October 14, 2011, proposal, EPA provided an additional opportunity for commenters to identify information, not previously made available to the agency, that might support similar revisions to Transport Rule state budgets or new unit set-asides in addition to those specifically identified in that proposal (76 FR 63868).

After reviewing comments received on the October 14, 2011 proposal, EPA published three actions on February 21, 2012. First, the Agency issued a final rule addressing the revisions specifically identified in the October 14, 2011, proposal (77 FR 10324). Second, the Agency issued a direct final rule that would have made a set of similar revisions on the basis of new information supplied by commenters responding to the October 14, 2011, proposal (77 FR 10342). Specifically, the direct final included revisions to the 2012 and 2014 state budgets for Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, and revisions to the new unit set-asides for Arkansas, Louisiana, and Missouri. Third, EPA published a parallel proposal that proposed the adjustments made in the direct final rule. (77 FR 10350) EPA indicated that if it received adverse comment, it would withdraw the relevant portions of that rule and address all relevant comments received in any subsequent rule taking final action based on the parallel proposal.

EPA received adverse comment on the February 21, 2012, direct final rule and the parallel proposal, and thus has taken a separate action to withdraw the direct final rule May 16, 2012. (77 FR 28785). EPA has reviewed all of the comments received and is now taking final action on the revisions that were proposed in the February 21, 2012, parallel proposal. See section IV of this preamble for a discussion of the Agency's response to general comments on this action. See section V of this preamble for a discussion of the specific revisions being made in this final rule as well as

[1] Throughout this preamble, EPA refers to a state budget for 2012 and 2013 as a ''2012'' state budget and refers to a state budget for 2014 and thereafter as a ''2014'' state budget. Therefore, any revision of a 2012 state budget would apply to the state budget for 2012 and 2013, and any revision of a 2014 state budget would apply to the state budget for 2014 and thereafter.

the corresponding Response to Comments document contained in the docket for this action.

Tables III–1 through III–6 below summarize the state budgets, new unit set-asides, Indian country new-unit set-asides, and variability limits for all states covered by the Transport Rule, reflecting all of the revisions finalized in this action as well as those revisions included in a previous final rule published on February 21, 2012 (77 FR 10324).

TABLE III–1—2012–2013 SO_2 BUDGETS, NEW UNIT SET-ASIDES

State	2012–2013 Total budget	2012 New unit set-aside	2013 New unit set-aside	2012–2013 Indian country new unit set-aside
Alabama	216,033	4,321		.....
Georgia	158,527	3,171		.....
Illinois	234,889	11,744		.....
Indiana	290,762	8,723		.....
Iowa	107,085	2,035		107
Kansas	41,980	798		42
Kentucky	232,662	13,960		.....
Maryland	30,120	602		.....
Michigan	229,303	4,357		229
Minnesota	41,981	798		42
Missouri	207,466	4,149	6,224	.....
Nebraska	68,162	2,658		68
New Jersey	7,670	153		.....
New York	36,296	690		36
North Carolina	136,881	10,813		137
Ohio	315,393	6,308		.....
Pennsylvania	278,651	5,573		.....
South Carolina	96,633	1,836		97
Tennessee	148,150	2,963		.....
Texas	294,471	14,430		294
Virginia	70,820	2,833		.....
West Virginia	146,174	10,232		.....
Wisconsin	79,480	3,099		80

TABLE III–2—2014 SO_2 BUDGETS, NEW UNIT SET-ASIDES AND VARIABILITY LIMITS

State	2014 Total budget	2014 New unit set-aside	2014 Indian country new unit set-aside	2014 Variability limit
Alabama	213,258	4,265	.....	38,386
Georgia	135,565	2,711	.....	24,402
Illinois	124,123	6,206	.....	22,342
Indiana	166,449	4,993	.....	29,961
Iowa	75,184	1,429	75	13,533
Kansas	41,980	798	42	7,556

TABLE III–2—2014 SO_2 BUDGETS, NEW UNIT SET-ASIDES AND VARIABILITY LIMITS—Continued

State	2014 Total budget	2014 New unit set-aside	2014 Indian country new unit set-aside	2014 Variability limit
Kentucky	106,284	6,377	.....	19,131
Maryland	28,203	564	.....	5,077
Michigan	143,995	2,736	144	25,919
Minnesota	41,981	798	42	7,557
Missouri	165,941	4,978	.....	29,869
Nebraska	68,162	2,658	68	12,269
New Jersey	5,574	111	.....	1,003
New York	27,556	523	28	4,960
North Carolina	57,620	4,552	58	10,372
Ohio	142,240	2,845	.....	25,603
Pennsylvania	112,021	2,240	.....	20,164
South Carolina	96,633	1,836	97	17,394
Tennessee	58,833	1,177	.....	10,590
Texas	294,471	14,430	294	53,005
Virginia	35,057	1,402	.....	6,310
West Virginia	75,668	5,297	.....	13,620
Wisconsin	47,883	1,867	48	8,619

TABLE III–3—2012–2013 ANNUAL NO_X BUDGETS, NEW UNIT SET-ASIDES

State	2012–2013 Total budget	2012 New unit set-aside	2013 New unit set-aside	2012–2013 Indian country new unit set-side
Alabama	72,691	1,454		.....
Georgia	62,010	1,240		.....
Illinois	47,872	3,830		.....
Indiana	109,726	3,292		.....
Iowa	38,335	729		38
Kansas	31,354	596		31
Kentucky	85,086	3,403		.....
Maryland	16,633	333		.....
Michigan	65,421	1,243		65
Minnesota	29,572	561		30
Missouri	52,400	1,572	3,144	.....
Nebraska	30,039	1,772		30
New Jersey	8,218	164		.....
New York	21,722	412		22
North Carolina	50,587	2,984		51

TABLE III–3—2012–2013 ANNUAL NO_X BUDGETS, NEW UNIT SET-ASIDES—Continued

State	2012–2013 Total budget	2012 New unit set-aside	2013 New unit set-aside	2012–2013 Indian country new unit set-side
Ohio	95,468	1,909		.....
Pennsylvania	119,986	2,400		.....
South Carolina	32,498	617		33
Tennessee	35,703	714		.....
Texas	137,701	5,370		138
Virginia	33,242	1,662		.....
West Virginia	59,472	2,974		.....
Wisconsin	34,101	2,012		34

TABLE III–4—2014 ANNUAL NO_X BUDGETS, NEW UNIT SET-ASIDES AND VARIABILITY LIMITS

State	2014 Total budget	2014 New unit set-side	2014 Indian country new unit set-side	2014 Variability limit
Alabama	71,962	1,439	.....	12,953
Georgia	53,738	1,075	.....	9,673
Illinois	47,872	3,830	.....	8,617
Indiana	108,424	3,253	.....	19,516
Iowa	37,498	712	38	6,750
Kansas	31,354	596	31	5,644
Kentucky	77,238	3,090	.....	13,903
Maryland	16,574	331	.....	2,983
Michigan	63,040	1,198	63	11,347
Minnesota	29,572	561	30	5,323
Missouri	48,743	2,925	.....	8,774
Nebraska	30,039	1,772	30	5,407
New Jersey	7,945	159	.....	1,430
New York	21,722	412	22	3,910
North Carolina	41,553	2,451	42	7,480
Ohio	90,258	1,805	.....	16,246
Pennsylvania	119,194	2,384	.....	21,455
South Carolina	32,498	617	33	5,850
Tennessee	19,337	387	.....	3,481
Texas	137,701	5,370	138	24,786
Virginia	33,242	1,662	.....	5,984
West Virginia	54,582	2,729	.....	9,825
Wisconsin	32,871	1,939	33	5,917

TABLE III–5—2012–2013 OZONE-SEASON NO_X BUDGETS, NEW UNIT SET-ASIDES

State	2012 Total budget	2013 Total budget	2012 New unit set-aside	2013 New unit set-aside	2012–2013 Indian country new unit set-aside
Alabama	31,746		635		.....
Arkansas	15,110		756		.....
Florida	28,644		544		29
Georgia	27,944		559		.....
Illinois	21,208		1,697		.....
Indiana	46,876		1,406		.....
Iowa	16,532		314		17
Kentucky	36,167		1,447		.....
Louisiana	18,115		344		18
Maryland	7,179		144		.....
Michigan	28,041		533		28
Mississippi	12,429		237		12
Missouri	22,788		684	1,367	.....
New Jersey	4,128		83		.....
New York	10,369		197		10
North Carolina	22,168		1,308		22
Ohio	41,284		826		.....
Oklahoma	36,567	22,694	731	454	.....
Pennsylvania	52,201		1,044		.....
South Carolina	13,909		264		14
Tennessee	14,908		298		.....
Texas	65,560		2,556		66
Virginia	14,452		723		.....
West Virginia	25,283		1,264		.....
Wisconsin	14,784		872		15

TABLE III–6—2014 OZONE-SEASON NO_X BUDGETS, NEW UNIT SET-ASIDES AND VARIABILITY LIMITS

State	2014 Total budget	2014 New unit set-aside	2014 Indian country new unit set-aside	2014 Variability limit
Alabama	31,499	630	.....	6,615
Arkansas	15,110	1,209	.....	3,173
Florida	27,825	529	28	5,843
Georgia	24,041	481	.....	5,049
Illinois	21,208	1,697	.....	4,454
Indiana	46,175	1,385	.....	9,697
Iowa	16,207	308	16	3,403

TABLE III–6—2014 OZONE-SEASON NO_X BUDGETS, NEW UNIT SET-ASIDES AND VARIABILITY LIMITS—Continued

State	2014 Total budget	2014 New unit set-aside	2014 Indian country new unit set-aside	2014 Variability limit
Kentucky	32,674	1,307		6,862
Louisiana	18,115	344	18	3,804
Maryland	7,179	144		1,508
Michigan	27,016	513	27	5,673
Mississippi	12,429	237	12	2,610
Missouri	21,099	1,266		4,431
New Jersey	3,731	75		784
New York	10,369	197	10	2,177
North Carolina	18,455	1,089	18	3,876
Ohio	39,013	780		8,193
Oklahoma	22,694	454		4,766
Pennsylvania	51,912	1,038		10,902
South Carolina	13,909	264	14	2,921
Tennessee	8,016	160		1,683
Texas	65,560	2,556	66	13,768
Virginia	14,452	723		3,035
West Virginia	23,291	1,165		4,891
Wisconsin	14,296	844	14	3,002

IV. Response to General Comments

EPA received several comments on the direct final rule and parallel proposal published on February 21, 2012. Many commenters generally supported the proposed revisions to state budgets and new unit set-asides, and EPA received few comments addressing the manner in which the revisions were quantified.

Some commenters, while supporting the proposed revisions, asked that additional revisions be made. Most of these comments simply re-iterated, often verbatim, comments that were previously submitted and to which EPA had already responded. (See, EPA's Response to Comments document in the docket for this action.) Some of those comments asserted that EPA had failed to address specific unit level issues that commenters had previously raised, frequently in reference to unit level emission rates and fuel choices. EPA responded to all comments received on prior proposals in the context of those prior rulemakings. In some cases, EPA declined to make specific revisions requested by commenters. EPA's reasoned determination that it would not be appropriate to make certain requested revisions does not, as commenters appear to suggest, demonstrate that the EPA ''failed to address'' issues raised in prior comments.

For instance, a commenter responding to EPA's October 14, 2011 proposed revisions rule argued that the NO_X emission rate in the IPM ''TR Remedy'' run was erroneously low for several units in Florida, including Crist Units 4 and 5, Smith Unit 1, and Scholz Units 1 and 2. The commenters argued that the rates in IPM should have reflected the units' historic emission rates and should not have reflected the installation of low-NO_X burners (LNBs). EPA evaluated these comments and determined that the correct rate was used in the TR remedy run. EPA explained its rationale for disagreeing with the comment in the Response to Comment document. As the Agency explained, ''[t]he controlled NO_X base rate modeled for these units is very consistent with the emission rates reported by the units themselves. However, the controlled NO_X policy rate for these units is adjusted downward as a result of combustion control (e.g., LNB) upgrades or installation that would be considered economic at the cost thresholds modeled in the remedy scenario. The rates modeled are reflective of what other similarly-configured units are achieving when installing such controls. Therefore, the rates modeled are derived, but different, from the historic rates observed at the units as noted by commenter. However, the change is not accidental (as assumed by commenter) but intentional and explained in section VII of the final Transport Rule preamble and the IPM v.4.10 documentation.'' [2] In this case, EPA did indeed address the comment, and its determination that the requested budget adjustment was not appropriate does not imply that it ''failed to address'' an issue.

A brief summary of selected general comments received on the February 21,

[2] Response to Comments on the Proposed Revisions to FIPs to Reduce Interstate Transport of Fine PM and Ozone (EPA–HQ–OAR–2009–0491–4963, page 83).

2012, direct final/parallel proposal notices follows. Responses to comments on specific proposed revisions are addressed in section V, which describes in greater detail the specific revisions finalized in this action. Additional and more detailed responses appear in the response to comments document in the docket for this rulemaking.

1. General Comments on Rulemaking Procedures

Comment: One commenter suggests that, before finalizing this rule, EPA should prepare a ''comprehensive proposal that includes the information provided in the Direct Final Rule, the Final Revisions Rule, the Supplemental Rule, and the three NODAs.''

Response: EPA does not agree that an additional proposal is needed in these circumstances. EPA published the direct final rule and parallel proposal on February 21, 2012. That notice explicitly laid out for public comment all of the actions EPA is taking in this final action. EPA provided ample opportunity for comment on those revisions, received public comment on the notices, and in accordance with proper rulemaking procedure is now taking this final action. The commenter has not identified any specific criteria in the Administrative Procedures Act or the Clean Air Act with which it believes EPA did not adhere.

Further, in this action, EPA is only making targeted specific revisions to state budgets and new unit set asides. EPA neither proposed, nor reopened for comment, any aspect of the applicability provisions in the final Transport Rule or any the methodologies established in that rule including those used to quantify each individual state's significant contribution to nonattainment and interference with maintenance, to develop state budgets, and to allocate allowances to individual units.

2. Comment Regarding Air Quality Modeling

Comment: A commenter suggested that EPA should redo air quality modeling in light of the revisions.

Response: EPA conducted quantitative air quality assessments regarding the full suite of revisions contained in the actions EPA published on February 21, 2012 (including the revisions in that date's final rule as well as that date's direct final rule and parallel proposal), with the intent of determining whether any of the unit-level discrepancies addressed by those revisions would have affected the basis (informed by air quality modeling) of decisions EPA made in the promulgation of the final Transport Rule. That analysis evaluated the relationship between all of the revisions EPA has considered and the original air quality analysis conducted for the July 6, 2011, final Transport Rule that informed that Rule's determination of emissions that significantly contribute to nonattainment or interfere with maintenance of the National Ambient Air Quality Standards (NAAQS) in downwind states.[3] This analysis found that the revisions would lead to only minor changes in estimated air quality concentrations at the receptors to which the states in this rule were ''linked'' in the final Transport Rule (76 FR 48236; see section V.D in the preamble to the final Transport Rule for an explanation of how upwind states are linked to specific downwind receptors at issue in the Transport Rule).

These findings confirmed that the revisions at issue in this action as well as the revisions in the February 21, 2012, final rule (77 FR 10324) have only a limited air quality impact that would not have changed EPA's determination of the appropriate cost thresholds with which EPA quantified significant contribution or interference with maintenance under the final Transport Rule. EPA's analysis shows that SO_2 emission increases related to state budget increases in this action would not substantially affect the air quality component of the multifactor test and thus would not affect EPA's conclusions in the final Transport Rule identifying $2,300/ton and $500/ton as the appropriate SO_2 cost thresholds for ''Group 1'' and ''Group 2'' states, respectively, and would not change each state's designation as either ''Group 1'' or ''Group 2'' as was made in the final Transport Rule. For more detail regarding this analysis, please see section B of the ''Final June Revisions Rule Significant Contribution Assessment TSD'' in the docket for this rulemaking.

The results of this analysis also show that the increases in annual and ozone-season NO_X related to this action's revisions represent a small percentage of each state's total emissions. Therefore, EPA believes that the impact of these revisions would be limited to comparatively small changes to the 2014 ozone design values projected in the final Transport Rule air quality analysis. As a result, EPA does not find any basis on which this action's revisions, and the underlying data supporting those revisions, would substantively impact the air quality modeling previously conducted in support of the final Transport Rule.

3. Comments Regarding Power-Sector Modeling to Quantify State Budgets

Comment: Some commenters suggested that the information underlying the proposed revisions would require EPA to re-execute full power sector modeling using the Integrated Planning Model (IPM) to determine state budgets.

Response: EPA previously responded to comments on this topic on page 18–19 of the ''Response to Comments on the Proposed Revisions to FIPs to Reduce Interstate Transport of Fine PM and Ozone.'' (EPA–HQ–OAR–2009–0491–4963) The state budgets are defined as the emissions projected to remain, in an average year, after all emissions that significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS in a downwind state are eliminated (76 FR 48246). In developing the Transport Rule, EPA relied on sophisticated air quality analysis and power sector modeling in order to determine the appropriate cost per ton thresholds at which emission reductions relevant to significant contribution and interference with maintenance could be identified (based on the ''multifactor test'' described in the July 6, 2011, final Transport Rule). This approach was broad enough to necessitate a simultaneous examination of emissions across thousands of EGUs at multiple cost per ton levels, which EPA determined was best simulated with the assistance of IPM modeling. (See, ''Final June Revisions Rule Significant Contribution Assessment TSD'' and ''Final June Revisions Rule State Budgets TSD'' in the docket for this rulemaking).

In contrast, this action considers small adjustments to the quantification of remaining emissions at a discrete and limited subset of individual EGUs. While IPM is a powerful tool and EPA uses its output information when determining state budgets, that does not preclude EPA from making targeted adjustments to the IPM output that are consistent with the overall methodology. For example, some of the revisions were made due to non-economic factors that affect near-term unit-level electricity dispatch in certain specific circumstances. In those narrow

[3] See, ''Final Revisions Rule Significant Contribution Assessment TSD'' (EPA–HQ–OAR–2009–0491–4956) where this relationship is evaluated by comparing Tables 37, 38, 39, and 40 (inclusive of the revisions contained in the February 21, 2012 final rule (77 FR 10324) as well as the revisions contained in this action) with the columns ''Without'' budget increases in Tables 2, 3, 4, and 5. See also, ''Final June Revisions Rule Significant Contribution Assessment TSD,'' Tables 2, 3, 4, and 5.

cases, it is appropriate to adjust the output of an economic model like IPM to reflect these factors, as demonstrated in this rule's ''Final June Revisions Rule State Budgets and New Unit Set-Asides TSD'' quantifying these out-of-merit-order dispatch adjustments, found in the docket for this rulemaking. As a result, EPA does not find it necessary to re-execute full power sector modeling in order to quantify the revisions to state budgets addressing the unit-level discrepancies the Agency identified in the final Transport Rule analysis as the basis for this rulemaking.

4. Comments Regarding Budget Adjustments Based on Control Installation Timing

Comment: One commenter argued that the Wisconsin state SO_2 and NO_X budgets should be increased to account for the scheduling of the installation of controls. The commenter notes that EPA proposed making such an adjustment for controls in Georgia and believes the Wisconsin situation is similar.

Response: EPA has previously responded to these comments (see Response to Comments on the Proposed Revisions to FIPs to Reduce Interstate Transport of Fine PM and Ozone; EPA–HQ–OAR–2009–0491–4963). Moreover, the commenter errs in asserting that the adjustments it requests are similar to the adjustments made to the Georgia budget. First, the commenter overlooks the fact that Georgia is a Group 2 state while Wisconsin is a Group 1 state. EPA determined in the final Transport Rule that implementation of all controls available at $500/ton would resolve the significant contribution and interference with maintenance of Group 2 states. For Group 1 states, however, significant contribution and interference with maintenance is not resolved unless controls available at $2300/ton are implemented. EPA acknowledges that, absent an independent non Transport Rule related requirement, no additional scrubbers will be installed in Group 2 states (76 FR 48257, 48282). For this same reason, EPA determined that it could not assume that planned scrubber installations would be expedited in Group 2 states. This conclusion does not hold true for units in Group 1 states, where the $2300/cost threshold may be sufficient to incentivize both new scrubbers and the expedited installation of planned scrubbers.

Second, in the case of Georgia, the controls would not be operating until the following year (i.e. 2015 instead of 2014). The commenter acknowledges that this is not the case in Wisconsin as the controls will operate in 2014, just potentially not at the beginning of the year. The commenter's suggestion that EPA should assume the controls will not operate at all in 2014 contradicts their own acknowledgement that these controls will be operating most of the year; furthermore, even if the controls are not installed in time to operate at the very beginning of the year, the plant will not be emitting, or emitting at low levels, due to outages necessary for final tie-in. Additionally, the flexibility of trading mechanisms of the Transport Rule allows plants to accommodate this type of control installation schedule without disrupting the state's ability to meet its budget and assurance level. For these reasons, the requested revisions to the Wisconsin budget are not comparable to the revisions made to state budgets in Georgia .

5. Petitions for Reconsideration

EPA received a number of Petitions, pursuant to section 307(d)(7)(B) of the Clean Air Act, for Reconsideration of the Transport Rule. By providing, in this rulemaking, an additional opportunity for comment on aspects of Transport Rule state budgets, EPA has addressed some of the issues and concerns raised in many of the petitions for administrative reconsideration. While EPA is not, in this final action, taking action to grant or deny any such petitions, EPA believes this action may make moot some of the issues raised in those petitions. EPA will take separate action to grant or deny reconsideration on issues raised in the petitions to the extent they have not become moot.

V. Specific Revisions in This Final Action

In this rule, EPA is taking final action to revise the Transport Rule and the Transport Rule FIPs. EPA has determined after considering all comments received during the comment period that it is appropriate to finalize the revisions as proposed. This section describes the specific revisions made in this rule. Additional information regarding the calculations done by EPA to quantify the appropriate changes to state budgets and new unit set asides can be found in the ''Final June Revisions Rule State Budgets and New Unit Set-Asides TSD.'' Quantitative assessments of the relationship between final revisions to the Transport Rule and the original analysis can be found in the ''Final June Revisions Rule Significant Contribution Assessment TSD.'' Unit-level allocations under the revised FIPs appear in a document entitled ''Final June Revisions Rule Unit-Level Allocations under the FIPs.'' All of these documents, and additional relevant information including a detailed response to additional comments received during the comment period are in the docket for this rulemaking.

(1) Revise the Arkansas ozone season NO_X budgets for 2012 and 2014 and increase the Arkansas ozone season new unit set-aside budget.

In this final action, EPA is increasing the Arkansas 2012 and 2014 ozone-season NO_X budgets by 73 tons. EPA is also increasing the ozone-season NO_X new unit set-aside for Arkansas for 2014 and beyond. The revised ozone new unit set-aside is 8 percent of the ozone-season NO_X budget.

EPA evaluated comments received in response to the October 14, 2011, proposed revisions, and determined that the McClellan plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation.[4] EPA therefore recalculated the emissions from the McClellan plant with non-economic generation to account for the input assumption changes. These calculations yield increases to the Arkansas 2012 and 2014 state budgets for ozone-season NO_X of 73 tons.

EPA received comments on the October 14, 2011 revisions proposal that identified Turk Unit 1 as a unit commencing commercial operation on or after January 1, 2010. EPA evaluated these comments and determined that Turk Unit 1 qualifies as a new unit under the final Transport Rule's unit-level allocation methodology (see 76 FR 48290 for a description of that allocation methodology). The final Transport Rule did not include this unit's projected emissions in the calculation of Arkansas' ozone-season NO_X new unit set-aside. EPA is therefore revising the portion of the Arkansas ozone-season budget dedicated to the state's new unit set-aside account so that it takes into account this unit's projected emissions, consistent with the new unit set-aside methodology in the final Transport Rule. EPA is applying this revision to the new unit set-asides for 2014 and beyond. 2014 is the first year for which EPA has not yet recorded (i.e., distributed) allowances to existing units under the Arkansas state budget. To implement this revision for 2012 and 2013, EPA would have to take back allocations of 2012 and 2013 allowances that the Agency has already distributed

[4] For purposes of this rule and the February 21, 2012, revisions rule, EPA characterizes an out-of-merit-order dispatch area as one in which ''units * * * are frequently dispatched out of regional economic order as a result of short-run limitations on the ability to meet local electricity demand with generation from outside the area.'' *See* 76 FR 63865.

to existing units in Arkansas.[5] EPA received a comment suggesting that the revision to the 2012 and 2013 new unit set-asides could be made because the stay meant ''these allocations are no longer distributed for use until the stay is lifted.'' The premise of this comment is incorrect. Allowances for 2012 and 2013 were recorded in the compliance accounts of existing sources in Arkansas prior to the December 30, 2011, stay of the Transport Rule. Transport Rule allowance allocations recorded prior to December 30, 2011 remain in circulation in the marketplace. These allowances are electronically transferable by the owners and operators of such sources, and therefore those allowances may no longer reside in the specific compliance accounts in which they were originally recorded. Further, allowances still in their original recorded accounts may already be under contract to be transferred at a later date to another entity.[6] The commenter's assertion that ''these allocations are no longer distributed for use'' is thus not accurate. While sources are not required to hold allowances for compliance at this time, the previously allocated allowances remain in circulation and may have already been traded. Turk Unit 1 remains eligible to request allowance allocation from the new unit set-asides for any control period under the program. In the final Transport Rule, EPA established a minimum amount of allowances (equivalent to 2 percent of the relevant state budget) to be supplied to each new unit set-aside in addition to any other allowances supplied to that set-aside on the basis of projected emissions from specific new units EPA identified at the time. As such, the new unit set-asides can accommodate allocation requests from new units that were not explicitly identified at the time EPA promulgated the Transport Rule. (76 FR 48291) Further, as the commenter acknowledges, this unit is not projected to start-up until late 2012 and thus the unit will have little if any ozone-season emissions in 2012. It is likely that this unit will not need to hold 2012 ozone-season allowances for compliance. Finally, EPA notes that Turk Unit 1's compliance possibilities are not limited to its initial allowance allocation; like any other unit, it may obtain other allowances as necessary in the marketplace.

This revision yields an ozone-season NO_X new unit set-aside of 8 percent for 2014 and beyond for Arkansas. See the ''Final June Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

These revisions to the Arkansas new unit set-aside result in changes to allowance allocations to existing units, but they do not change the state's overall budget. See ''Final June Revisions Rule Unit-Level Allocations under the FIPs'' in the docket to this rulemaking.

(2) Revise the Georgia SO_2, annual NO_X, and ozone season NO_X budgets for 2014.

In this final action, EPA is increasing the Georgia 2014 SO_2 budget by 40,334 tons, the Georgia 2014 annual NO_X budget by 13,198 tons and the Georgia 2014 ozone-season NO_X budget by 5,762 tons.

EPA received comments on the October 14, 2011, revisions proposal indicating that EPA erroneously assumed certain pollution control requirements would be in place by 2014 due to requirements in a Georgia state rule. Other commenters with sources in Group 1 states (i.e., Virginia, West Virginia, Ohio, Wisconsin) suggested that similar timing issues existed for their units. However, in these particular states the 2014 scrubber installations were predicted due to the economic incentives facing Group 1 states at the higher cost threshold ($2,300 per ton) derived from EPA's multi-factor analysis. EPA's modeling projects that units in those states would find it cost-effective to install and operate new scrubbers in 2014 to support Transport Rule emission reductions regardless of other pollution control incentives or requirements that may be on a different schedule. Georgia faces a lower cost threshold ($500 per ton) as a Group 2 state, and while EPA believes that such a cost threshold is sufficient to induce the operation of existing scrubbers, EPA is not assuming that these units in Georgia would install new scrubbers by 2014 purely in response to the cost threshold applied to their state under the Transport Rule.

EPA evaluated the Georgia-specific comments on this issue and determined that the deadlines for certain units extend beyond 2014 in the Georgia state law in question. EPA also determined that, because Georgia is a Group 2 SO_2 state, it could not demonstrate that these controls would be installed absent the Georgia state law or in advance of the deadlines established therein. To correct the alignment of the Georgia 2014 state budgets with the requirements for affected units in Georgia to install controls by the state rule's deadlines, EPA is increasing Georgia's 2014 state budgets by 40,334 tons of SO_2, 13,198 tons of annual NO_X, and 5,762 tons of ozone-season NO_X.

(3) Revise the Indiana SO_2 budgets for 2012 and 2014.

In this final action, EPA is increasing the Indiana SO_2 budget for 2012 and 2014 by 5,338 tons.

EPA evaluated comments received in response to the October 14, 2011, proposed revisions regarding post-combustion control status at Gallagher Units 2 and 4. Commenters identified an erroneous assumption of flue gas desulphurization (FGD, or scrubber) with 86 percent removal at units that have actually installed dry sorbent injection (DSI) technology with a 60 percent removal rate and an emission rate limit of 0.8 lbs/mmBtu established in a NSR settlement agreement. EPA evaluated the comments and determined that an adjustment was appropriate as it is supported by their data reported in EIA form 860 data and the legal requirements under Consent Decree of the Gallagher Plant. Therefore, EPA increased the state's annual SO_2 budget by 3,465 tons.

Commenters on the October 14, 2011, revisions proposal also identified a facility in Indiana, Gibson Unit 5, which currently faces immediate-term limitations regarding the amount of flue gas that can be treated in its existing FGD. Commenters noted its removal rate should be lower than that assumed by EPA. EPA examined the basis for its assumed removal rate—the design capability reported for the unit in EIA form 860. The Gibson Unit 5 reports in form EIA 860 that it can only pass 98% of its flue gas through its scrubber, not 100% as originally assumed by EPA. EPA modified the unit's removal rate assumed in IPM to be consistent with its reported design capability and revised the budget accordingly.

In the final Transport Rule analysis, EPA relied on the SO_2 removal efficiency that this facility reported at its scrubber to the Energy Information Administration (EIA). However, EPA has since determined that this reported value only intended to address the removal efficiency for the portion of the flue gas treated in the scrubber.

EPA received comments supporting the revised assumption regarding the portion of the flue gas treated in the scrubber, and comments opposing EPA's use of the removal efficiency rate (95%) reported on EIA form 860. The

[5] Because the total number of allowances available to all sources in a given state is limited to that state's budget, adjusting the size of the new unit set-aside necessarily changes the size of the total allowance pool that is distributed as initial allocations to existing units.

[6] EPA does not collect information on when and how allowance trades are executed in private contracts; instead, EPA's data only shows the physical location of allowances in accounts at a given point in time.

commenter argues that EPA should instead use a lower removal efficiency rate (85%). While this removal efficiency rate is not a rate that was reported to EIA, the commenter argues that this rate is closer to the unit's removal values reported in EIA form 923.

After evaluating comments on this topic, EPA determined that its use of the 95% rate reported on EIA form 860 is appropriate. First, EPA relied on EIA form 860 as its default assumption for scrubber removal efficiency as it represents a consistent, conservative, and accurate metric (reported by the sources themselves). As explained in the Final Transport Rule Response to Comments, ''EPA notes that where EIA 860 reported values conflicted with those provided in comments, EPA generally relied on the EIA 860 reported values to promote consistent treatment of removal efficiencies among scrubbed units.'' Among other things, there can be inconsistency in the suggested removal rates provided to EPA by commenters. For example, at proposal, two different utilities that were co-owners of the same unit commented separately and provided a suggested removal rate for the same unit that they co-owned. However, the rate each suggested was different (EPA–HQ–OAR–2009–0491–2689.1, EPA–HQ–OAR–2009–0491–2665.1). For all of the above reasons, EPA remains confident that the consistent use of EIA 860 data is appropriate.

Second, the commenter's observation that its comment-supplied removal rate more closely parallels that reported in EIA 923 misunderstands the parameter being addressed in the IPM modeling and misconstrues the purpose for which EPA conducted IPM modeling in support of the Transport Rule. EPA applied its IPM modeling to develop accurate and reasonable state-level emission projections, for which it was necessary to develop a consistent approach and data source regarding the emission reduction capability of all scrubbers throughout the fleet. The removal rate input parameter that EPA uses in its power sector modeling addresses scrubber capability, not a particular scrubber's performance in any given year. The removal rate reported on EIA form 923 only reflects performance of the scrubber in a particular year, which can be significantly affected by variable operational decisions at the unit; conversely, the removal rate reported on EIA form 860 reflects design capability of the scrubber—that is, what the supplier built it to regularly accomplish when at full operation. While the commenter argues that this particular scrubber has performed under its design value, there is also evidence that other scrubbers have performed above their design values. For example, comparing the scrubber removal efficiencies reported on EIA 923 to the corresponding design values reported in EIA 860 shows that three out of the four units at the Petersburg plant exceeded their design values in 2010. Evidently, individual scrubber efficiency in any given year may vary above or below that scrubber's design value; however, EPA does not find that any one instance of this type of variation, such as that reported by Gibson Unit 5, provides a sufficient basis for revising the projected *state-level* emissions on which the quantification of the state budget depends.

Because of the conservative nature of design values (representing broadly reliable and sustainable performance expectations) and the consistency with which they are reported from year to year on EIA form 860 (contrary to reported values on EIA form 923 that vary significantly from year to year), EPA determined that the design value data provided on EIA form 860 provide, in the aggregate, a more reliable metric for estimating the performance capability of a state's scrubbed fleet and thus result in reasonable and accurate state-level emission projections. For these reasons, EPA believes it is appropriate to use the scrubber removal efficiency reported on EIA form 860 for units modeled in IPM—including Gibson 5.

EPA recalculated the projected emissions for this unit using the most recent data reported by this facility to EIA on form 860 for 2009, which includes the scrubber's removal efficiency and the portion of flue gas treated. Based on this recalculation, EPA is increasing Indiana's 2012 and 2014 SO_2 budgets by 1,873 tons (5,338 tons total).

(4) Revise the Kansas SO_2 and annual NO_X budgets for 2012 and 2014.

In this final rule, EPA is increasing the Kansas 2012 and 2014 SO_2 budgets by 452 tons, as well as increasing the 2012 annual NO_X budget by 640 tons and the 2014 annual NO_X budget by 5,794 tons.

Commenters on the October 14, 2011, revisions proposal provided information showing that one unit at the Quindaro plant in Kansas is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA evaluated these comments and determined that, based on the new information submitted, there were immediate-term local conditions that would likely necessitate non-economic generation at these units. EPA therefore recalculated the emissions from this plant with non-economic generation to account for the input assumption changes. These calculations yield increases to the Kansas 2012 and 2014 state budgets for annual SO_2 of 452 tons and annual NO_X of 640 tons.

Commenters on the October 14, 2011, revisions proposal also noted that EPA inadvertently included an emission rate requirement from a consent decree affecting a Kansas facility whose deadline actually extends beyond 2014. EPA evaluated the comment and determined that a revision was warranted because it could not establish that this emission rate limit would be met absent the consent decree or before the consent decree deadline. In particular, EPA determined that, because Kansas is a Group 2 SO_2 state, EPA could not demonstrate that these controls would be installed absent the consent decree or in advance of the deadlines established therein. To correct the alignment of the Kansas 2014 state budget with the requirements for affected units in Kansas to meet the emission rate limitation by the consent decree's deadlines, EPA is increasing the Kansas 2014 annual NO_X budget by an additional 5,154 tons (5,794 tons total).

(5) Revise the Louisiana ozone season NO_X budgets for 2012 and 2014 and adjust the ozone season new unit set-aside.

In this final action, EPA is increasing the Louisiana 2012 and 2014 ozone-season NO_X budgets by 89 tons. EPA is also decreasing the ozone-season NO_X new unit set-aside for 2012 and 2014. The revised new unit set-aside is 2 percent of the ozone-season budget.

EPA received comments on the October 14, 2011, proposed revisions rule demonstrating that the Stall and Lieberman plants are in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA evaluated the comments and determined that immediate-term local conditions would likely necessitate non-economic generation at these units. EPA recalculated the emissions from the Stall and Lieberman plants with non-economic generation to account for the input assumption changes. These calculations yield increases to Louisiana's 2012 and 2014 state budgets for ozone-season NO_X of 89 tons.

Comments on the October 14, 2011, revisions proposal also noted that in calculating the Louisiana ozone-season NO_X new unit set-aside, EPA included projected emissions from a planned new

facility, Washington Parish, which will not in fact come into service in Louisiana. EPA determined that Washington Parish's projected emissions should be subtracted from Louisiana's new unit set-aside calculations. EPA is therefore reducing the size of Louisiana's ozone-season NO_X new unit set-aside in 2012 and 2014 to 2 percent (from the previous 3 percent) to account for the exclusion of these projected emissions from the relevant calculation. This revision means that fewer allowances will need to be held in reserve for the new unit set-aside. After this revision's effective date, EPA will reallocate any allowances in excess of the revised new unit set-aside to existing units in the state by the same existing unit allowance allocation methodology as previously finalized. See the ''Final June Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

These revisions to the Louisiana new unit set-aside result in changes to allowance allocations to existing units, but they do not change the state's overall budget. See ''Final June Revisions Rule Unit-Level Allocations under the FIPs'' in the docket to this rulemaking.

(6) Revise the Mississippi ozone season NO_X budgets for 2012 and 2014.

In this final action, EPA is increasing both the Mississippi 2012 and 2014 ozone-season NO_X budgets by 115 tons.

EPA received comments on the October 14, 2011, revisions proposal demonstrating that the Moselle plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA has determined that there were immediate-term local conditions that would likely necessitate non-economic generation at these units.

Therefore, EPA recalculated the emissions from the Moselle plant with non-economic generation to account for the input assumption changes. These calculations yield increases to Mississippi's 2012 and 2014 state budgets for ozone-season NO_X of 115 tons.

(7) Revise the Missouri annual and ozone season NO_X budgets for 2012 and 2014 and revise the SO_2, annual NO_X, and ozone season NO_X new unit set-aside budgets.

In this final action, EPA is increasing the Missouri 2012 and 2014 annual and ozone-season NO_X budgets by 26 tons and increasing the size of the SO_2, annual NO_X, and ozone season NO_X new unit set-aside budgets. The revised set-aside budgets are 3 percent of the SO_2 budget and 6 percent of the annual and ozone-season NO_X budgets.

EPA is increasing these budgets to account for operational constraints at six plants that were identified in comments received on the October 14, 2011, revisions proposal. Commenters provided information showing that these units were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation. EPA evaluated these comments and determined that there were immediate-term local conditions that would likely necessitate non-economic generation at these units.

EPA recalculated the emissions from these six plants with non-economic generation to account for the input assumption changes. These calculations yield increases to Missouri's 2012 and 2014 state budgets for annual NO_X of 26 tons and ozone-season NO_X of 26 tons.

Comments on the October 14, 2011, revisions proposal also identified Iatan Unit 2 as commencing commercial operation on or after January 1, 2010. EPA reviewed these comments and determined that Iatan Unit 2 qualifies as a new unit under the final Transport Rule's unit-level allocation methodology (76 FR 48290). The final Transport Rule omitted this unit's projected emissions from the calculation of Missouri's new unit set-asides. EPA is therefore revising the portion of Missouri's SO_2, annual NO_X, and ozone-season NO_X budgets dedicated to the state's new unit set-asides so that they take into account this unit's projected emissions, consistent with the new unit set-aside methodology in the final Transport Rule. EPA is only applying this revision for 2013 and beyond, the first year for which EPA has not yet recorded (i.e., distributed) allowances to existing units under the Missouri state budget. In this manner, EPA will avoid any retroactive adjustments to allowance allocations that the Agency has already distributed to existing units in Missouri for Transport Rule compliance in the 2012 and 2013 control periods.[7] Allowances for 2012 were recorded in the compliance accounts of existing sources in Missouri prior to the December 30, 2011, stay of the Transport Rule. Transport rule allowance allocations recorded prior to the December 30, 2011 stay are electronically transferable by the owners and operators of such sources, and because they are transferable, those allowances may no longer reside in the compliance accounts in which they were originally recorded. Iatan Unit 2 remains eligible to request allowance allocation from the new unit set-asides for any control period under the program. This revision yields an ozone-season NO_X new unit set-aside of 6 percent, an annual NO_X new unit set-aside of 6 percent, and an SO_2 new unit set-aside of 3 percent for 2013 and beyond for Missouri. See the ''Final June Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

These revisions to the Missouri new unit set-aside result in changes to allowance allocations to existing units, but they do not change the state's overall budget. See ''Final June Revisions Rule Unit-Level Allocations under the FIPs'' in the docket to this rulemaking.

(8) Revise the Ohio SO_2, annual NO_X, and ozone season NO_X budgets for 2012 and 2014.

In this final action, EPA is increasing Ohio's 2012 and 2014 annual SO_2, annual NO_X, and ozone-season NO_X by 5,163, 2,765, and 1,221 tons respectively.

EPA is finalizing budget increases in this action account for operational constraints at two plants, Conesville and Muskingum River, that were identified in comments received on the October 14, 2011, revisions proposal. The commenter provided information showing that these plants were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation. EPA determined there were immediate-term local conditions that would likely necessitate non-economic generation at these units.

EPA recalculated the emissions from these two plants with non-economic generation to reflect the input assumption changes. These calculations yield increases to Ohio's 2012 and 2014 state budgets for annual SO_2 of 5,163 tons, annual NO_X of 547 tons, and ozone-season NO_X of 257 tons.

EPA is finalizing additional adjustments to Ohio's 2012 and 2014 annual and ozone-season NO_X budgets to correct an erroneous assumption of an SCR at Bayshore 4. EPA received comments on the October 14, 2011, revisions proposal arguing that EPA's assumption regarding SCR at the unit was incorrect. EPA reviewed recent emissions data and verified that there is no SCR currently at the facility, and that there is no evidence contradicting the commenter's recent claims that no SCR

[7] Because the total number of allowances available to all sources in a given state is limited to that state's budget, adjusting the size of the new unit set-aside necessarily changes the size of the total allowance pool that is distributed as initial allocations to existing units.

is planned or under construction. Therefore, removing the SCR assumption results in an additional 2,218 ton increase (2,765 ton total) in the state's annual NO_X budget and a 964 ton increase (1,221 ton total) for the ozone-season NO_X budget.

(9) Revise the Nebraska SO_2 budgets for 2012 and 2014.

EPA is finalizing revisions to increase the Nebraska 2012 and 2014 SO_2 budgets by 3,110 tons.

EPA received comments on the October 14, 2011 revisions proposal arguing that EPA's assumptions regarding FGD pollution control technology at Whelan Energy Center Units 1 and 2 and Nebraska City Unit 2 were incorrect. The commenter noted that the technology at Nebraska Unit 2 and Whelan Unit 2 is dry FGD technology, whereas EPA had assumed wet FGD technology with a higher SO_2 removal efficiency than the actual dry FGD technology that those units achieve. EPA evaluated these comments and determined that this difference in control type warranted a change in the relevant budgets. Additionally, EPA is also revising its assumption of FGD technology at Whelan Energy Center Unit 1, as EPA determined that there is no FGD present, planned, or under construction at the unit. These adjustments result in an increase of 3,110 tons to the 2012 and 2014 annual SO_2 budgets for the state.

(10) Revise the New York SO_2, annual NO_X, and ozone season NO_X budgets for 2012 and 2014.

In this final action, EPA is increasing New York's 2012 and 2014 annual SO_2, annual NO_X, and ozone-season NO_X budgets by 5,444 tons, 694 tons, and 127 tons respectively.

EPA received comments on the October 14, 2011, revisions proposal demonstrating that the East River plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA determined that based on this information, the East River plant's near-term operations are likely to yield increased emissions beyond those accounted for in the final Transport Rule's quantification of the relevant state budgets. EPA recalculated the emissions from this facility with out-of-merit-order dispatch to reflect the input assumption changes. These calculations yield increases to New York's 2012 and 2014 state budgets for annual SO_2 of 84 tons, annual NO_X of 694 tons, and ozone-season NO_X of 127 tons.

EPA is also finalizing an adjustment of 5,360 tons to New York's 2012 and 2014 SO_2 budgets based on its determination that the appropriate removal rate for two facilities, Dunkirk and Huntley, with existing dry sorbent injection (DSI). The removal rate for the DSI controls should be 53 percent. EPA had previously assumed an SO_2 removal rate of 70 percent for these two units, as 70% is the default value that EPA assumes for new DSI retrofits in IPM modeling. However, more recently reported EIA form 860 data released after the rule was finalized confirms the commenter's reporting that the removal rate is less than 70%. In the 2010 EIA 860 form, the sources reported 53% removal and EPA is updating its assumptions and budgets to reflect this value. This revised approach is consistent with EPA's assumptions of scrubber SO_2 removal rates, which EPA bases on reported values on EIA form 860. EPA recalculated the projected emissions for these units based on this revised assumption and is increasing the New York 2012 and 2014 SO_2 budgets accordingly.

(11) Revise the Oklahoma ozone-season NO_X budgets for 2013 and 2014.

EPA is increasing the Oklahoma 2013 [8] and 2014 ozone-season NO_X budgets by 859 tons.

EPA received comments received on the October 14, 2011, revisions proposal demonstrating that the Comanche plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA determined there were immediate-term local conditions that would likely necessitate non-economic generation at these units. This action also revises the assumption of an FGD at the W S Lee Facility. Current emissions data reported to EPA's Air Markets Program Data (*http://ampd.epa.gov/ampd/*) did not suggest any existing FGD, and EPA could not find any new evidence to suggest that FGDs were planned, under construction, or expected to be online in 2012 or 2014 at this facility.

(12) Revise the Texas annual NO_X and ozone season NO_X budgets for 2012 and 2014.

In this final action, EPA is increasing the Texas 2012 and 2014 annual and ozone-season NO_X budgets by 2,731 and 1,142 tons respectively.

These revisions are made to account for operational constraints at six plants: Jones, Moore County, Nichols, Plant X, Knox Lee, and Wilkes. These constraints were identified by commenters in response to the October 14, 2011, revisions proposal. The commenters provided information showing that these plants were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation. EPA determined that there were immediate-term local conditions that would likely necessitate non-economic generation at these units.

EPA recalculated the emissions from these plants with non-economic generation to account for the input assumption changes. These calculations yield increases to the Texas 2012 and 2014 state budgets for annual NO_X of 2,731 tons, and ozone-season NO_X of 1,142 tons.

VI. Statutory and Executive Order Reviews

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

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action makes relatively minor revisions to the emission budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule and corrects minor technical errors which are ministerial. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the final Transport Rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0667. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

[8] These changes do not apply to the Oklahoma 2012 budget because similar changes were already made to the affected units' operation in 2012, as described in the Technical Support Document ''Determination of State Budgets for the Final Ozone Supplemental of the Transport Rule'' (EPA–HQ–OAR–2009–0491–485, pg 5–7).

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this action are electric power generators whose ultimate parent entity has a total electric output of 4 million megawatt-hours (MWh) or less in the previous fiscal year. We have determined that the changes considered in this rulemaking pose no additional burden for small entities. The revision to the new unit set-asides in Arkansas, Missouri, and Texas would yield an extremely small change in unit-level allowance allocations to existing units, including small entities, such that it would not affect the analysis conducted on small entity impacts under the finalized Transport Rule. In all other states, the revisions in this rulemaking would yield additional allowance allocations to all units, including small entities, without increasing program stringency, such that it is not possible for the impact to small entities to be any larger than that already considered and reviewed in the finalized Transport Rule.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. This action is increasing the budgets and increasing the total number of allowances or maintaining the same budget but revising unit-level allocations in several other states in the Transport Rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

In developing the final Transport Rule, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action makes relatively minor revisions to the emissions budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule. Thus, Executive Order 13132 does not apply to this rule. EPA did provide information to state and local officials during development of both the proposed and final Transport 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 action makes relatively minor revisions to the emissions budgets and allowance allocations in several states in the final Transport Rule and helps ease the transition from CAIR. Indian country new unit set-asides will increase slightly or remain unchanged in the states affected by this action. Thus, Executive Order 13175 does not apply to this action. EPA consulted with tribal officials during the process of promulgating the final Transport Rule to permit them to have meaningful and timely input into its development.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Analyses by EPA that show how the emission reductions from the strategies in the final Transport Rule will further improve air quality and children's health can be found in the final Transport Rule RIA.

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

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

I. National Technology Transfer and Advancement Act

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

As described in section XII.I of the preamble to the final Transport Rule, the Transport Rule program requires all sources to meet the applicable monitoring requirements of 40 CFR part 75. Part 75 already incorporates a number of voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (EO) 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 United States.

In the ''Final June Revisions Rule Significant Contribution Assessment TSD'' in the docket to this rulemaking, EPA assessed impacts of the emission changes in this rule on air quality throughout the Transport Rule region. For SO_2, the estimated air quality impacts were minimal and no additional nonattainment or maintenance areas were identified. EPA also assessed the relationship between the NO_X emission inventories in each affected state and the finalized revisions to annual and ozone-season NO_X budgets and found the revisions represent small percentages of each state's total emissions in 2014. As a

result, EPA does not believe these technical revisions would affect any of the conclusions supported by the air quality and environmental justice analyses conducted for the final Transport Rule.

Based on the significant contribution assessment in the technical support document for this action, EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA believes that the vast majority of communities and individuals in areas covered by the Transport Rule program inclusive of this action, including numerous low-income, minority, and tribal individuals and communities in both rural areas and inner cities in the eastern and central U.S., will see significant improvements in air quality and resulting improvements in health. EPA's assessment of the effects of the final Transport Rule program on these communities is available in section XII.J of the preamble to the final Transport Rule.

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 United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a not ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective August 13, 2012.

L. Judicial Review

Petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 13, 2012. 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 if (i) the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) 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.''

In the final Transport Rule, EPA determined that ''[a]ny final action related to the Transport Rule is 'nationally applicable' within the meaning of section 307(b)(1).'' 76 FR 48352. Through this rule, EPA is revising specific aspects of the final Transport Rule. This rule therefore is a final action related to the Transport Rule and as such is covered by the determination of national applicability made in the final Transport Rule. Thus, pursuant to section 307(b) any petitions for review of this action 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**. Filing a petition for reconsideration of this action does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. In addition, pursuant to CAA section 307(b)(2) this action may not be challenged later in proceedings to enforce its requirements.

List of Subjects in 40 CFR Part 97

Administrative practice and procedure, Air pollution control, Electric utilities, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: June 5, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 97—[Amended]

■ 1. The authority citation for Part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

Subpart AAAAA—[Amended]

■ 2. Section 97.410 is amended by:

■ a. Revising paragraphs (a)(2)(iv) and (a)(2)(v);

■ b. Revising paragraphs (a)(6), (a)(11), (a)(14), (a)(16), and (a)(20); and

■ c. Revising paragraphs (b)(2), (b)(6), (b)(11), (b)(14), (b)(16) and (b)(20).

The revisions read as follows:

§ 97.410 State NO_X Annual trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) * * *

(iv) The NO_X annual trading budget for 2014 and thereafter is 53,738 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,075 tons.

* * * * *

(6) *Kansas.* (i) The NO_X annual trading budget for 2012 and 2013 is 31,354 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 596 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 31 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 31,354 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 596 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 31 tons.

* * * * *

(11) *Missouri.* (i) The NO_X annual trading budget for 2012 and 2013 is 52,400 tons.

(ii) The NO_X annual new unit set-aside for 2012 is 1,572 tons and for 2013 is 3,144 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 48,743 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 2,925 tons.

* * * * *

(14) *New York.* (i) The NO_X annual trading budget for 2012 and 2013 is 21,722 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 412 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 22 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 21,722 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 412 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 22 tons.

* * * * *

(16) *Ohio.* (i) The NO_X annual trading budget for 2012 and 2013 is 95,468 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,909 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 90,258 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,805 tons.

* * * * *

(20) *Texas.* (i) The NO_X annual trading budget for 2012 and 2013 is 137,701 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 5,370 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 138 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 137,701 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 5,370 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 138 tons.

* * * * *

(b) * * *

(2) The NO_X annual variability limit for Georgia is 9,673 tons.

* * * * *

(6) The NO_X annual variability limit for Kansas is 5,644 tons.

* * * * *

(11) The NO_X annual variability limit for Missouri is 8,774 tons.

* * * * *

(14) The NO_X annual variability limit for New York is 3,910 tons.

* * * * *

(16) The NO_X annual variability limit for Ohio is 16,246 tons.

* * * * *

(20) The NO_X annual variability limit for Texas is 24,786 tons.

* * * * *

Subpart BBBBB—[Amended]

■ 3. Section 97.510 is amended by:

■ a. Revising paragraph (a)(2);

■ b. Revising paragraphs (a)(4)(iv) and (a)(4)(v);

■ c. Revising paragraphs (a)(9), (a)(12), (a)(13), (a)(15), (a)(17), (a)(18), and (a)(22); and

■ d. Revising paragraphs (b)(2), (b)(4), (b)(9), (b)(12), (b)(13), (b)(15), (b)(17), (b)(18), and (b)(22).

The revisions read as follows:

§ 97.510 State NO_X Ozone Season trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) *Arkansas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 15,110 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 756 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 15,110 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,209 tons.

* * * * *

(4) * * *

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 24,041 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 481 tons.

* * * * *

(9) *Louisiana.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 18,115 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 344 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 18 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 18,115 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 344 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 18 tons.

* * * * *

(12) *Mississippi.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 12,429 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 237 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 12 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 12,429 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 237 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 12 tons.

(13) *Missouri.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 22,788 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 is 684 tons and for 2013 is 1,367 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 21,099 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,266 tons.

* * * * *

(15) *New York.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 10,369 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 197 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 10 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 10,369 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 197 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 10 tons.

* * * * *

(17) *Ohio.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 41,284 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 826 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 39,013 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 780 tons.

(18) *Oklahoma.* (i) The NO_X ozone season trading budget for 2012 is 36,567 tons and for 2013 is 22,694 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 is 731 tons and for 2013 is 454 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 22,694 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 454 tons.

* * * * *

(22) *Texas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 65,560 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 2,556 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 66 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 65,560 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 2,556 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 66 tons.

* * * * *

(b) * * *

(2) The NO_X ozone season variability limit for Arkansas is 3,173 tons.

* * * * *

(4) The NO_X ozone season variability limit for Georgia is 5,049 tons.

* * * * *

(9) The NO_X ozone season variability limit for Louisiana is 3,804 tons.

* * * * *

(12) The NO_X ozone season variability limit for Mississippi is 2,610 tons.

(13) The NO_X ozone season variability limit for Missouri is 4,431 tons.

* * * * *

(15) The NO_X ozone season variability limit for New York is 2,177 tons.

* * * * *

(17) The NO_X ozone season variability limit for Ohio is 8,193 tons.

(18) The NO_X ozone season variability limit for Oklahoma is 4,766 tons.

* * * * *

(22) The NO_X ozone season variability limit for Texas is 13,768 tons.

* * * * *

Subpart CCCCC—[Amended]

■ 4. Section 97.610 is amended by revising:

■ a. Paragraph (a)(2);

■ b. Paragraphs (a)(7)(ii) and (a)(7)(v);

■ c. Paragraphs (a)(9) and (a)(11); and

■ d. Paragraphs (b)(2), (b)(9), and (b)(11).

The revisions read as follows:

§ 97.610 State SO_2 Group 1 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) *Indiana.* (i) The SO_2 trading budget for 2012 and 2013 is 290,762 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 8,723 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 166,449 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,993 tons.

* * * * *

(7) * * *

(ii) The SO_2 new unit set-aside for 2012 is 4,149 tons and for 2013 is 6,224 tons.

* * * * *

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,978 tons.

* * * * *

(9) *New York.* (i) The SO_2 trading budget for 2012 and 2013 is 36,296 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 690 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 36 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 27,556 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 523 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 28 tons.

* * * * *

(11) *Ohio.* (i) The SO_2 trading budget for 2012 and 2013 is 315,393 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 6,308 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 142,240 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,845 tons.

* * * * *

(b) * * *

(2) The SO_2 variability limit for Indiana is 29,961 tons.

* * * * *

(9) The SO_2 variability limit for New York is 4,960 tons.

* * * * *

(11) The SO_2 variability limit for Ohio is 25,603 tons.

* * * * *

Subpart DDDDD—[Amended]

■ 5. Section 97.710 is amended by:

■ a. Revising paragraphs (a)(2)(iv) and (a)(2)(v);

■ b. Revising paragraphs (a)(3), (a)(5), and (a)(6); and

■ c. Revising paragraphs (b)(2), (b)(3), (b)(5) and (b)(6).

The revisions read as follows:

§ 97.710 State SO_2 Group 2 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) * * *

(iv) The SO_2 trading budget for 2014 and thereafter is 135,565 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,711 tons.

* * * * *

(3) *Kansas.* (i) The SO_2 trading budget for 2012 and 2013 is 41,980 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 798 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 42 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 41,980 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 798 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 42 tons.

* * * * *

(5) *Nebraska.* (i) The SO_2 trading budget for 2012 and 2013 is 68,162 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,658 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 68 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 68,162 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,658 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 68 tons.

(6) *South Carolina.* (i) The SO_2 trading budget for 2012 and 2013 is 96,633 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 1,836 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 97 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 96,633 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,836 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 97 tons.

* * * * *

(b) * * *

(2) The SO_2 variability limit for Georgia is 24,402 tons.

(3) The SO_2 variability limit for Kansas is 7,556 tons.

* * * * *

(5) The SO_2 variability limit for Nebraska is 12,269 tons.

(6) The SO_2 variability limit for South Carolina is 17,394 tons.

* * * * *

[FR Doc. 2012–14251 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 390 and 396

[Docket No. FMCSA–2011–0046]

RIN 2126–AB34

Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report for Intermodal Equipment

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation.

ACTION: Final rule.

SUMMARY: FMCSA eliminates the requirement for drivers operating intermodal equipment (IME) to submit—and intermodal equipment providers (IEPs) to retain—driver-vehicle inspection reports (DVIRs) when the driver has neither found nor been made aware of any defects in the IME. This responds to a joint petition for rulemaking from the Ocean Carrier Equipment Management Association (OCEMA) and the Institute of International Container Lessors (IICL).

DATES: The final rule is effective June 12, 2012.

ADDRESSES: For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to:

- Regulations.gov, *http://www.regulations.gov,* at any time and insert FMCSA–2011–0046 in the ''Keyword'' box, and then click ''Search.''
- Docket Management Facility, Room W12–140, DOT Building, 1200 New Jersey Avenue SE., Washington, DC. You may view the docket online by visiting the facility between 9 a.m. and 5 p.m. e.t., Monday through Friday except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations (MC–PSV), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–5370.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The purpose of this rule is to eliminate the reporting requirement for Driver-Vehicle Inspection Reports (DVIR) for intermodal equipment (IME), if the driver has neither found nor has been made aware of any defects in the IME. The rule also eliminates the recordkeeping requirement for intermodal equipment providers (IEPs) to retain DVIRs that do not indicate IME defects. The FMCSA estimates annual time and costs savings of 1.636 million hours and $54 million dollars. This rule is part of the effort of the U.S. Department of Transportation to implement Executive Order 13563.

II. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the U.S. Department of Transportation's (DOT) Privacy Act system of records notice for the DOT Federal Docket Management System (FDMS) in the **Federal Register** published on January 17, 2008 (73 FR 3316) at *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

III. Abbreviations

AAR Association of American Railroads
ATA American Trucking Associations
CMV Commercial motor vehicle
DOT U.S. Department of Transportation
DVIR Driver-vehicle inspection report
EDI Electronic data interchange
FHWA Federal Highway Administration
FMCSRs Federal Motor Carrier Safety Regulations
GIER Global Intermodal Equipment Registry
IANA Intermodal Association of North America
IC Information collection
ICC Interstate Commerce Commission
IEP Intermodal equipment provider
IICL Institute of International Container Lessors
IMCC Intermodal Motor Carriers Conference
IME Intermodal equipment
NPRM Notice of proposed rulemaking
OCEMA Ocean Carrier Equipment Management Association
OOS Out of service
Secretary Secretary of Transportation

IV. Legal Basis for the Rulemaking

Although intermodal cargo containers move by ship and/or by rail, the trip generally begins and ends on chassis trailers (on IME) for transportation by highway. These trailers fall under FMCSA's safety jurisdiction. At issue in this final rule is the requirement that drivers complete DVIRs, which note the existence or absence of defects or deficiencies in IME. The final rule eliminates the requirement that drivers complete DVIRs when they have no defects or deficiencies to report.

This final rule is based on the authority of the Motor Carrier Act of 1935 (1935 Act) and the Motor Carrier Safety Act of 1984 (1984 Act), both of which are broadly discretionary, and the specific mandates of section 4118 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act; a Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144, at 1729, August 10, 2005, codified at 49 U.S.C. 31151).

The 1935 Act provides that the Secretary of Transportation (Secretary) may prescribe requirements for

- Qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier (49 U.S.C. 31502(b)(1)), and
- Qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation (49 U.S.C. 31502(b)(2)).

This rulemaking is based on the Secretary's authority under both § 31502(b)(1) and (2).

The 1984 Act authorizes the Secretary to regulate drivers, motor carriers, and vehicle equipment. Codified at 49 U.S.C. 31136(a), section 206(a) of the 1984 Act requires the Secretary to publish regulations on motor vehicle safety. Specifically, the Act sets forth minimum safety standards to ensure that: (1) Commercial motor vehicles (CMVs) are maintained, equipped, loaded, and operated safely (49 U.S.C. 31136(a)(1)); (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely (49 U.S.C. 31136(a)(2)); (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely (49 U.S.C. 31136(a)(3)); and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators (49 U.S.C. 31136(a)(4)). Section 211 of the 1984 Act also grants the Secretary broad power in carrying out motor carrier safety statutes and regulations to ''prescribe recordkeeping and reporting requirements'' and to ''perform other acts the Secretary considers appropriate'' (49 U.S.C. 31133(a)(8) and (10)).

This rule implements, in part, the Administrator's delegated authority under Section 206(a)(1) of the 1984 Act to ensure that CMVs are maintained, equipped, loaded and operated safely and also exercises the broad recordkeeping and implementation authority under Section 211. The other subsections of Section 206(a) do not apply because this final rule only addresses CMV equipment.

Section 4118 of SAFETEA–LU, entitled ''Roadability,'' requires the Secretary to issue regulations ''to ensure that intermodal equipment used to transport intermodal containers is safe and systematically maintained.'' Codified at 49 U.S.C. 31151(a)(3), it specifies a minimum of 14 items to be included in those regulations. It also authorizes Departmental employees designated by the Secretary to inspect IME and make copies of related maintenance and repair records (49 U.S.C. 31151(b)). Any IME that fails to comply with applicable Federal safety regulations may be placed out of service (OOS) by Departmental or other Federal, State, or government officials designated by the Secretary until the necessary repairs have been made (49 U.S.C. 31151(c)). Also included is a provision preempting inconsistent State, local, or tribal requirements that relate to CMV safety, but providing that preemption of a State periodic chassis inspection requirement that was in effect on January 1, 2005 may be waived upon application by the State if the Secretary finds the State requirement is as effective as the Federal requirement and does not unduly burden interstate commerce (49 U.S.C. 31151(d) and (e)).

FMCSA published a final rule on December 17, 2008 (73 FR 76794), implementing the SAFETEA–LU requirements. That rule requires IEPs to register and file with FMCSA an IEP Identification Report (Form MCS–150C); establish a systematic inspection, repair, and maintenance program in order to provide IME that is in safe and proper operating condition; maintain documentation of their maintenance program; and provide a means to respond effectively to driver and motor carrier reports about intermodal chassis mechanical defects and deficiencies. The regulations also require IEPs to mark each intermodal chassis offered for transportation in interstate commerce with a DOT identification number. For the first time, these regulations made IEPs subject to the FMCSRs, and called for shared safety responsibility among IEPs, motor carriers, and drivers.

Additionally, FMCSA adopted inspection requirements for motor carriers and drivers operating IME.

V. Background

Section 4118 of SAFETEA–LU amended 49 U.S.C. chapter 311 to require that the Secretary establish a program ensuring that IME used to transport intermodal containers is safe and systematically maintained (49 U.S.C. 31151). Among other things, the statute called for the Secretary to mandate ''a process by which a driver or motor carrier transporting intermodal equipment is required to report to the intermodal equipment provider or the providers' designated agent any actual damage or defect in the intermodal equipment of which the driver or motor carrier is aware at the time the intermodal equipment is returned to the intermodal equipment provider or the provider's designated agent'' (49 U.S.C. 31151(a)(3)(L)). FMCSA's December 17, 2008 rule (73 FR 76794) satisfied this requirement.

The 2008 rule included a new § 390.42, which prescribed the responsibilities of drivers and motor carriers when operating IME. Section 390.42(b) required the driver or motor carrier to report any damage to or deficiencies in certain IME parts and accessories at the time the equipment is returned to the IEP.

Importantly, FMCSA did *not* propose any changes to § 396.11(b), ''Report content,'' which requires—for both non-IME and IME—that ''If no defect or deficiency is discovered by or reported to the driver, the report shall so indicate.'' This requirement to prepare a DVIR, even in the absence of equipment defects or deficiencies (hereafter a ''no-defect DVIR''), has been in the safety regulations since 1952 (17 FR 4422, 4452, May 15, 1952).[1] In the 2008 final rule, the Agency added language in the new § 390.42(b) and § 396.12(b)(4) to clarify that ''if no damage, defects, or deficiencies are discovered by the driver, the report shall so indicate.'' This was done to make the new rules for IEPs consistent with § 396.11(b).

[1] The driver's responsibility to report vehicle defects has always been part of the Federal safety regulations for CMVs. Part 6, Rule 6.6, of the Motor Carrier Safety Regulations issued by the Interstate Commerce Commission (ICC) in 1939 called for every driver to submit a written report at the end of his day's work or tour of duty to inform his employer of any vehicle defect or deficiency he discovered that would likely affect the safety of operation of that vehicle (4 FR 2294, 2305, June 7, 1939). The ICC recommended, but did not require, that motor carriers use a Driver's Trip Report. The report included the driver's name, vehicle number, date, a list of 20 items for inspection, and a space for the driver and mechanic to note defects.

On October 27, 2009, OCEMA petitioned FMCSA for a partial extension of the compliance date for §§ 396.9(d), 396.11(a)(2), 396.12(a), 396.12(c), and 396.12(d). These provisions include the process for delivering the DVIR and acting on defects or deficiencies reported. FMCSA granted the petition. In a final rule published on December 29, 2009, FMCSA extended the compliance date for these provisions from December 17, 2009, to June 30, 2010 (74 FR 68703).

On March 31, 2010, OCEMA and IICL jointly filed a petition for rulemaking to rescind the part of § 390.42(b) that required drivers to file no-defect DVIRs with IEPs on IME they are returning. OCEMA and IICL requested that FMCSA delete the sentence ''if no damage, defects, or deficiencies are discovered by the driver, the report shall so indicate.''

FMCSA granted the petition for rulemaking on July 30, 2010. Because FMCSA had previously extended the compliance date to June 30, 2010, (74 FR 68703), FMCSA published a final rule on August 20, 2010 that extended the compliance date for § 390.42(b) to June 30, 2011 (75 FR 51419). On May 20, 2011, FMCSA published a notice further extending the compliance date, to June 30, 2012 (76 FR 29169).

The petitioners presented four arguments supporting their request:

1. SAFETEA–LU requires DVIRs only for known damage or defects. Congress could have added a requirement to file no-defect DVIRs but did not do so.

2. There is significant risk that a large volume of no-defect DVIRs could overwhelm the small proportion (4 percent) of DVIRs that contain damage or defects.

3. Data transmission, processing, and storage requirements for no-defect DVIRs could add significant unnecessary costs to intermodal operations without providing offsetting benefits.

4. Submission of no-defect DVIRs contributes to driver productivity losses in the form of congestion and delay at intermodal facilities.

The Agency published an NPRM on June 7, 2011 (75 FR 32906) proposing changes to §§ 390.42(b), 396.11(b), and 396.12(b)(4) that would eliminate the requirement to file no-defect DVIRs.

VI. Discussion of Public Comments

NPRM Issues

In addition to seeking general comments on the NPRM:

1. FMCSA sought comment on the Petitioners' and FMCSA's estimates of the costs and time burden associated with no-defect DVIRs. The Petitioners estimated a time burden of 3 minutes, whereas the FMCSA's information collection (IC) request statement referenced in the 2008 final rule estimated a burden of 2 minutes 35 seconds.

2. FMCSA sought comment on the Petitioners' statement that IEPs incur a $0.02 transaction cost to retrieve the USDOT number through an electronic database, which Petitioners asserted is necessary for IME identification and completion of no-defect DVIR processing. FMCSA asked for clarification of the Petitioner's statement, because the Agency's December 29, 2009, technical amendment (74 FR 68703), mandated that no fee would be charged to outside users.

3. Finally, FMCSA asked the following questions about how DVIRs are handled:

> 1.1. Please explain in detail the procedures for filing and maintaining DVIRs from the time they are completed through the end of their retention periods. Are defect DVIRs kept separate from no-defect DVIRs, sent to maintenance staff, and then acted on? Do you have special procedures in place for the no-defect DVIRs? If so, please describe them.
>
> 1.2. Do you have examples of specific incidents in which handling of a large volume of no-defect DVIRs has interfered with handling of defect DVIRs? If so, please describe how these additional documents affected the repairing of defects.
>
> 1.3. Some DVIRs are completed electronically. Are the electronic DVIRs automatically or manually separated into defect and no-defect categories? Do you have an estimate of the percentage of forms filled out on paper and electronically? If so, please provide detailed information on the data and methodology used for that estimate.
>
> 2. Please provide information on the percentage of no-defect DVIRs. Also, please provide a discussion of the methodology for developing this information. (76 FR 32909)

Comments Received

The Agency received comments from five organizations: the Association of American Railroads (AAR), IICL, Intermodal Association of North America (IANA), Intermodal Motor Carriers Conference (IMCC) of the American Trucking Associations (ATA), and OCEMA. All commenters stated they supported FMCSA's proposed revisions of §§ 390.42(b), 396.11(b), and 396.12(b)(4).

Procedures for Filing and Maintaining DVIRs; Time Burden Estimate for Manual and Electronic Filing

In response to FMCSA's question concerning procedures for filing and maintaining DVIRs, IANA described several types of DVIR collection

processes. These processes ranged from manual submission of hard-copy paperwork to unassisted electronic data interchange (EDI) transmissions. IANA added that the different nature of these processes contributes to the variation in time burden and would make an exact assessment difficult. IANA also described the comprehensive electronic ''virtual pre-gate'' and at-gate procedures, which allow for reporting and processing of DVIRs via a web portal, interactive voice response system, or EDI and transmittals of files in various formats. IANA noted that its program offers IEPs and motor carriers electronic DVIR retention and recordkeeping features that go beyond FMCSA's requirements. IANA stated that, although it does not possess empirical data to validate petitioners' OCEMA and IICL's 3-minute estimate, its discussions with its Motor Carrier Division confirm the validity of this estimate.

OCEMA estimated that the actual time it takes to file a DVIR could vary between 1 and 5 minutes, depending upon the DVIR process, its format, and the driver's familiarity and comfort level with the process. OCEMA stated it believes that 3 minutes is a reasonable estimate, although possibly a low one. OCEMA also stated that the majority of the intermodal industry appears to have adopted either IANA's system, *DVIR.Intermodal.org,* or another DVIR system available through *Chassis.com.* OCEMA added that if a defect or damage is noted on a DVIR, that information is sent to the intermodal facility, the chassis pool manager, and often to the terminal operator, to initiate a corrective action. In some cases, the terminal places a hold on the unit of IME to keep it from leaving the facility until maintenance personnel release it.

IICL stated that its members agreed with FMCSA's analyses.

FMCSA Response: FMCSA believes that IME DVIRs are no more complex than DVIRs for other CMV equipment, and therefore that it has opted to use its estimate of two minutes and thirty-five seconds rather than the 3 minutes mentioned by the petitioners.

Cost of Filing and Maintaining DVIRs

With respect to the cost estimate, IANA and OCEMA clarified that the $0.02 fee per DVIR is a transaction fee that IEPs and other users incur to offset DVIR processing costs. They emphasize that it is not a Global Intermodal Equipment Registry (GIER) user fee. OCEMA noted that, to its knowledge, direct public web-portal access to the GIER database is free to the public.

FMCSA Response: FMCSA acknowledges IANA's and OCEMA's clarification. This is consistent with the Agency's position that there should not be an outside user fee associated with database access.

Impact on Processing Defect DVIRs Due to Large Volume of No-Defect DVIRs

In response to the request for examples of specific incidents in which handling a large volume of no-defect DVIRs interfered with handling defect DVIRs, OCEMA stated that it was not able to identify specific incidents, but noted that there had been only a limited time period when defect DVIRs were required. OCEMA added that increased reporting would likely generate more reports containing errors, greatly increase the data flows through operational processes, and increase burdens associated with report storage and retrieval.

IANA stated that its system accepts both defect and no-defect DVIRs and separates them automatically. OCEMA added that *Chassis.com* also accepts both defect and no-defect DVIRs.

FMCSA Response: The information confirmed the Agency's understanding of many of the processes, as well as providing clarifying details.

Percentages of No-Defect DVIRs

With respect to the percentage of no-defect DVIRs received, IANA stated that it received 98.8 percent no-defect DVIRs for the period December 17, 2009 through July 30, 2010. During the following 2 months, the total number of DVIRs IANA processed declined by 51 percent, with the no-defect DVIR proportion remaining at 98.8 percent. IANA also stated that from August 20, 2010 through June 30, 2011, as a result of FMCSA's extension of the compliance date for no-defect DVIR reporting, no-defect DVIRs were not submitted or processed, and there is no relevant statistical information available on the ratio of no-defect to defect DVIRs.

OCEMA stated that 98 percent of DVIRs received by its subsidiary, Consolidated Chassis Management, identified no defects.

FMCSA Response: FMCSA has received different industry estimates of the percentage of no-defect DVIRs. To ensure a conservative estimate of the reduction in costs and paperwork burdens, FMCSA will continue to use 95 percent as the estimated proportion of DVIRs that do not identify defects. Filing DVIRs on only the roughly 5 percent of IME with defects will focus attention on the IME that needs it—rather than the 95 percent with no defects. This change in procedure should streamline the process by providing IEPs only that information they need to act on.

Other Comments Received

ATA IMCC contends that a written driver pre-trip report documenting the condition of the IME offered for interchange is necessary for FMCSA to measure compliance with the IME regulations effectively. IMCC believes that a lack of documentation on pre-trip equipment conditions prevents the facility operator or other party responsible for IME maintenance from evaluating its processes and making necessary changes.

FMCSA Response: Although it is outside the scope of this particular rulemaking, the Agency notes that Section 4118 of SAFETEA–LU did include requirements for drivers to conduct an inspection ''as part of the Federal requirement in effect on the date of enactment of this Act''—that is, a pre-trip inspection. In its comments to the December 2006 NPRM, ATA and other commenters recommend that FMCSA adopt the industry inspection procedures by requiring the same list of inspection items as set forth in Exhibit A of the Uniform Intermodal Interchange and Facility Access Agreement (UIIA). Even though the Federal requirement that it refers to, codified at 49 CFR 392.7, does not include a requirement for a pre-trip inspection document, the Agency understands that it has been customary for drivers to use that checklist. Although there are differences between the UIIA and the requirements of 49 CFR Part 393, the Agency stated in the preamble to the December 2008 final rule, ''To the extent that the contents of any other inspection checklist are compatible with it, and do not otherwise conflict with FMCSR requirements, IEPs and motor carriers may continue to use them.'' (73 FR 76794, at 76803). In addition, the FMCSA does not have any data to suggest that adding such a requirement to the FMCSRs would provide safety benefits.

VII. Discussion of Final Rule

All commenters expressed support for eliminating the requirement to file no-defect DVIRs, which they viewed as an unnecessary administrative burden. AAR noted, ''Rarely does an agency have an opportunity to eliminate a paperwork requirement that clearly serves no useful purpose. This is one such occasion. AAR applauds FMCSA for initiating this proceeding.''

The Agency emphasizes that this rule does not change a driver's obligation to

assess the condition of IME at the end of a workday to determine whether the IME has defects or deficiencies that could affect operational safety. Although FMCSA is removing the requirement to complete a DVIR if the driver finds no defects in the IME and none have been reported to the driver, he or she must still inspect the IME to make this determination.

FMCSA also points out that § 390.40(i) requires IEPs to develop and implement procedures to repair any equipment damage, defects, or deficiencies identified as part of a pre-trip inspection or replace the equipment prior to the driver's departure. It is in the IEPs'—and drivers'—best interests for IME defects to be identified and remedied before the IME is next tendered. If drivers submit DVIRs when they note IME defects or deficiencies, they can be remedied without delaying the next driver who receives the equipment.

This rule does not affect requirements governing the inspection and completion of DVIRs for power units. Drivers also must continue to complete no-defect DVIRs on chassis that are owned or leased by the motor carrier.

Changes to the Code of Federal Regulations

FMCSA makes the changes proposed in the NPRM eliminating the no-defect DVIR filing requirement. FMCSA revises § 390.42(b) by deleting the sentence, ''If no damage, defects, or deficiencies are discovered by the driver, the report shall so indicate.'' Conforming changes are made in §§ 396.11(b) and 396.12(b)(4).

This rule does not change the IEPs' obligation under § 390.40(c) to systematically inspect, repair, and maintain—or cause to be systematically inspected, repaired and maintained—all IME intended for interchange with a motor carrier. Nor does it alter the IEPs' responsibility under § 390.40(d) to provide IME intended for interchange that is in safe and proper operating condition.

This rule includes editorial changes to § 396.11(a) and (b). The content from § 396.11(a), (b), and (d) has been re-organized for clarity and includes a revised paragraph § 396.11(a). Paragraph (b) has been rewritten, for clarity, into four subparagraphs: § 396.11(b)(1), (2), (3), and (4). Also for clarity and to conform to contemporary regulatory citation style, the individual items listed in § 396.11(a)(1) and (b)(1) are given paragraph designations. The Agency also revises the authority citations for 49 CFR parts 390 and 396 to correct statutory references and eliminate references that are either erroneous or unnecessary.

VIII. Regulatory Analyses

Executive Orders 13563 and 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA has determined that this action meets the criteria for a ''significant regulatory action'' as specified in Executive Order 12866, as supplemented by Executive Order 13563 issued by the President on January 18, 2011 (76 FR 3821) and within the meaning of the Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). The Department expects this rule to generate cost savings in the form of reduced paperwork burdens. Due to other existing inspection requirements, the Department does not believe that this rule will result in reduced safety.

The rule removes the requirement for drivers to submit DVIRs when they do not have IME defects or deficiencies to report. The only impact of this rule is to alleviate a portion of the paperwork burden for CMV drivers, which in monetary terms does not warrant a full regulatory analysis.

Approximately 40 million items of IME are in-gated each year. Of those, approximately 95 percent of DVIRs do not note defects. Therefore, for each of these 38 million units of no-defect IME (40 million × .95 = 38 million), a DVIR would not have to be completed. Filling out a no-defect DVIR is estimated to take 2.5 minutes and reviewing and signing a DVIR is estimated to take 5 seconds when no defects are noted. For a total of 2 minutes and 35 seconds in time savings if these reports are not required when no-defects are noted. This amounts to a time savings of 1.636 million hours annually (38 million units × 155 seconds per IME/3600 seconds/hour). As this burden falls on drivers, the value of this time can be monetized using the prevailing wage for truck drivers. We use the median annual wage for BLS occupation category 53–3032 Heavy and Tractor-Trailer Truck Drivers from the May 2011 Occupational Employment and Wages report, the most recent available. The median wage for truck drivers from this report is $18.24 per hour, which we inflate by 52 percent to account for fringe benefits and 27 percent to account for overhead. This produces a total loaded hourly time value of $33, rounded to the nearest dollar (the exact amount is $32.65). The estimated costs savings is $1.42 per transaction (155 seconds × $33 per hour/3600 seconds per hour = $1.42). The total savings annually amount to $54 (38 million units of IME × $1.42 per eliminated report = $54 million rounded to the nearest $100,000).

FMCSA emphasizes that this rule does not change two related requirements concerning IME safety. It does not change a driver's obligation to assess the condition of IME at the end of a workday to determine whether the IME has defects or deficiencies that could affect operational safety. In addition, § 390.40(i) requires IEPs to develop and implement procedures to repair any equipment damage, defects, or deficiencies identified as part of a pre-trip inspection or replace the equipment prior to the driver's departure. Because there are multiple opportunities for IME to be inspected for potential safety defects, the Agency does not believe that the implementation of this rule would lead to an increase in safety risk.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to determine whether rules could have a significant economic impact on a substantial number of small entities. This rule will grant regulatory relief to IEPs, which include 108 entities consisting of steamship lines, railroads, and chassis pool operators. In its 2008 final rule, the Agency confirmed that all IEPs are either foreign-owned or otherwise do not meet the criteria for small business designation as defined by the Small Business Administration (73 FR 76816, December 17, 2008). Consequently, I certify that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rulemaking does not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, *et seq.*), that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $143.1 million (which is the value of $100 million in 2010 after adjusting for inflation) or more in any 1 year.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

FMCSA analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FMCSA determined that this rulemaking does not pose an environmental risk to health or safety that may affect children disproportionately.

Executive Order 12630 (Taking of Private Property)

This rulemaking does not effect a taking of private property or otherwise have takings implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

A rulemaking has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on State or local governments. FMCSA analyzed this action in accordance with Executive Order 13132. The rule will not have a substantial direct effect on States or local governments, nor will it limit the policymaking discretion of States. Nothing in this rulemaking will preempt any State law or regulation.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this action.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires FMCSA to consider the impact of paperwork and other information collection burdens imposed on the public. This rule will result in a reduction of burden hours for the ''Inspection, Repair, and Maintenance'' information collection (IC) request, OMB control number 2126–0003. In this IC, the burden associated with DVIRs is calculated as a CMV driver activity without regard to the commodity or type of trailer, such as IME, that they are hauling. The current burden estimate was based on 4,679,682 CMVs generating 1,249,168,107 DVIRs per year. Those calculations also estimate that 95 percent of DVIRs do not note defects. The Agency will continue to use this estimate, rather than using the petitioners' estimate of 96 percent for IME DVIRs. The petitioners estimate that about 40 million IME in-gates requiring a DVIR occur each year (400,000 units of IME, 100 in-gates per unit of IME per year).

This IC includes all tasks related to inspection, repair, and maintenance, including two distinct driver tasks related to DVIRs: (1) Filling out a DVIR (IC2) and reviewing and signing a DVIR (IC6). Filling out a DVIR (IC2) is estimated to take 2.5 minutes and (2) reviewing and signing a DVIR (IC6) is estimated to take 5 seconds when no defects are noted. As noted above, approximately 40 million of the total 1.25 billion DVIRs completed by the industry are for IME. This rule results in a reduction of 1.583 million hours for IC2 (40 million IEP DVIR × 95 percent no defect rate × 150 seconds per DVIR ÷ 3600 seconds per hour) and 0.053 million hours for IC6 (40 million IEP DVIR × 95 percent no defect rate × 5 seconds per DVIR ÷ 3600 seconds per hour). The currently approved burden estimate for this entire IC is 59,729,888 hours, and the new burden estimate is 58,093,888 hours: a total burden reduction of 1.636 million hours per year. As this burden falls on drivers, the value of this time can be monetized using the prevailing wage for truck drivers. We use the median annual wage for BLS occupation category 53–3032 Heavy and Tractor-Trailer Truck Drivers from the May 2011 Occupational Employment and Wages report, the most recent available. The median wage for truck drivers from this report is $18.24 per hour, which we inflate by 52 percent to account for fringe benefits and 27 percent to account for overhead. This produces a total loaded hourly time value of $33, rounded to the nearest dollar (the exact amount is $32.65). Multiplying this figure by the burden hour reduction estimate of 1.636 million hours produces a monetized time cost savings of $53,988,000, or roughly $54 million.

National Environmental Policy Act and Clean Air Act

FMCSA analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1, issued March 1, 2004 (69 FR 9680), that this action does not have any effect on the quality of the environment. Therefore, this final rule is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1, paragraph 6(bb) of Appendix 2. The Categorical Exclusion under paragraph 6(y)(6) relates to ''regulations concerning vehicle operation safety standards,'' such as the driver-vehicle inspection reports addressed by this rulemaking. A Categorical Exclusion determination is available for inspection or copying in the *Regulations.gov* Web site listed under **ADDRESSES.**

FMCSA also analyzed this action under section 176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

In addition to the NEPA requirements to examine impacts on air quality, the CAA requires FMCSA to analyze the potential impact of its actions on air quality and to ensure that FMCSA actions conform to State and local air quality implementation plans. The additional contributions to air emissions are expected to fall within the CAA *de minimis* standards and are not expected to be subject to the Environmental Protection Agency's General Conformity Rule (40 CFR parts 51 and 93).

Executive Order 13211 (Energy Effects)

FMCSA analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA determined that it is not a ''significant energy action'' under that Executive Order because it is not economically significant and is not likely to have an adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 396

Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III, subchapter B, as follows:

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 1. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31132, 31133, 31136, 31144, 31151, and 31502; sec.

114, Pub. L. 103–311, 108 Stat. 1673, 1677–1678; secs. 212 and 217, Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 229, Pub. L. 106–159 (as transferred by. Sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743–1744); sec. 4136, Pub. L. 109–59, 119 Stat. 1144, 1745 and 49 CFR 1.73.

■ 2. Revise § 390.42(b) to read as follows:

§ 390.42 What are the responsibilities of drivers and motor carriers operating intermodal equipment?

* * * * *

(b) A driver or motor carrier transporting intermodal equipment must report to the intermodal equipment provider, or its designated agent, any known damage, defects, or deficiencies in the intermodal equipment at the time the equipment is returned to the provider or the provider's designated agent. The report must include, at a minimum, the items in § 396.11(a)(2) of this chapter.

PART 396—INSPECTION, REPAIR, AND MAINTENANCE

■ 3. The authority citation for part 396 is revised to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31151, and 31502; and 49 CFR 1.73.

■ 4. Revise § 396.11(a) and (b) to read as follows:

§ 396.11 Driver vehicle inspection report(s).

(a) *Equipment provided by motor carrier.* (1) *Report required.* Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated, except for intermodal equipment tendered by an intermodal equipment provider. The report shall cover at least the following parts and accessories:

(i) Service brakes including trailer brake connections;

(ii) Parking brake;

(iii) Steering mechanism;

(iv) Lighting devices and reflectors;

(v) Tires;

(vi) Horn;

(vii) Windshield wipers;

(viii) Rear vision mirrors;

(ix) Coupling devices;

(x) Wheels and rims;

(xi) Emergency equipment;

(2) *Report content.* The report shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. If no defect or deficiency is discovered by or reported to the driver, the report shall so indicate. In all instances, the driver shall sign the report. On two-driver operations, only one driver needs to sign the driver vehicle inspection report, provided both drivers agree as to the defects or deficiencies identified. If a driver operates more than one vehicle during the day, a report shall be prepared for each vehicle operated.

(3) *Corrective action.* (i) Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle.

(ii) Every motor carrier or its agent shall certify on the original driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again.

(4) *Retention period for reports.* Every motor carrier shall maintain the original driver vehicle inspection report, the certification of repairs, and the certification of the driver's review for three months from the date the written report was prepared.

(5) *Exceptions.* The rules in this section shall not apply to a private motor carrier of passengers (nonbusiness), a driveaway-towaway operation, or any motor carrier operating only one commercial motor vehicle.

(b) *Equipment provided by intermodal equipment provider.* (1) *Report required.* Every intermodal equipment provider must have a process to receive driver reports of, and each driver or motor carrier transporting intermodal equipment must report to the intermodal equipment provider or its designated agent, any known damage, defects, or deficiencies in the intermodal equipment at the time the equipment is returned to the provider or the provider's designated agent. The report must include, at a minimum, the following parts and accessories:

(i) Brakes;

(ii) Lighting devices, lamps, markers, and conspicuity marking material;

(iii) Wheels, rims, lugs, tires;

(iv) Air line connections, hoses, and couplers;

(v) King pin upper coupling device;

(vi) Rails or support frames;

(vii) Tie down bolsters;

(viii) Locking pins, clevises, clamps, or hooks;

(ix) Sliders or sliding frame lock;

(2) *Report content.* (i) Name of the motor carrier responsible for the operation of the intermodal equipment at the time the damage, defects, or deficiencies were discovered by, or reported to, the driver.

(ii) Motor carrier's USDOT number; intermodal equipment provider's USDOT number, and a unique identifying number for the item of intermodal equipment.

(iii) Date and time the report was submitted.

(iv) All damage, defects, or deficiencies of the intermodal equipment reported to the equipment provider and discovered by, or reported to, the motor carrier or its driver which would

(A) Affect the safety of operation of the intermodal equipment, or

(B) Result in its mechanical breakdown while transported on public roads

(v) The signature of the driver who prepared the report.

(3) *Corrective action.* (i) Prior to allowing or permitting a motor carrier to transport a piece of intermodal equipment for which a motor carrier or driver has submitted a report about damage, defects or deficiencies, each intermodal equipment provider or its agent must repair the reported damage, defects, or deficiencies that are likely to affect the safety of operation of the vehicle.

(ii) Each intermodal equipment provider or its agent must certify on the original driver's report which lists any damage, defects, or deficiencies of the intermodal equipment that the reported damage, defects, or deficiencies have been repaired, or that repair is unnecessary, before the vehicle is operated again.

(4) *Retention period for reports.* Each intermodal equipment provider must maintain all documentation required by this section, including the original driver report, the certification of repairs on all intermodal equipment, for a period of three months from the date that a motor carrier or its driver submits the report to the intermodal equipment provider or its agent.

■ 5. Revise § 396.12(b)(4) to read as follows:

§ 396.12 Procedures for intermodal equipment providers to accept reports required by § 390.42 (b) of this chapter.

* * * * *

(b) * * *

(4) All damage, defects, or deficiencies of the intermodal equipment must be reported to the equipment provider by the motor carrier or its driver. If no defect or deficiency in the intermodal equipment is discovered by or reported to the driver, no written report is required.

* * * * *

Issued on: June 5, 2012.

Anne S. Ferro,

Administrator, FMCSA.

[FR Doc. 2012–14215 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111213751–2102–02]

RIN 0648–XC064

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod for American Fisheries Act Catcher/Processors Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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 American Fisheries Act (AFA) trawl catcher/processors in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2012 Pacific cod total allowable catch specified for AFA trawl catcher/processors in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), June 10, 2012, through 2400 hrs, A.l.t., December 31, 2012.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (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.

The 2012 Pacific cod total allowable catch (TAC) allocated to AFA trawl catcher/processors in the BSAI is 5,361 metric tons (mt) as established by the final 2012 and 2013 harvest specifications for groundfish in the BSAI (77 FR 10669, February 23, 2012).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2012 Pacific cod TAC allocated to AFA trawl catcher/processors in the BSAI will be taken as incidental catch in the directed fishing for other species. Therefore, the Regional Administrator is establishing a directed fishing allowance of 0 mt and in accordance with § 679.20(d)(1)(iii), finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by AFA trawl catcher/processors in the BSAI.

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 Acting 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 closure of directed fishing for Pacific cod by AFA trawl catcher/processors in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of June 6, 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: June 7, 2012.

Carrie Selberg,

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

[FR Doc. 2012–14258 Filed 6–7–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 113
Tuesday, June 12, 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AM63

Prevailing Rate Systems; Special Wage Schedules for Nonappropriated Fund Automotive Mechanics

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management is issuing a proposed rule to establish special wage schedules for the Department of Defense's (DOD's) nonappropriated fund (NAF) automotive mechanics. These special wage schedules would replace the current commission pay practice covering DOD's NAF automotive mechanics with a flat rate pay system. Implementation of a flat rate pay system will better align the pay practice for compensating NAF automotive mechanics with current prevailing pay practices in the private sector.

DATES: We must receive comments on or before August 13, 2012.

ADDRESSES: Send or deliver comments to Jerome D. Mikowicz, Deputy Associate Director for Pay and Leave, Employee Services, U.S. Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415–8200; email *pay-leave-policy@opm.gov;* or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606–2838; email *pay-leave-policy@opm.gov;* or Fax: (202) 606–4264.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to establish special wage schedules for the Department of Defense's (DOD's) approximately 80 nonappropriated fund (NAF) automotive mechanics. These special wage schedules would replace the current commission pay practice covering DOD's NAF automotive mechanics with a flat rate pay system. Implementation of a flat rate pay system will better align the pay practice for compensating NAF automotive mechanics with current prevailing pay practices in the private sector.

Background

Since 1972, OPM (and its predecessor, the Civil Service Commission) has been responsible for overseeing the administration of the Federal Wage System (FWS), the pay system for the Federal Government's craft, trade, and laboring employees. The FWS is designed to provide common policies, practices, and job-grading standards for uniform application by all Federal agencies. While most FWS employees are paid according to their grade level from the regular wage schedule for their wage area, certain agency policies and practices, including the NAF pay practice for compensating automotive mechanics on a commission rate basis, continued as ''set-aside'' pay practices under the FWS. The set-aside pay practices were to be frozen in place until they could be reviewed by the Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees. These NAF set-aside pay practices are documented in appendix V of the OPM Operating Manual Federal Wage System—Nonappropriated Fund. Appendix V provides the schedules, employee coverage, basis for rates, evaluation plan, and schedule areas applicable under the NAF set-aside schedules.

DOD has requested that the current commission pay practices covering DOD's NAF automotive mechanics be replaced with a flat rate pay system. FPRAC reviewed and recommended that we adopt these changes by majority vote. These changes would be effective on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations.

Current Commission Pay Plan

The commission rate special schedules compensate automotive mechanics on the basis of a percentage of sales. Under the current commission pay plan, management controls the shop labor rate and determines the commission percentage. The automotive mechanic's pay is directly linked to sales generated. Any fluctuation up or down in the shop labor rate impacts the automotive mechanic's earnings.

Proposed Flat Rate Pay Plan

The proposed flat rate pay plan would not be linked to shop labor rates, but would instead take into account local prevailing rates, the mechanic's skill level, and the standard number of hours required to complete a particular job. Since the change would de-link shop labor rates from employee pay rates, it would permit NAF automotive businesses to adjust retail rates as needed without having to adjust employee pay rates.

Under the flat rate pay plan, DOD would conduct a special flat rate survey of similar jobs in the local area annually. An hourly flat rate would be established for each of the covered grades. The flat rate would be de-linked from the sale. Fluctuations up or down in the shop labor rate would not impact the automotive mechanic's earnings.

Employees Covered

NAF automotive mechanics who would be changed to a flat rate pay system are employees in pay plans NA, NL, and NS, series 5823, grades 8 through 10, who are currently paid based on commission. Employees currently being paid hourly rates would not be moved to the flat rate pay system; they will continue to receive hourly rates. No current employee will have his or her pay rate reduced as a result of implementing these new special schedules.

Effect on Employee Benefits

The flat rate pay plan would not change how premium pay, paid leave, and holidays are paid nor would it change the employee's retirement calculation.

FPRAC Oversight

The automotive mechanics flat rate pay plan would be re-evaluated by FPRAC every 3 years, beginning 3 years after OPM issues final regulations to implement the special wage schedules for NAF automotive mechanics. In preparation for this evaluation, OPM staff would prepare a report on the impact of the plan on recruitment, retention, and workers' earnings.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

Executive Order 13563 and Executive Order 12866

This proposed rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 13563 and Executive Order 12866.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; 532.707 also issued under 5 U.S.C. 552.

2. Subpart B is amended by adding § 532.287 to read as follows:

§ 532.287 Special wage schedules for nonappropriated fund automotive mechanics.

(a) The Department of Defense (DOD) will establish a flat rate pay system for nonappropriated fund (NAF) automotive mechanics. This flat rate pay system will take into account local prevailing rates, the mechanic's skill level, and the standard number of hours required to complete a particular job.

(b) DOD will issue special wage schedules for NAF automotive mechanics who are covered by the flat rate pay system. These special schedules will provide rates of pay for nonsupervisory, leader, and supervisory employees. These special schedule positions will be identified by pay plan codes XW (nonsupervisory), XY (leader), and XZ (supervisory), grades 8–10, and will use the Federal Wage System occupational code 5823.

(c) DOD will issue special wage schedules for NAF automotive mechanics based on annual special flat rate surveys of similar jobs conducted in each special schedule wage area.

(1) The survey area for these special surveys will include the same counties as the regular NAF survey area.

(2) The survey jobs used will be Automotive Worker and Automotive Mechanic.

(3) The special surveys will include data on automotive mechanics that are paid under private industry flat rate pay plans as well as those paid by commission.

(3) In addition to all standard North American Industry Classification System (NAICS) codes currently used on the regular surveys, the industries surveyed will include—

2007 NAICS codes	2007 NAICS industry titles
441110	New Car Dealers.
441310	Automotive Parts and Accessory Stores.
811111	General Automotive Repair.
811191	Automotive Oil Change and Lubrication Shops.

(4) The surveys will cover establishments with a total employment of eight or more.

(5) The special schedules for NAF automotive mechanics will be effective on the same dates as the regular wage schedules in the NAF FWS wage area.

(d) New employees will be hired at step 1 of the position under the flat rate pay system. Current employees will be moved to these special wage schedules on a step-by-step basis. Pay retention will apply to any employee whose rate of basic pay would otherwise be reduced as a result of placement in these new special schedules.

[FR Doc. 2012–14274 Filed 6–11–12; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[Doc. #AMS–CN–11–0091]

Cotton Board Rules and Regulations: Adjusting Supplemental Assessment on Imports (2011 Amendments)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) is proposing to amend the Cotton Board Rules and Regulations by increasing the value assigned to imported cotton for calculating supplemental assessments collected for use by the Cotton Research and Promotion Program. An amendment is required to adjust the assessments collected on imported cotton and the cotton content of imported products to be the same as those paid on domestically produced cotton. In addition, AMS proposes to change the Harmonized Tariff Schedule (HTS) statistical reporting numbers that were amended since the last assessment adjustment.

DATES: Comments must be received on or before July 12, 2012.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule to Shethir M. Riva, Chief, Research and Promotion Staff, Cotton and Tobacco Programs, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. Comments should be submitted in triplicate. Comments may also be submitted electronically through *www.regulations.gov*. All comments received will be made available for public inspection at Cotton and Tobacco Programs, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. A copy of this notice may be found at: *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Chief, Research and Promotion Staff, Cotton and Tobacco Programs, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov*.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This proposed rule would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Cotton Research and Promotion Act (7 U.S.C. 2101–2118) (Act) provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 12 of the Act, any person subject to an order may file with the Secretary of Agriculture (Secretary) a petition stating that the order, any provision of the plan, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition.

The Act provides that the District Court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling, provided a complaint is filed within 20 days from the date of the entry of ruling.

Background

Amendments to the Act were enacted by Congress under Subtitle G of Title XIX of the Food, Agriculture, Conservation, and Trade Act of 1990 (Pub. L. 101–624, 104 stat. 3909, November 28, 1990). These amendments contained two provisions that authorized changes in the funding procedures for the Cotton Research and Promotion Program.

These provisions are: (1) The assessment of imported cotton and cotton products; and (2) termination of the right of cotton producers to demand a refund of assessments.

As amended, the Cotton Research and Promotion Order (7 CFR part 1205) (Order) was approved by producers and importers voting in a referendum held July 17–26, 1991, and the amended Order was published in the **Federal Register** on December 10, 1991, (56 FR 64470). A proposed rule implementing the amended Order was published in the **Federal Register** on December 17, 1991, (56 FR 65450). Implementing rules were published on July 1 and 2, 1992, (57 FR 29181) and (57 FR 29431), respectively.

This proposed rule would increase the value assigned to imported cotton in the Cotton Board Rules and Regulations (7 CFR 1205.510(b)(2)). The total value is determined by a two-part assessment. The first part of the assessment is levied on the weight of cotton produced or imported at a rate of $1 per bale of cotton, which is equivalent to 500 pounds, or $1 per 226.8 kilograms of cotton. The second value is used to calculate the supplemental assessments on imported cotton and the cotton content of imported products. Supplemental assessments are levied at a rate of five-tenths of one percent of the value of domestically produced cotton, imported cotton, and the cotton content of imported products. The supplemental assessment is combined with the per bale equivalent to determine the total value and assessment of the imported cotton or cotton-containing products.

Section 1205.510(b)(2) of the Cotton Research and Promotion Rules and Regulations provides for assigning the calendar year weighted average price received by U.S. farmers for Upland cotton to represent the value of imported cotton. This is so that the assessment on domestically produced cotton and the assessment on imported cotton and the cotton content of imported products is the same. The source for the average price statistic is *Agricultural Prices,* a publication of the National Agricultural Statistics Service (NASS) of the Department of Agriculture. Use of the weighted average price figure in the calculation of supplemental assessments on imported cotton and the cotton content of imported products will yield an assessment that is the same as assessments paid on domestically produced cotton.

The current value of imported cotton as published in the **Federal Register** (76 FR 54078) for the purpose of calculating assessments on imported cotton is $0.012665 per kilogram. Using the Average Weighted Priced received by U.S. farmers for Upland cotton for the calendar year 2011, the new value of imported cotton is $0.014109 per kilogram.

An example of the complete assessment formula and how the figures are obtained is as follows:

One bale is equal to 500 pounds.

One kilogram equals 2.2046 pounds.

One pound equals 0.453597 kilograms.

One Dollar Per Bale Assessment Converted to Kilograms

A 500-pound bale equals 226.8 kg. (500 × .453597).

$1 per bale assessment equals $0.002000 per pound or $0.2000 cents per pound (1/500) or $0.004409 per kg or $0.4409 cents per kg. (1/226.8).

Supplemental Assessment of 5/10 of One Percent of the Value of the Cotton Converted to Kilograms

The 2011 calendar year weighted average price received by producers for Upland cotton is $0.880 per pound or $1.940 per kg. (0.880 × 2.2046).

Five tenths of one percent of the average price in kg. equals $0.009700 per kg. (1.940 × .005).

Total Assessment

The total assessment per kilogram of raw cotton is obtained by adding the $1 per bale equivalent assessment of $0.004409 per kg. and the supplemental assessment $0.009700 per kg. which equals $0.014109 per kg.

The current assessment on imported cotton is $0.012665 per kilogram of imported cotton. The proposed assessment is $0.014109, an increase of $0.001444 per kilogram. This increase reflects the increase in the Average Weighted Price of Upland Cotton Received by U.S. Farmers during the period January through December 2011.

Since the value of cotton is the basis of the supplemental assessment calculation and the figures shown in the right hand column of the Import Assessment Table in section 1205.510(b)(3) are a result of such a calculation, the figures in this table have been revised. These figures indicate the total assessment per kilogram due for each HTS numbers subject to assessment.

AMS also compared the current import assessment table with the U.S. International Trade Commission's (ITC) 2012 HTS and information from U.S. Customs and Border Protection and identified HTS statistical reporting numbers that have been removed.

A 30-day comment period is provided to comment on the changes to the Cotton Board Rules and Regulations proposed herein. This period is deemed appropriate because this proposal would increase the assessments paid by importers under the Cotton Research and Promotion Order. An amendment is required to adjust the assessments collected on imported cotton and the cotton content of imported products to be the same as those paid on domestically produced cotton. Accordingly, the change proposed in this rule, if adopted, should be implemented as soon as possible.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601–612], AMS has examined the economic impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such action so that small businesses will not be unduly or disproportionately burdened. The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (importers) as having receipts of no more than $7,000,000. In 2011, an estimated 17,000 importers are subject to the rules and regulations issued pursuant to the Cotton Research and Promotion Order. Most are considered small entities as defined by the Small Business Administration.

This proposed rule would only affect importers of cotton and cotton-containing products and would raise the assessments paid by the importers under the Cotton Research and Promotion Order. The current assessment on imported cotton is $0.012665 per kilogram of imported cotton. The proposed assessment is

$0.014109, which was calculated based on the 12-month average of monthly weighted average prices received by U.S. cotton farmers. Section 1205.510, ''Levy of assessments'', provides ''the rate of the supplemental assessment on imported cotton will be the same as that levied on cotton produced within the United States.'' In addition, section 1205.510 provides that the 12-month average of monthly weighted average prices received by U.S. farmers will be used as the value of imported cotton for the purpose of levying the supplemental assessment on imported cotton.

Under the Cotton Research and Promotion Program, assessments are used by the Cotton Board to finance research and promotion programs designed to increase consumer demand for Upland cotton in the United States and international markets. In 2010 (the last audited year), producer assessments totaled $46.5 million and importer assessments totaled $38.1 million. According to the Cotton Board, should the volume of cotton products imported into the U.S. remain at the same level in 2011, one could expect the increased assessment to generate approximately $8,309,158 in additional revenue.

Importers with line-items appearing on U.S. Customs and Border Protection documentation with value of the cotton contained therein results of an assessment of two dollars ($2.00) or less will not be subject to assessments. In addition, imported cotton and products may be exempt from assessment if the cotton content of products is U.S. produced, cotton other than Upland, or imported products that are eligible to be labeled as 100 percent organic under the National Organic Program (7 CFR part 205) and who is not a split operation.

There are no Federal rules that duplicate, overlap, or conflict with this rule.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act (PRA) (44 U.S.C. Chapter 35) the information collection requirements contained in the regulation to be amended have been previously approved by OMB and were assigned control number 0581–0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved.

List of Subjects in 7 CFR Part 1205

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

For the reasons set forth in the preamble 7 CFR Part 1205 is proposed to be amended as follows:

PART 1205—COTTON RESEARCH AND PROMOTION

1. The authority citation for Part 1205 continues to read as follows:

Authority: 7 U.S.C. 2101–2118.

2. In § 1205.510, paragraph (b)(2) and the table in paragraph (b)(3)(ii) are revised to read as follows:

§ 1205.510 Levy of assessments.

* * * * *

(b) * * *

(2) The 12-month average of monthly weighted average prices received by U.S. farmers will be calculated annually. Such weighted average will be used as the value of imported cotton for the purpose of levying the supplemental assessment on imported cotton and will be expressed in kilograms. The value of imported cotton for the purpose of levying this supplemental assessment is $1.4109 cents per kilogram.

(3) * * *

(ii) * * *

IMPORT ASSESSMENT TABLE

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5007106010	0.2713	0.3828
5007106020	0.2713	0.3828
5007906010	0.2713	0.3828
5007906020	0.2713	0.3828
5112904000	0.1085	0.1531
5112905000	0.1085	0.1531
5112909010	0.1085	0.1531
5112909090	0.1085	0.1531
5201000500	0	1.4109
5201001200	0	1.4109
5201001400	0	1.4109
5201001800	0	1.4109
5201002200	0	1.4109
5201002400	0	1.4109
5201002800	0	1.4109
5201003400	0	1.4109
5201003800	0	1.4109
5204110000	1.0526	1.4852
5204190000	0.6316	0.8911
5204200000	1.0526	1.4852
5205111000	1.0000	1.4109
5205112000	1.0000	1.4109
5205121000	1.0000	1.4109
5205122000	1.0000	1.4109
5205131000	1.0000	1.4109
5205132000	1.0000	1.4109
5205141000	1.0000	1.4109
5205142000	1.0000	1.4109
5205151000	1.0000	1.4109
5205152000	1.0000	1.4109
5205210020	1.0440	1.4729
5205210090	1.0440	1.4729
5205220020	1.0440	1.4729
5205220090	1.0440	1.4729
5205230020	1.0440	1.4729
5205230090	1.0440	1.4729

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5205240020	1.0440	1.4729
5205240090	1.0440	1.4729
5205260020	1.0440	1.4729
5205260090	1.0440	1.4729
5205270020	1.0440	1.4729
5205270090	1.0440	1.4729
5205280020	1.0440	1.4729
5205280090	1.0440	1.4729
5205310000	1.0000	1.4109
5205320000	1.0000	1.4109
5205330000	1.0000	1.4109
5205340000	1.0000	1.4109
5205350000	1.0000	1.4109
5205410020	1.0440	1.4729
5205410090	1.0440	1.4729
5205420021	1.0440	1.4729
5205420029	1.0440	1.4729
5205420090	1.0440	1.4729
5205430021	1.0440	1.4729
5205430029	1.0440	1.4729
5205430090	1.0440	1.4729
5205440021	1.0440	1.4729
5205440029	1.0440	1.4729
5205440090	1.0440	1.4729
5205460021	1.0440	1.4729
5205460029	1.0440	1.4729
5205460090	1.0440	1.4729
5205470021	1.0440	1.4729
5205470029	1.0440	1.4729
5205470090	1.0440	1.4729
5205480020	1.0440	1.4729
5205480090	1.0440	1.4729
5206110000	0.7368	1.0396
5206120000	0.7368	1.0396
5206130000	0.7368	1.0396
5206140000	0.7368	1.0396
5206150000	0.7368	1.0396
5206210000	0.7692	1.0853
5206220000	0.7692	1.0853
5206230000	0.7692	1.0853
5206240000	0.7692	1.0853
5206250000	0.7692	1.0853
5206310000	0.7368	1.0396
5206320000	0.7368	1.0396
5206330000	0.7368	1.0396
5206340000	0.7368	1.0396
5206350000	0.7368	1.0396
5206410000	0.7692	1.0853
5206420000	0.7692	1.0853
5206430000	0.7692	1.0853
5206440000	0.7692	1.0853
5206450000	0.7692	1.0853
5207100000	0.9474	1.3366
5207900000	0.6316	0.8911
5208112020	1.0852	1.5311
5208112040	1.0852	1.5311
5208112090	1.0852	1.5311
5208114020	1.0852	1.5311
5208114040	1.0852	1.5311
5208114060	1.0852	1.5311
5208114090	1.0852	1.5311
5208116000	1.0852	1.5311
5208118020	1.0852	1.5311
5208118090	1.0852	1.5311
5208124020	1.0852	1.5311
5208124040	1.0852	1.5311
5208124090	1.0852	1.5311
5208126020	1.0852	1.5311
5208126040	1.0852	1.5311

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5208126060	1.0852	1.5311
5208126090	1.0852	1.5311
5208128020	1.0852	1.5311
5208128090	1.0852	1.5311
5208130000	1.0852	1.5311
5208192020	1.0852	1.5311
5208192090	1.0852	1.5311
5208194020	1.0852	1.5311
5208194090	1.0852	1.5311
5208196020	1.0852	1.5311
5208196090	1.0852	1.5311
5208198020	1.0852	1.5311
5208198090	1.0852	1.5311
5208212020	1.0852	1.5311
5208212040	1.0852	1.5311
5208212090	1.0852	1.5311
5208214020	1.0852	1.5311
5208214040	1.0852	1.5311
5208214060	1.0852	1.5311
5208214090	1.0852	1.5311
5208216020	1.0852	1.5311
5208216090	1.0852	1.5311
5208224020	1.0852	1.5311
5208224040	1.0852	1.5311
5208224090	1.0852	1.5311
5208226020	1.0852	1.5311
5208226040	1.0852	1.5311
5208226060	1.0852	1.5311
5208226090	1.0852	1.5311
5208228020	1.0852	1.5311
5208228090	1.0852	1.5311
5208230000	1.0852	1.5311
5208292020	1.0852	1.5311
5208292090	1.0852	1.5311
5208294020	1.0852	1.5311
5208294090	1.0852	1.5311
5208296020	1.0852	1.5311
5208296090	1.0852	1.5311
5208298020	1.0852	1.5311
5208298090	1.0852	1.5311
5208312000	1.0852	1.5311
5208314020	1.0852	1.5311
5208314040	1.0852	1.5311
5208314090	1.0852	1.5311
5208316020	1.0852	1.5311
5208316040	1.0852	1.5311
5208316060	1.0852	1.5311
5208316090	1.0852	1.5311
5208318020	1.0852	1.5311
5208318090	1.0852	1.5311
5208321000	1.0852	1.5311
5208323020	1.0852	1.5311
5208323040	1.0852	1.5311
5208323090	1.0852	1.5311
5208324020	1.0852	1.5311
5208324040	1.0852	1.5311
5208324060	1.0852	1.5311
5208324090	1.0852	1.5311
5208325020	1.0852	1.5311
5208325090	1.0852	1.5311
5208330000	1.0852	1.5311
5208392020	1.0852	1.5311
5208392090	1.0852	1.5311
5208394020	1.0852	1.5311
5208394090	1.0852	1.5311
5208396020	1.0852	1.5311
5208396090	1.0852	1.5311
5208398020	1.0852	1.5311
5208398090	1.0852	1.5311

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5208412000	1.0852	1.5311
5208414000	1.0852	1.5311
5208416000	1.0852	1.5311
5208418000	1.0852	1.5311
5208421000	1.0852	1.5311
5208423000	1.0852	1.5311
5208424000	1.0852	1.5311
5208425000	1.0852	1.5311
5208430000	1.0852	1.5311
5208492000	1.0852	1.5311
5208494010	1.0852	1.5311
5208494020	1.0852	1.5311
5208494090	1.0852	1.5311
5208496010	1.0852	1.5311
5208496020	1.0852	1.5311
5208496030	1.0852	1.5311
5208496090	1.0852	1.5311
5208498020	1.0852	1.5311
5208498090	1.0852	1.5311
5208512000	1.0852	1.5311
5208514020	1.0852	1.5311
5208514040	1.0852	1.5311
5208514090	1.0852	1.5311
5208516020	1.0852	1.5311
5208516040	1.0852	1.5311
5208516060	1.0852	1.5311
5208516090	1.0852	1.5311
5208518020	1.0852	1.5311
5208518090	1.0852	1.5311
5208521000	1.0852	1.5311
5208523020	1.0852	1.5311
5208523035	1.0852	1.5311
5208523045	1.0852	1.5311
5208523090	1.0852	1.5311
5208524020	1.0852	1.5311
5208524035	1.0852	1.5311
5208524045	1.0852	1.5311
5208524055	1.0852	1.5311
5208524065	1.0852	1.5311
5208524090	1.0852	1.5311
5208525020	1.0852	1.5311
5208525090	1.0852	1.5311
5208591000	1.0852	1.5311
5208592015	1.0852	1.5311
5208592025	1.0852	1.5311
5208592085	1.0852	1.5311
5208592095	1.0852	1.5311
5208594020	1.0852	1.5311
5208594090	1.0852	1.5311
5208596020	1.0852	1.5311
5208596090	1.0852	1.5311
5208598020	1.0852	1.5311
5208598090	1.0852	1.5311
5209110020	1.0309	1.4545
5209110025	1.0309	1.4545
5209110035	1.0309	1.4545
5209110050	1.0309	1.4545
5209110090	1.0309	1.4545
5209120020	1.0309	1.4545
5209120040	1.0309	1.4545
5209190020	1.0309	1.4545
5209190040	1.0309	1.4545
5209190060	1.0309	1.4545
5209190090	1.0309	1.4545
5209210020	1.0309	1.4545
5209210025	1.0309	1.4545
5209210035	1.0309	1.4545
5209210050	1.0309	1.4545
5209210090	1.0309	1.4545

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5209220020	1.0309	1.4545
5209220040	1.0309	1.4545
5209290020	1.0309	1.4545
5209290040	1.0309	1.4545
5209290060	1.0309	1.4545
5209290090	1.0309	1.4545
5209313000	1.0309	1.4545
5209316020	1.0309	1.4545
5209316025	1.0309	1.4545
5209316035	1.0309	1.4545
5209316050	1.0309	1.4545
5209316090	1.0309	1.4545
5209320020	1.0309	1.4545
5209320040	1.0309	1.4545
5209390020	1.0309	1.4545
5209390040	1.0309	1.4545
5209390060	1.0309	1.4545
5209390080	1.0309	1.4545
5209390090	1.0309	1.4545
5209413000	1.0309	1.4545
5209416020	1.0309	1.4545
5209416040	1.0309	1.4545
5209420020	0.9767	1.3780
5209420040	0.9767	1.3780
5209420060	0.9767	1.3780
5209420080	0.9767	1.3780
5209430030	1.0309	1.4545
5209430050	1.0309	1.4545
5209490020	1.0309	1.4545
5209490040	1.0309	1.4545
5209490090	1.0309	1.4545
5209513000	1.0309	1.4545
5209516015	1.0852	1.5311
5209516025	1.0852	1.5311
5209516032	1.0852	1.5311
5209516035	1.0852	1.5311
5209516050	1.0852	1.5311
5209516090	1.0852	1.5311
5209520020	1.0852	1.5311
5209520040	1.0852	1.5311
5209590015	1.0852	1.5311
5209590025	1.0852	1.5311
5209590040	1.0852	1.5311
5209590060	1.0852	1.5311
5209590090	1.0852	1.5311
5210114020	0.6511	0.9187
5210114040	0.6511	0.9187
5210114090	0.6511	0.9187
5210116020	0.6511	0.9187
5210116040	0.6511	0.9187
5210116060	0.6511	0.9187
5210116090	0.6511	0.9187
5210118020	0.6511	0.9187
5210118090	0.6511	0.9187
5210191000	0.6511	0.9187
5210192020	0.6511	0.9187
5210192090	0.6511	0.9187
5210194020	0.6511	0.9187
5210194090	0.6511	0.9187
5210196020	0.6511	0.9187
5210196090	0.6511	0.9187
5210198020	0.6511	0.9187
5210198090	0.6511	0.9187
5210214020	0.6511	0.9187
5210214040	0.6511	0.9187
5210214090	0.6511	0.9187
5210216020	0.6511	0.9187
5210216040	0.6511	0.9187
5210216060	0.6511	0.9187

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5210216090	0.6511	0.9187
5210218020	0.6511	0.9187
5210218090	0.6511	0.9187
5210291000	0.6511	0.9187
5210292020	0.6511	0.9187
5210292090	0.6511	0.9187
5210294020	0.6511	0.9187
5210294090	0.6511	0.9187
5210296020	0.6511	0.9187
5210296090	0.6511	0.9187
5210298020	0.6511	0.9187
5210298090	0.6511	0.9187
5210314020	0.6511	0.9187
5210314040	0.6511	0.9187
5210314090	0.6511	0.9187
5210316020	0.6511	0.9187
5210316040	0.6511	0.9187
5210316060	0.6511	0.9187
5210316090	0.6511	0.9187
5210318020	0.6511	0.9187
5210318090	0.6511	0.9187
5210320000	0.6511	0.9187
5210392020	0.6511	0.9187
5210392090	0.6511	0.9187
5210394020	0.6511	0.9187
5210394090	0.6511	0.9187
5210396020	0.6511	0.9187
5210396090	0.6511	0.9187
5210398020	0.6511	0.9187
5210398090	0.6511	0.9187
5210414000	0.6511	0.9187
5210416000	0.6511	0.9187
5210418000	0.6511	0.9187
5210491000	0.6511	0.9187
5210492000	0.6511	0.9187
5210494010	0.6511	0.9187
5210494020	0.6511	0.9187
5210494090	0.6511	0.9187
5210496010	0.6511	0.9187
5210496020	0.6511	0.9187
5210496090	0.6511	0.9187
5210498020	0.6511	0.9187
5210498090	0.6511	0.9187
5210514020	0.6511	0.9187
5210514040	0.6511	0.9187
5210514090	0.6511	0.9187
5210516020	0.6511	0.9187
5210516040	0.6511	0.9187
5210516060	0.6511	0.9187
5210516090	0.6511	0.9187
5210518020	0.6511	0.9187
5210518090	0.6511	0.9187
5210591000	0.6511	0.9187
5210592020	0.6511	0.9187
5210592090	0.6511	0.9187
5210594020	0.6511	0.9187
5210594090	0.6511	0.9187
5210596020	0.6511	0.9187
5210596090	0.6511	0.9187
5210598020	0.6511	0.9187
5210598090	0.6511	0.9187
5211110020	0.6511	0.9187
5211110025	0.6511	0.9187
5211110035	0.6511	0.9187
5211110050	0.6511	0.9187
5211110090	0.6511	0.9187
5211120020	0.6511	0.9187
5211120040	0.6511	0.9187
5211190020	0.6511	0.9187

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5211190040	0.6511	0.9187
5211190060	0.6511	0.9187
5211190090	0.6511	0.9187
5211202120	0.6511	0.9187
5211202125	0.6511	0.9187
5211202135	0.6511	0.9187
5211202150	0.6511	0.9187
5211202190	0.6511	0.9187
5211202220	0.6511	0.9187
5211202240	0.6511	0.9187
5211202920	0.6511	0.9187
5211202940	0.6511	0.9187
5211202960	0.6511	0.9187
5211202990	0.6511	0.9187
5211310020	0.6511	0.9187
5211310025	0.6511	0.9187
5211310035	0.6511	0.9187
5211310050	0.6511	0.9187
5211310090	0.6511	0.9187
5211320020	0.6511	0.9187
5211320040	0.6511	0.9187
5211390020	0.6511	0.9187
5211390040	0.6511	0.9187
5211390060	0.6511	0.9187
5211390090	0.6511	0.9187
5211410020	0.6511	0.9187
5211410040	0.6511	0.9187
5211420020	0.7054	0.9952
5211420040	0.7054	0.9952
5211420060	0.6511	0.9187
5211420080	0.6511	0.9187
5211430030	0.6511	0.9187
5211430050	0.6511	0.9187
5211490020	0.6511	0.9187
5211490090	0.6511	0.9187
5211510020	0.6511	0.9187
5211510030	0.6511	0.9187
5211510050	0.6511	0.9187
5211510090	0.6511	0.9187
5211520020	0.6511	0.9187
5211520040	0.6511	0.9187
5211590015	0.6511	0.9187
5211590025	0.6511	0.9187
5211590040	0.6511	0.9187
5211590060	0.6511	0.9187
5211590090	0.6511	0.9187
5212111010	0.5845	0.8247
5212111020	0.6231	0.8791
5212116010	0.8681	1.2249
5212116020	0.8681	1.2249
5212116030	0.8681	1.2249
5212116040	0.8681	1.2249
5212116050	0.8681	1.2249
5212116060	0.8681	1.2249
5212116070	0.8681	1.2249
5212116080	0.8681	1.2249
5212116090	0.8681	1.2249
5212121010	0.5845	0.8247
5212121020	0.6231	0.8791
5212126010	0.8681	1.2249
5212126020	0.8681	1.2249
5212126030	0.8681	1.2249
5212126040	0.8681	1.2249
5212126050	0.8681	1.2249
5212126060	0.8681	1.2249
5212126070	0.8681	1.2249
5212126080	0.8681	1.2249
5212126090	0.8681	1.2249
5212131010	0.5845	0.8247

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5212131020	0.6231	0.8791
5212136010	0.8681	1.2249
5212136020	0.8681	1.2249
5212136030	0.8681	1.2249
5212136040	0.8681	1.2249
5212136050	0.8681	1.2249
5212136060	0.8681	1.2249
5212136070	0.8681	1.2249
5212136080	0.8681	1.2249
5212136090	0.8681	1.2249
5212141010	0.5845	0.8247
5212141020	0.6231	0.8791
5212146010	0.8681	1.2249
5212146020	0.8681	1.2249
5212146030	0.8681	1.2249
5212146090	0.8681	1.2249
5212151010	0.5845	0.8247
5212151020	0.6231	0.8791
5212156010	0.8681	1.2249
5212156020	0.8681	1.2249
5212156030	0.8681	1.2249
5212156040	0.8681	1.2249
5212156050	0.8681	1.2249
5212156060	0.8681	1.2249
5212156070	0.8681	1.2249
5212156080	0.8681	1.2249
5212156090	0.8681	1.2249
5212211010	0.5845	0.8247
5212211020	0.6231	0.8791
5212216010	0.8681	1.2249
5212216020	0.8681	1.2249
5212216030	0.8681	1.2249
5212216040	0.8681	1.2249
5212216050	0.8681	1.2249
5212216060	0.8681	1.2249
5212216090	0.8681	1.2249
5212221010	0.5845	0.8247
5212221020	0.6231	0.8791
5212226010	0.8681	1.2249
5212226020	0.8681	1.2249
5212226030	0.8681	1.2249
5212226040	0.8681	1.2249
5212226050	0.8681	1.2249
5212226060	0.8681	1.2249
5212226090	0.8681	1.2249
5212231010	0.5845	0.8247
5212231020	0.6231	0.8791
5212236010	0.8681	1.2249
5212236020	0.8681	1.2249
5212236030	0.8681	1.2249
5212236040	0.8681	1.2249
5212236050	0.8681	1.2249
5212236060	0.8681	1.2249
5212236090	0.8681	1.2249
5212241010	0.5845	0.8247
5212241020	0.6231	0.8791
5212246010	0.8681	1.2249
5212246020	0.7054	0.9952
5212246030	0.8681	1.2249
5212246040	0.8681	1.2249
5212246090	0.8681	1.2249
5212251010	0.5845	0.8247
5212251020	0.6231	0.8791
5212256010	0.8681	1.2249
5212256020	0.8681	1.2249
5212256030	0.8681	1.2249
5212256040	0.8681	1.2249
5212256050	0.8681	1.2249
5212256060	0.8681	1.2249

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5212256090	0.8681	1.2249
5309213005	0.5426	0.7655
5309213010	0.5426	0.7655
5309213015	0.5426	0.7655
5309213020	0.5426	0.7655
5309214010	0.2713	0.3828
5309214090	0.2713	0.3828
5309293005	0.5426	0.7655
5309293010	0.5426	0.7655
5309293015	0.5426	0.7655
5309293020	0.5426	0.7655
5309294010	0.2713	0.3828
5309294090	0.2713	0.3828
5311003005	0.5426	0.7655
5311003010	0.5426	0.7655
5311003015	0.5426	0.7655
5311003020	0.5426	0.7655
5311004010	0.8681	1.2249
5311004020	0.8681	1.2249
5407810010	0.5426	0.7655
5407810020	0.5426	0.7655
5407810030	0.5426	0.7655
5407810040	0.5426	0.7655
5407810090	0.5426	0.7655
5407820010	0.5426	0.7655
5407820020	0.5426	0.7655
5407820030	0.5426	0.7655
5407820040	0.5426	0.7655
5407820090	0.5426	0.7655
5407830010	0.5426	0.7655
5407830020	0.5426	0.7655
5407830030	0.5426	0.7655
5407830040	0.5426	0.7655
5407830090	0.5426	0.7655
5407840010	0.5426	0.7655
5407840020	0.5426	0.7655
5407840030	0.5426	0.7655
5407840040	0.5426	0.7655
5407840090	0.5426	0.7655
5509210000	0.1053	0.1485
5509220010	0.1053	0.1485
5509220090	0.1053	0.1485
5509530030	0.3158	0.4455
5509530060	0.3158	0.4455
5509620000	0.5263	0.7426
5509920000	0.5263	0.7426
5510300000	0.3684	0.5198
5511200000	0.3158	0.4455
5512110010	0.1085	0.1531
5512110022	0.1085	0.1531
5512110027	0.1085	0.1531
5512110030	0.1085	0.1531
5512110040	0.1085	0.1531
5512110050	0.1085	0.1531
5512110060	0.1085	0.1531
5512110070	0.1085	0.1531
5512110090	0.1085	0.1531
5512190005	0.1085	0.1531
5512190010	0.1085	0.1531
5512190015	0.1085	0.1531
5512190022	0.1085	0.1531
5512190027	0.1085	0.1531
5512190030	0.1085	0.1531
5512190035	0.1085	0.1531
5512190040	0.1085	0.1531
5512190045	0.1085	0.1531
5512190050	0.1085	0.1531
5512190090	0.1085	0.1531
5512210010	0.0326	0.0459

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5512210020	0.0326	0.0459
5512210030	0.0326	0.0459
5512210040	0.0326	0.0459
5512210060	0.0326	0.0459
5512210070	0.0326	0.0459
5512210090	0.0326	0.0459
5512290010	0.2170	0.3062
5512910010	0.0543	0.0766
5512990005	0.0543	0.0766
5512990010	0.0543	0.0766
5512990015	0.0543	0.0766
5512990020	0.0543	0.0766
5512990025	0.0543	0.0766
5512990030	0.0543	0.0766
5512990035	0.0543	0.0766
5512990040	0.0543	0.0766
5512990045	0.0543	0.0766
5512990090	0.0543	0.0766
5513110020	0.3581	0.5053
5513110040	0.3581	0.5053
5513110060	0.3581	0.5053
5513110090	0.3581	0.5053
5513120000	0.3581	0.5053
5513130020	0.3581	0.5053
5513130040	0.3581	0.5053
5513130090	0.3581	0.5053
5513190010	0.3581	0.5053
5513190020	0.3581	0.5053
5513190030	0.3581	0.5053
5513190040	0.3581	0.5053
5513190050	0.3581	0.5053
5513190060	0.3581	0.5053
5513190090	0.3581	0.5053
5513210020	0.3581	0.5053
5513210040	0.3581	0.5053
5513210060	0.3581	0.5053
5513210090	0.3581	0.5053
5513230121	0.3581	0.5053
5513230141	0.3581	0.5053
5513230191	0.3581	0.5053
5513290010	0.3581	0.5053
5513290020	0.3581	0.5053
5513290030	0.3581	0.5053
5513290040	0.3581	0.5053
5513290050	0.3581	0.5053
5513290060	0.3581	0.5053
5513290090	0.3581	0.5053
5513310000	0.3581	0.5053
5513390011	0.3581	0.5053
5513390015	0.3581	0.5053
5513390091	0.3581	0.5053
5513410020	0.3581	0.5053
5513410040	0.3581	0.5053
5513410060	0.3581	0.5053
5513410090	0.3581	0.5053
5513491000	0.3581	0.5053
5513492020	0.3581	0.5053
5513492040	0.3581	0.5053
5513492090	0.3581	0.5053
5513499010	0.3581	0.5053
5513499020	0.3581	0.5053
5513499030	0.3581	0.5053
5513499040	0.3581	0.5053
5513499050	0.3581	0.5053
5513499060	0.3581	0.5053
5513499090	0.3581	0.5053
5514110020	0.4341	0.6124
5514110030	0.4341	0.6124
5514110050	0.4341	0.6124

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5514110090	0.4341	0.6124
5514120020	0.4341	0.6124
5514120040	0.4341	0.6124
5514191020	0.4341	0.6124
5514191040	0.4341	0.6124
5514191090	0.4341	0.6124
5514199010	0.4341	0.6124
5514199020	0.4341	0.6124
5514199030	0.4341	0.6124
5514199040	0.4341	0.6124
5514199090	0.4341	0.6124
5514210020	0.4341	0.6124
5514210030	0.4341	0.6124
5514210050	0.4341	0.6124
5514210090	0.4341	0.6124
5514220020	0.4341	0.6124
5514220040	0.4341	0.6124
5514230020	0.4341	0.6124
5514230040	0.4341	0.6124
5514230090	0.4341	0.6124
5514290010	0.4341	0.6124
5514290020	0.4341	0.6124
5514290030	0.4341	0.6124
5514290040	0.4341	0.6124
5514290090	0.4341	0.6124
5514303100	0.4341	0.6124
5514303210	0.4341	0.6124
5514303215	0.4341	0.6124
5514303280	0.4341	0.6124
5514303310	0.4341	0.6124
5514303390	0.4341	0.6124
5514303910	0.4341	0.6124
5514303920	0.4341	0.6124
5514303990	0.4341	0.6124
5514410020	0.4341	0.6124
5514410030	0.4341	0.6124
5514410050	0.4341	0.6124
5514410090	0.4341	0.6124
5514420020	0.4341	0.6124
5514420040	0.4341	0.6124
5514430020	0.4341	0.6124
5514430040	0.4341	0.6124
5514430090	0.4341	0.6124
5514490010	0.4341	0.6124
5514490020	0.4341	0.6124
5514490030	0.4341	0.6124
5514490040	0.4341	0.6124
5514490090	0.4341	0.6124
5515110005	0.1085	0.1531
5515110010	0.1085	0.1531
5515110015	0.1085	0.1531
5515110020	0.1085	0.1531
5515110025	0.1085	0.1531
5515110030	0.1085	0.1531
5515110035	0.1085	0.1531
5515110040	0.1085	0.1531
5515110045	0.1085	0.1531
5515110090	0.1085	0.1531
5515120010	0.1085	0.1531
5515120022	0.1085	0.1531
5515120027	0.1085	0.1531
5515120030	0.1085	0.1531
5515120040	0.1085	0.1531
5515120090	0.1085	0.1531
5515190005	0.1085	0.1531
5515190010	0.1085	0.1531
5515190015	0.1085	0.1531
5515190020	0.1085	0.1531
5515190025	0.1085	0.1531

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5515190030	0.1085	0.1531
5515190035	0.1085	0.1531
5515190040	0.1085	0.1531
5515190045	0.1085	0.1531
5515190090	0.1085	0.1531
5515290005	0.1085	0.1531
5515290010	0.1085	0.1531
5515290015	0.1085	0.1531
5515290020	0.1085	0.1531
5515290025	0.1085	0.1531
5515290030	0.1085	0.1531
5515290035	0.1085	0.1531
5515290040	0.1085	0.1531
5515290045	0.1085	0.1531
5515290090	0.1085	0.1531
5515999005	0.1085	0.1531
5515999010	0.1085	0.1531
5515999015	0.1085	0.1531
5515999020	0.1085	0.1531
5515999025	0.1085	0.1531
5515999030	0.1085	0.1531
5515999035	0.1085	0.1531
5515999040	0.1085	0.1531
5515999045	0.1085	0.1531
5515999090	0.1085	0.1531
5516210010	0.1085	0.1531
5516210020	0.1085	0.1531
5516210030	0.1085	0.1531
5516210040	0.1085	0.1531
5516210090	0.1085	0.1531
5516220010	0.1085	0.1531
5516220020	0.1085	0.1531
5516220030	0.1085	0.1531
5516220040	0.1085	0.1531
5516220090	0.1085	0.1531
5516230010	0.1085	0.1531
5516230020	0.1085	0.1531
5516230030	0.1085	0.1531
5516230040	0.1085	0.1531
5516230090	0.1085	0.1531
5516240010	0.1085	0.1531
5516240020	0.1085	0.1531
5516240030	0.1085	0.1531
5516240040	0.1085	0.1531
5516240085	0.1085	0.1531
5516240095	0.1085	0.1531
5516410010	0.3798	0.5359
5516410022	0.3798	0.5359
5516410027	0.3798	0.5359
5516410030	0.3798	0.5359
5516410040	0.3798	0.5359
5516410050	0.3798	0.5359
5516410060	0.3798	0.5359
5516410070	0.3798	0.5359
5516410090	0.3798	0.5359
5516420010	0.3798	0.5359
5516420022	0.3798	0.5359
5516420027	0.3798	0.5359
5516420030	0.3798	0.5359
5516420040	0.3798	0.5359
5516420050	0.3798	0.5359
5516420060	0.3798	0.5359
5516420070	0.3798	0.5359
5516420090	0.3798	0.5359
5516430010	0.2170	0.3062
5516430015	0.3798	0.5359
5516430020	0.3798	0.5359
5516430035	0.3798	0.5359
5516430080	0.3798	0.5359

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5516440010	0.3798	0.5359
5516440022	0.3798	0.5359
5516440027	0.3798	0.5359
5516440030	0.3798	0.5359
5516440040	0.3798	0.5359
5516440050	0.3798	0.5359
5516440060	0.3798	0.5359
5516440070	0.3798	0.5359
5516440090	0.3798	0.5359
5516910010	0.0543	0.0766
5516910020	0.0543	0.0766
5516910030	0.0543	0.0766
5516910040	0.0543	0.0766
5516910050	0.0543	0.0766
5516910060	0.0543	0.0766
5516910070	0.0543	0.0766
5516910090	0.0543	0.0766
5516920010	0.0543	0.0766
5516920020	0.0543	0.0766
5516920030	0.0543	0.0766
5516920040	0.0543	0.0766
5516920050	0.0543	0.0766
5516920060	0.0543	0.0766
5516920070	0.0543	0.0766
5516920090	0.0543	0.0766
5516930010	0.0543	0.0766
5516930020	0.0543	0.0766
5516930090	0.0543	0.0766
5516940010	0.0543	0.0766
5516940020	0.0543	0.0766
5516940030	0.0543	0.0766
5516940040	0.0543	0.0766
5516940050	0.0543	0.0766
5516940060	0.0543	0.0766
5516940070	0.0543	0.0766
5516940090	0.0543	0.0766
5601210010	0.9767	1.3780
5601210090	0.9767	1.3780
5601220010	0.9767	1.3780
5601220090	0.9767	1.3780
5601300000	0.3256	0.4593
5602101000	0.0543	0.0766
5602109090	0.4341	0.6124
5602290000	0.4341	0.6124
5602906000	0.5426	0.7656
5602909000	0.3256	0.4593
5603143000	0.2713	0.3828
5603910010	0.0217	0.0306
5603910090	0.0651	0.0919
5603920010	0.0217	0.0306
5603920090	0.0651	0.0919
5603930010	0.0217	0.0306
5603930090	0.0651	0.0919
5603941090	0.3256	0.4593
5603943000	0.1628	0.2297
5603949010	0.0326	0.0459
5604100000	0.2632	0.3713
5604909000	0.2105	0.2970
5605009000	0.1579	0.2228
5606000010	0.1263	0.1782
5606000090	0.1263	0.1782
5607502500	0.1684	0.2376
5607909000	0.8421	1.1881
5608901000	1.0852	1.5311
5608902300	0.6316	0.8911
5608902700	0.6316	0.8911
5608903000	0.3158	0.4455
5609001000	0.8421	1.1881
5609004000	0.2105	0.2970

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5701101300	0.0526	0.0743
5701101600	0.0526	0.0743
5701104000	0.0526	0.0743
5701109000	0.0526	0.0743
5701901010	1.0000	1.4109
5701901020	1.0000	1.4109
5701901030	0.0526	0.0743
5701901090	0.0526	0.0743
5701902010	0.9474	1.3366
5701902020	0.9474	1.3366
5701902030	0.0526	0.0743
5701902090	0.0526	0.0743
5702101000	0.0447	0.0631
5702109010	0.0447	0.0631
5702109020	0.8500	1.1993
5702109030	0.0447	0.0631
5702109090	0.0447	0.0631
5702201000	0.0447	0.0631
5702311000	0.0447	0.0631
5702312000	0.0895	0.1262
5702322000	0.0895	0.1262
5702391000	0.0895	0.1262
5702392010	0.8053	1.1361
5702392090	0.0447	0.0631
5702411000	0.0447	0.0631
5702412000	0.0447	0.0631
5702421000	0.0895	0.1262
5702422020	0.0895	0.1262
5702422080	0.0895	0.1262
5702491020	0.8947	1.2624
5702491080	0.8947	1.2624
5702492000	0.0895	0.1262
5702502000	0.0895	0.1262
5702504000	0.0447	0.0631
5702505200	0.0895	0.1262
5702505600	0.8500	1.1993
5702912000	0.0447	0.0631
5702913000	0.0447	0.0631
5702914000	0.0447	0.0631
5702921000	0.0447	0.0631
5702929000	0.0447	0.0631
5702990500	0.8947	1.2624
5702991500	0.8947	1.2624
5703201000	0.0452	0.0638
5703202010	0.0452	0.0638
5703302000	0.0452	0.0638
5703900000	0.3615	0.5101
5705001000	0.0452	0.0638
5705002005	0.0452	0.0638
5705002015	0.0452	0.0638
5705002020	0.7682	1.0839
5705002030	0.0452	0.0638
5705002090	0.1808	0.2550
5801210000	0.9767	1.3780
5801221000	0.9767	1.3780
5801229000	0.9767	1.3780
5801230000	0.9767	1.3780
5801260010	0.7596	1.0718
5801260020	0.7596	1.0718
5801310000	0.2170	0.3062
5801320000	0.2170	0.3062
5801330000	0.2170	0.3062
5801360010	0.2170	0.3062
5801360020	0.2170	0.3062
5802110000	1.0309	1.4545
5802190000	1.0309	1.4545
5802200020	0.1085	0.1531
5802200090	0.3256	0.4593
5802300030	0.4341	0.6124

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5802300090	0.1085	0.1531
5803001000	1.0852	1.5311
5803002000	0.8681	1.2249
5803003000	0.8681	1.2249
5803005000	0.3256	0.4593
5804101000	0.4341	0.6124
5804109090	0.2193	0.3094
5804291000	0.8772	1.2376
5804300020	0.3256	0.4593
5805001000	0.1085	0.1531
5805003000	1.0852	1.5311
5806101000	0.8681	1.2249
5806103090	0.2170	0.3062
5806200010	0.2577	0.3636
5806200090	0.2577	0.3636
5806310000	0.8681	1.2249
5806393080	0.2170	0.3062
5806400000	0.0814	0.1148
5807100510	0.8681	1.2249
5807102010	0.8681	1.2249
5807900510	0.8681	1.2249
5807902010	0.8681	1.2249
5808104000	0.2170	0.3062
5808107000	0.2170	0.3062
5808900010	0.4341	0.6124
5810100000	0.3256	0.4593
5810910010	0.7596	1.0718
5810910020	0.7596	1.0718
5810921000	0.2170	0.3062
5810929030	0.2170	0.3062
5810929050	0.2170	0.3062
5810929080	0.2170	0.3062
5811002000	0.8681	1.2249
5901102000	0.5643	0.7962
5901904000	0.8139	1.1483
5903101000	0.4341	0.6124
5903103000	0.1085	0.1531
5903201000	0.4341	0.6124
5903203090	0.1085	0.1531
5903901000	0.4341	0.6124
5903903090	0.1085	0.1531
5904901000	0.0326	0.0459
5905001000	0.1085	0.1531
5905009000	0.1085	0.1531
5906100000	0.4341	0.6124
5906911000	0.4341	0.6124
5906913000	0.1085	0.1531
5906991000	0.4341	0.6124
5906993000	0.1085	0.1531
5907002500	0.3798	0.5359
5907003500	0.3798	0.5359
5907008090	0.3798	0.5359
5908000000	0.7813	1.1024
5909001000	0.6837	0.9646
5909002000	0.4883	0.6890
5910001010	0.3798	0.5359
5910001020	0.3798	0.5359
5910001030	0.3798	0.5359
5910001060	0.3798	0.5359
5910001070	0.3798	0.5359
5910001090	0.6837	0.9646
5910009000	0.5697	0.8038
5911101000	0.1736	0.2450
5911102000	0.0434	0.0612
5911201000	0.4341	0.6124
5911310010	0.4341	0.6124
5911310020	0.4341	0.6124
5911310030	0.4341	0.6124
5911310080	0.4341	0.6124

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
5911320010	0.4341	0.6124
5911320020	0.4341	0.6124
5911320030	0.4341	0.6124
5911320080	0.4341	0.6124
5911400000	0.5426	0.7655
5911900040	0.3158	0.4455
5911900080	0.2105	0.2970
6001106000	0.1096	0.1547
6001210000	0.9868	1.3923
6001220000	0.1096	0.1547
6001290000	0.1096	0.1547
6001910010	0.8772	1.2376
6001910020	0.8772	1.2376
6001920010	0.0548	0.0774
6001920020	0.0548	0.0774
6001920030	0.0548	0.0774
6001920040	0.0548	0.0774
6001999000	0.1096	0.1547
6002404000	0.7401	1.0443
6002408020	0.1974	0.2785
6002408080	0.1974	0.2785
6002904000	0.7895	1.1139
6002908020	0.1974	0.2785
6002908080	0.1974	0.2785
6003201000	0.8772	1.2376
6003203000	0.8772	1.2376
6003301000	0.1096	0.1547
6003306000	0.1096	0.1547
6003401000	0.1096	0.1547
6003406000	0.1096	0.1547
6003901000	0.1096	0.1547
6003909000	0.1096	0.1547
6004100010	0.2961	0.4177
6004100025	0.2961	0.4177
6004100085	0.2961	0.4177
6004902010	0.2961	0.4177
6004902025	0.2961	0.4177
6004902085	0.2961	0.4177
6004909000	0.2961	0.4177
6005210000	0.7127	1.0056
6005220000	0.7127	1.0056
6005230000	0.7127	1.0056
6005240000	0.7127	1.0056
6005310010	0.1096	0.1547
6005310080	0.1096	0.1547
6005320010	0.1096	0.1547
6005320080	0.1096	0.1547
6005330010	0.1096	0.1547
6005330080	0.1096	0.1547
6005340010	0.1096	0.1547
6005340080	0.1096	0.1547
6005410010	0.1096	0.1547
6005410080	0.1096	0.1547
6005420010	0.1096	0.1547
6005420080	0.1096	0.1547
6005430010	0.1096	0.1547
6005430080	0.1096	0.1547
6005440010	0.1096	0.1547
6005440080	0.1096	0.1547
6005909000	0.1096	0.1547
6006211000	1.0965	1.5470
6006219020	0.7675	1.0829
6006219080	0.7675	1.0829
6006221000	1.0965	1.5470
6006229020	0.7675	1.0829
6006229080	0.7675	1.0829
6006231000	1.0965	1.5470
6006239020	0.7675	1.0829
6006239080	0.7675	1.0829

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6006241000	1.0965	1.5470
6006249020	0.7675	1.0829
6006249080	0.7675	1.0829
6006310020	0.3289	0.4641
6006310040	0.3289	0.4641
6006310060	0.3289	0.4641
6006310080	0.3289	0.4641
6006320020	0.3289	0.4641
6006320040	0.3289	0.4641
6006320060	0.3289	0.4641
6006320080	0.3289	0.4641
6006330020	0.3289	0.4641
6006330040	0.3289	0.4641
6006330060	0.3289	0.4641
6006330080	0.3289	0.4641
6006340020	0.3289	0.4641
6006340040	0.3289	0.4641
6006340060	0.3289	0.4641
6006340080	0.3289	0.4641
6006410025	0.3289	0.4641
6006410085	0.3289	0.4641
6006420025	0.3289	0.4641
6006420085	0.3289	0.4641
6006430025	0.3289	0.4641
6006430085	0.3289	0.4641
6006440025	0.3289	0.4641
6006440085	0.3289	0.4641
6006909000	0.1096	0.1547
6101200010	1.0200	1.4391
6101200020	1.0200	1.4391
6101301000	0.2072	0.2923
6101900500	0.1912	0.2698
6101909010	0.5737	0.8095
6101909030	0.5100	0.7196
6101909060	0.2550	0.3598
6102100000	0.2550	0.3598
6102200010	0.9562	1.3492
6102200020	0.9562	1.3492
6102300500	0.1785	0.2518
6102909005	0.5737	0.8095
6102909015	0.4462	0.6296
6102909030	0.2550	0.3598
6103101000	0.0637	0.0899
6103104000	0.1218	0.1719
6103105000	0.1218	0.1719
6103106010	0.8528	1.2033
6103106015	0.8528	1.2033
6103106030	0.8528	1.2033
6103109010	0.5482	0.7735
6103109020	0.5482	0.7735
6103109030	0.5482	0.7735
6103109040	0.1218	0.1719
6103109050	0.1218	0.1719
6103109080	0.1827	0.2578
6103320000	0.8722	1.2306
6103398010	0.7476	1.0548
6103398030	0.3738	0.5274
6103398060	0.2492	0.3516
6103411010	0.3576	0.5045
6103411020	0.3576	0.5045
6103412000	0.3576	0.5045
6103421020	0.8343	1.1771
6103421035	0.8343	1.1771
6103421040	0.8343	1.1771
6103421050	0.8343	1.1771
6103421065	0.8343	1.1771
6103421070	0.8343	1.1771
6103422010	0.8343	1.1771
6103422015	0.8343	1.1771

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6103422025	0.8343	1.1771
6103431520	0.2384	0.3363
6103431535	0.2384	0.3363
6103431540	0.2384	0.3363
6103431550	0.2384	0.3363
6103431565	0.2384	0.3363
6103431570	0.2384	0.3363
6103432020	0.2384	0.3363
6103432025	0.2384	0.3363
6103491020	0.2437	0.3438
6103491060	0.2437	0.3438
6103492000	0.2437	0.3438
6103498010	0.5482	0.7735
6103498014	0.3655	0.5157
6103498024	0.2437	0.3438
6103498026	0.2437	0.3438
6103498034	0.5482	0.7735
6103498038	0.3655	0.5157
6103498060	0.2437	0.3438
6104196010	0.8722	1.2306
6104196020	0.8722	1.2306
6104196030	0.8722	1.2306
6104196040	0.8722	1.2306
6104198010	0.5607	0.7911
6104198020	0.5607	0.7911
6104198030	0.5607	0.7911
6104198040	0.5607	0.7911
6104198060	0.3738	0.5274
6104198090	0.2492	0.3516
6104320000	0.8722	1.2306
6104392010	0.5607	0.7911
6104392030	0.3738	0.5274
6104392090	0.2492	0.3516
6104420010	0.8528	1.2033
6104420020	0.8528	1.2033
6104499010	0.5482	0.7735
6104499030	0.3655	0.5157
6104499060	0.2437	0.3438
6104520010	0.8822	1.2447
6104520020	0.8822	1.2447
6104598010	0.5672	0.8002
6104598030	0.3781	0.5335
6104598090	0.2521	0.3556
6104610010	0.2384	0.3363
6104610020	0.2384	0.3363
6104610030	0.2384	0.3363
6104621010	0.7509	1.0594
6104621020	0.8343	1.1771
6104621030	0.8343	1.1771
6104622006	0.7151	1.0089
6104622011	0.8343	1.1771
6104622016	0.7151	1.0089
6104622021	0.8343	1.1771
6104622026	0.7151	1.0089
6104622028	0.8343	1.1771
6104622030	0.8343	1.1771
6104622050	0.8343	1.1771
6104622060	0.8343	1.1771
6104631020	0.2384	0.3363
6104631030	0.2384	0.3363
6104632006	0.8343	1.1771
6104632011	0.8343	1.1771
6104632016	0.7151	1.0089
6104632021	0.8343	1.1771
6104632026	0.3576	0.5045
6104632028	0.3576	0.5045
6104632030	0.3576	0.5045
6104632050	0.7151	1.0089
6104632060	0.3576	0.5045

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6104691000	0.3655	0.5157
6104692030	0.3655	0.5157
6104692060	0.3655	0.5157
6104698010	0.5482	0.7735
6104698014	0.3655	0.5157
6104698020	0.2437	0.3438
6104698022	0.5482	0.7735
6104698026	0.3655	0.5157
6104698038	0.2437	0.3438
6104698040	0.2437	0.3438
6105100010	0.9332	1.3166
6105100020	0.9332	1.3166
6105100030	0.9332	1.3166
6105202010	0.2916	0.4114
6105202020	0.2916	0.4114
6105202030	0.2916	0.4114
6105908010	0.5249	0.7406
6105908030	0.3499	0.4937
6105908060	0.2333	0.3292
6106100010	0.9332	1.3166
6106100020	0.9332	1.3166
6106100030	0.9332	1.3166
6106202010	0.2916	0.4114
6106202020	0.4666	0.6583
6106202030	0.2916	0.4114
6106901500	0.0583	0.0823
6106902510	0.5249	0.7406
6106902530	0.3499	0.4937
6106902550	0.2916	0.4114
6106903010	0.5249	0.7406
6106903030	0.3499	0.4937
6106903040	0.2916	0.4114
6107110010	1.0727	1.5134
6107110020	1.0727	1.5134
6107120010	0.4767	0.6726
6107120020	0.4767	0.6726
6107191000	0.1192	0.1682
6107210010	0.8343	1.1771
6107210020	0.7151	1.0089
6107220010	0.3576	0.5045
6107220015	0.1192	0.1682
6107220025	0.2384	0.3363
6107299000	0.1788	0.2522
6107910030	1.1918	1.6816
6107910040	1.1918	1.6816
6107910090	0.9535	1.3453
6107991030	0.3576	0.5045
6107991040	0.3576	0.5045
6107991090	0.3576	0.5045
6107999000	0.1192	0.1682
6108199010	1.0611	1.4971
6108199030	0.2358	0.3327
6108210010	1.1790	1.6635
6108210020	1.1790	1.6635
6108299000	0.3537	0.4990
6108310010	1.0611	1.4971
6108310020	1.0611	1.4971
6108320010	0.2358	0.3327
6108320015	0.2358	0.3327
6108320025	0.2358	0.3327
6108398000	0.3537	0.4990
6108910005	1.1790	1.6635
6108910015	1.1790	1.6635
6108910025	1.1790	1.6635
6108910030	1.1790	1.6635
6108910040	1.1790	1.6635
6108920005	0.2358	0.3327
6108920015	0.2358	0.3327
6108920025	0.2358	0.3327

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6108920030	0.2358	0.3327
6108920040	0.2358	0.3327
6108999000	0.3537	0.4990
6109100004	1.0022	1.4140
6109100007	1.0022	1.4140
6109100011	1.0022	1.4140
6109100012	1.0022	1.4140
6109100014	1.0022	1.4140
6109100018	1.0022	1.4140
6109100023	1.0022	1.4140
6109100027	1.0022	1.4140
6109100037	1.0022	1.4140
6109100040	1.0022	1.4140
6109100045	1.0022	1.4140
6109100060	1.0022	1.4140
6109100065	1.0022	1.4140
6109100070	1.0022	1.4140
6109901007	0.2948	0.4159
6109901009	0.2948	0.4159
6109901013	0.2948	0.4159
6109901025	0.2948	0.4159
6109901047	0.2948	0.4159
6109901049	0.2948	0.4159
6109901050	0.2948	0.4159
6109901060	0.2948	0.4159
6109901065	0.2948	0.4159
6109901070	0.2948	0.4159
6109901075	0.2948	0.4159
6109901090	0.2948	0.4159
6109908010	0.3499	0.4937
6109908030	0.2333	0.3292
6110201010	0.7476	1.0548
6110201020	0.7476	1.0548
6110201022	0.7476	1.0548
6110201024	0.7476	1.0548
6110201026	0.7476	1.0548
6110201029	0.7476	1.0548
6110201031	0.7476	1.0548
6110201033	0.7476	1.0548
6110202005	1.1214	1.5822
6110202010	1.1214	1.5822
6110202015	1.1214	1.5822
6110202020	1.1214	1.5822
6110202025	1.1214	1.5822
6110202030	1.1214	1.5822
6110202035	1.1214	1.5822
6110202040	1.0965	1.5470
6110202045	1.0965	1.5470
6110202067	1.0965	1.5470
6110202069	1.0965	1.5470
6110202077	1.0965	1.5470
6110202079	1.0965	1.5470
6110909010	0.5607	0.7911
6110909012	0.1246	0.1758
6110909014	0.3738	0.5274
6110909020	0.2492	0.3516
6110909022	0.2492	0.3516
6110909024	0.2492	0.3516
6110909026	0.5607	0.7911
6110909028	0.1869	0.2637
6110909030	0.3738	0.5274
6110909038	0.2492	0.3516
6110909040	0.2492	0.3516
6110909042	0.2492	0.3516
6110909044	0.5607	0.7911
6110909046	0.5607	0.7911
6110909052	0.3738	0.5274
6110909054	0.3738	0.5274
6110909064	0.2492	0.3516

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6110909066	0.2492	0.3516
6110909067	0.5607	0.7911
6110909069	0.5607	0.7911
6110909071	0.5607	0.7911
6110909073	0.5607	0.7911
6110909079	0.3738	0.5274
6110909080	0.3738	0.5274
6110909081	0.3738	0.5274
6110909082	0.3738	0.5274
6110909088	0.2492	0.3516
6110909090	0.2492	0.3516
6111201000	1.1918	1.6816
6111202000	1.1918	1.6816
6111203000	0.9535	1.3453
6111204000	0.9535	1.3453
6111205000	0.9535	1.3453
6111206010	0.9535	1.3453
6111206020	0.9535	1.3453
6111206030	0.9535	1.3453
6111206050	0.9535	1.3453
6111206070	0.9535	1.3453
6111301000	0.2384	0.3363
6111302000	0.2384	0.3363
6111303000	0.2384	0.3363
6111304000	0.2384	0.3363
6111305010	0.2384	0.3363
6111305015	0.2384	0.3363
6111305020	0.2384	0.3363
6111305030	0.2384	0.3363
6111305050	0.2384	0.3363
6111305070	0.2384	0.3363
6111901000	0.2384	0.3363
6111902000	0.2384	0.3363
6111903000	0.2384	0.3363
6111904000	0.2384	0.3363
6111905010	0.2384	0.3363
6111905020	0.2384	0.3363
6111905030	0.2384	0.3363
6111905050	0.2384	0.3363
6111905070	0.2384	0.3363
6112110010	0.9535	1.3453
6112110020	0.9535	1.3453
6112110030	0.9535	1.3453
6112110040	0.9535	1.3453
6112110050	0.9535	1.3453
6112110060	0.9535	1.3453
6112120010	0.2384	0.3363
6112120020	0.2384	0.3363
6112120030	0.2384	0.3363
6112120040	0.2384	0.3363
6112120050	0.2384	0.3363
6112120060	0.2384	0.3363
6112191010	0.2492	0.3516
6112191020	0.2492	0.3516
6112191030	0.2492	0.3516
6112191040	0.2492	0.3516
6112191050	0.2492	0.3516
6112191060	0.2492	0.3516
6112201060	0.2492	0.3516
6112201070	0.2492	0.3516
6112201080	0.2492	0.3516
6112201090	0.2492	0.3516
6112202010	0.8722	1.2306
6112202020	0.3738	0.5274
6112202030	0.2492	0.3516
6112310010	0.1192	0.1682
6112310020	0.1192	0.1682
6112390010	1.0727	1.5134
6112410010	0.1192	0.1682

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6112410020	0.1192	0.1682
6112410030	0.1192	0.1682
6112410040	0.1192	0.1682
6112490010	0.8939	1.2612
6113001005	0.1246	0.1758
6113001010	0.1246	0.1758
6113001012	0.1246	0.1758
6113009015	0.3489	0.4922
6113009020	0.3489	0.4922
6113009038	0.3489	0.4922
6113009042	0.3489	0.4922
6113009055	0.3489	0.4922
6113009060	0.3489	0.4922
6113009074	0.3489	0.4922
6113009082	0.3489	0.4922
6114200005	0.9747	1.3751
6114200010	0.9747	1.3751
6114200015	0.8528	1.2033
6114200020	0.8528	1.2033
6114200035	0.8528	1.2033
6114200040	0.8528	1.2033
6114200042	0.3655	0.5157
6114200044	0.8528	1.2033
6114200046	0.8528	1.2033
6114200048	0.8528	1.2033
6114200052	0.8528	1.2033
6114200055	0.8528	1.2033
6114200060	0.8528	1.2033
6114301010	0.2437	0.3438
6114301020	0.2437	0.3438
6114302060	0.1218	0.1719
6114303014	0.2437	0.3438
6114303020	0.2437	0.3438
6114303030	0.2437	0.3438
6114303042	0.2437	0.3438
6114303044	0.2437	0.3438
6114303052	0.2437	0.3438
6114303054	0.2437	0.3438
6114303060	0.2437	0.3438
6114303070	0.2437	0.3438
6114909045	0.5482	0.7735
6114909055	0.3655	0.5157
6114909070	0.3655	0.5157
6115100500	0.4386	0.6188
6115101510	1.0965	1.5470
6115103000	0.9868	1.3923
6115106000	0.1096	0.1547
6115298010	1.0965	1.5470
6115309030	0.7675	1.0829
6115956000	0.9868	1.3923
6115959000	0.9868	1.3923
6115966020	0.2193	0.3094
6115991420	0.2193	0.3094
6115991920	0.2193	0.3094
6115999000	0.1096	0.1547
6116101300	0.3463	0.4885
6116101720	0.8079	1.1399
6116104810	0.4444	0.6270
6116105510	0.6464	0.9119
6116107510	0.6464	0.9119
6116109500	0.1616	0.2280
6116920500	0.8079	1.1399
6116920800	0.8079	1.1399
6116926410	1.0388	1.4656
6116926420	1.0388	1.4656
6116926430	1.1542	1.6285
6116926440	1.0388	1.4656
6116927450	1.0388	1.4656
6116927460	1.1542	1.6285

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6116927470	1.0388	1.4656
6116928800	1.0388	1.4656
6116929400	1.0388	1.4656
6116938800	0.1154	0.1628
6116939400	0.1154	0.1628
6116994800	0.1154	0.1628
6116995400	0.1154	0.1628
6116999510	0.4617	0.6514
6116999530	0.3463	0.4885
6117106010	0.9234	1.3028
6117106020	0.2308	0.3257
6117808500	0.9234	1.3028
6117808710	1.1542	1.6285
6117808770	0.1731	0.2443
6117809510	0.9234	1.3028
6117809540	0.3463	0.4885
6117809570	0.1731	0.2443
6117909003	1.1542	1.6285
6117909015	0.2308	0.3257
6117909020	1.1542	1.6285
6117909040	1.1542	1.6285
6117909060	1.1542	1.6285
6117909080	1.1542	1.6285
6201121000	0.8981	1.2671
6201122010	0.8482	1.1967
6201122020	0.8482	1.1967
6201122025	0.9979	1.4079
6201122035	0.9979	1.4079
6201122050	0.6486	0.9151
6201122060	0.6486	0.9151
6201134015	0.1996	0.2816
6201134020	0.1996	0.2816
6201134030	0.2495	0.3520
6201134040	0.2495	0.3520
6201199010	0.5613	0.7919
6201199030	0.3742	0.5280
6201199060	0.3742	0.5280
6201921000	0.8779	1.2386
6201921500	1.0974	1.5483
6201922005	0.9754	1.3763
6201922010	0.9754	1.3763
6201922021	1.2193	1.7203
6201922031	1.2193	1.7203
6201922041	1.2193	1.7203
6201922051	0.9754	1.3763
6201922061	0.9754	1.3763
6201931000	0.2926	0.4129
6201932010	0.2439	0.3441
6201932020	0.2439	0.3441
6201933511	0.2439	0.3441
6201933521	0.2439	0.3441
6201999010	0.5487	0.7741
6201999030	0.3658	0.5161
6201999060	0.2439	0.3441
6202121000	0.8879	1.2527
6202122010	1.0482	1.4789
6202122020	1.0482	1.4789
6202122025	1.2332	1.7399
6202122035	1.2332	1.7399
6202122050	0.8016	1.1309
6202122060	0.8016	1.1309
6202134005	0.2524	0.3561
6202134010	0.2524	0.3561
6202134020	0.3155	0.4451
6202134030	0.3155	0.4451
6202199010	0.5678	0.8012
6202199030	0.3786	0.5341
6202199060	0.2524	0.3561
6202921000	0.9865	1.3919

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6202921500	0.9865	1.3919
6202922010	0.9865	1.3919
6202922020	0.9865	1.3919
6202922026	1.2332	1.7399
6202922031	1.2332	1.7399
6202922061	0.9865	1.3919
6202922071	0.9865	1.3919
6202931000	0.2960	0.4176
6202932010	0.2466	0.3480
6202932020	0.2466	0.3480
6202935011	0.2466	0.3480
6202935021	0.2466	0.3480
6202999011	0.5549	0.7829
6202999031	0.3700	0.5220
6202999061	0.2466	0.3480
6203122010	0.1233	0.1740
6203122020	0.1233	0.1740
6203191010	0.9865	1.3919
6203191020	0.9865	1.3919
6203191030	0.9865	1.3919
6203199010	0.5549	0.7829
6203199020	0.5549	0.7829
6203199030	0.5549	0.7829
6203199050	0.3700	0.5220
6203199080	0.2466	0.3480
6203221000	1.2332	1.7399
6203321000	0.6782	0.9569
6203322010	1.1715	1.6529
6203322020	1.1715	1.6529
6203322030	1.1715	1.6529
6203322040	1.1715	1.6529
6203322050	1.1715	1.6529
6203332010	0.1233	0.1740
6203332020	0.1233	0.1740
6203392010	0.1233	0.1740
6203392020	0.1233	0.1740
6203399010	0.5549	0.7829
6203399030	0.3700	0.5220
6203399060	0.2466	0.3480
6203421000	1.0616	1.4978
6203422005	0.7077	0.9985
6203422010	0.9436	1.3314
6203422025	0.9436	1.3314
6203422050	0.9436	1.3314
6203422090	0.9436	1.3314
6203424003	1.0616	1.4978
6203424006	1.1796	1.6642
6203424011	1.1796	1.6642
6203424016	0.9436	1.3314
6203424021	1.1796	1.6642
6203424026	1.1796	1.6642
6203424031	1.1796	1.6642
6203424036	1.1796	1.6642
6203424041	0.9436	1.3314
6203424046	0.9436	1.3314
6203424051	0.8752	1.2348
6203424056	0.8752	1.2348
6203424061	0.8752	1.2348
6203431000	0.1887	0.2663
6203431500	0.1180	0.1664
6203432005	0.1180	0.1664
6203432010	0.2359	0.3328
6203432025	0.2359	0.3328
6203432050	0.2359	0.3328
6203432090	0.2359	0.3328
6203432500	0.4128	0.5825
6203433510	0.0590	0.0832
6203433590	0.0590	0.0832
6203434010	0.1167	0.1646

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6203434015	0.1167	0.1646
6203434020	0.1167	0.1646
6203434030	0.1167	0.1646
6203434035	0.1167	0.1646
6203434040	0.1167	0.1646
6203491005	0.1180	0.1664
6203491010	0.2359	0.3328
6203491025	0.2359	0.3328
6203491050	0.2359	0.3328
6203491090	0.2359	0.3328
6203491500	0.4128	0.5825
6203492015	0.2359	0.3328
6203492020	0.2359	0.3328
6203492030	0.1180	0.1664
6203492045	0.1180	0.1664
6203492050	0.1180	0.1664
6203492060	0.1180	0.1664
6203498020	0.5308	0.7489
6203498030	0.3539	0.4993
6203498045	0.2359	0.3328
6204110000	0.0617	0.0870
6204120010	0.9865	1.3919
6204120020	0.9865	1.3919
6204120030	0.9865	1.3919
6204120040	0.9865	1.3919
6204132010	0.1233	0.1740
6204132020	0.1233	0.1740
6204192000	0.1233	0.1740
6204198010	0.5549	0.7829
6204198020	0.5549	0.7829
6204198030	0.5549	0.7829
6204198040	0.5549	0.7829
6204198060	0.3083	0.4350
6204198090	0.2466	0.3480
6204221000	1.2332	1.7399
6204321000	0.6782	0.9569
6204322010	1.1715	1.6529
6204322020	1.1715	1.6529
6204322030	0.9865	1.3919
6204322040	0.9865	1.3919
6204398010	0.5549	0.7829
6204398030	0.3083	0.4350
6204412010	0.0603	0.0851
6204412020	0.0603	0.0851
6204421000	1.2058	1.7012
6204422000	0.6632	0.9357
6204423010	1.2058	1.7012
6204423020	1.2058	1.7012
6204423030	0.9043	1.2759
6204423040	0.9043	1.2759
6204423050	0.9043	1.2759
6204423060	0.9043	1.2759
6204431000	0.4823	0.6805
6204432000	0.0603	0.0851
6204442000	0.4316	0.6090
6204495010	0.5549	0.7829
6204495030	0.2466	0.3480
6204510010	0.0631	0.0890
6204510020	0.0631	0.0890
6204521000	1.2618	1.7803
6204522010	1.1988	1.6913
6204522020	1.1988	1.6913
6204522030	1.1988	1.6913
6204522040	1.1988	1.6913
6204522070	1.0095	1.4243
6204522080	1.0095	1.4243
6204531000	0.4416	0.6231
6204532010	0.0631	0.0890
6204532020	0.0631	0.0890

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6204533010	0.2524	0.3561
6204533020	0.2524	0.3561
6204591000	0.4416	0.6231
6204594010	0.5678	0.8012
6204594030	0.2524	0.3561
6204594060	0.2524	0.3561
6204611010	0.0590	0.0832
6204611020	0.0590	0.0832
6204619010	0.0590	0.0832
6204619020	0.0590	0.0832
6204619030	0.0590	0.0832
6204619040	0.1180	0.1664
6204621000	0.8681	1.2249
6204622005	0.7077	0.9985
6204622010	0.9436	1.3314
6204622025	0.9436	1.3314
6204622050	0.9436	1.3314
6204623000	1.1796	1.6642
6204624003	1.0616	1.4978
6204624006	1.1796	1.6642
6204624011	1.1796	1.6642
6204624021	0.9436	1.3314
6204624026	1.1796	1.6642
6204624031	1.1796	1.6642
6204624036	1.1796	1.6642
6204624041	1.1796	1.6642
6204624046	0.9436	1.3314
6204624051	0.9436	1.3314
6204624056	0.9335	1.3171
6204624061	0.9335	1.3171
6204624066	0.9335	1.3171
6204631000	0.2019	0.2849
6204631200	0.1180	0.1664
6204631505	0.1180	0.1664
6204631510	0.2359	0.3328
6204631525	0.2359	0.3328
6204631550	0.2359	0.3328
6204632000	0.4718	0.6657
6204632510	0.0590	0.0832
6204632520	0.0590	0.0832
6204633010	0.0603	0.0851
6204633090	0.0603	0.0851
6204633510	0.2412	0.3402
6204633525	0.2412	0.3402
6204633530	0.2412	0.3402
6204633532	0.2309	0.3258
6204633535	0.2309	0.3258
6204633540	0.2309	0.3258
6204691005	0.1180	0.1664
6204691010	0.2359	0.3328
6204691025	0.2359	0.3328
6204691050	0.2359	0.3328
6204692010	0.0590	0.0832
6204692020	0.0590	0.0832
6204692030	0.0590	0.0832
6204692510	0.2359	0.3328
6204692520	0.2359	0.3328
6204692530	0.2359	0.3328
6204692540	0.2309	0.3258
6204692550	0.2309	0.3258
6204692560	0.2309	0.3258
6204696010	0.5308	0.7489
6204696030	0.2359	0.3328
6204696070	0.3539	0.4993
6204699010	0.5308	0.7489
6204699030	0.2359	0.3328
6204699044	0.2359	0.3328
6204699046	0.2359	0.3328
6204699050	0.3539	0.4993

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6205201000	1.1796	1.6642
6205202003	0.9436	1.3314
6205202016	0.9436	1.3314
6205202021	0.9436	1.3314
6205202026	0.9436	1.3314
6205202031	0.9436	1.3314
6205202036	1.0616	1.4978
6205202041	1.0616	1.4978
6205202044	1.0616	1.4978
6205202047	0.9436	1.3314
6205202051	0.9436	1.3314
6205202056	0.9436	1.3314
6205202061	0.9436	1.3314
6205202066	0.9436	1.3314
6205202071	0.9436	1.3314
6205202076	0.9436	1.3314
6205301000	0.4128	0.5825
6205302010	0.2949	0.4161
6205302020	0.2949	0.4161
6205302030	0.2949	0.4161
6205302040	0.2949	0.4161
6205302050	0.2949	0.4161
6205302055	0.2949	0.4161
6205302060	0.2949	0.4161
6205302070	0.2949	0.4161
6205302075	0.2949	0.4161
6205302080	0.2949	0.4161
6205900710	0.1180	0.1664
6205900720	0.1180	0.1664
6205901000	0.2359	0.3328
6205903010	0.5308	0.7489
6205903030	0.2359	0.3328
6205903050	0.1769	0.2496
6205904010	0.5308	0.7489
6205904030	0.2359	0.3328
6205904040	0.2359	0.3328
6206100010	0.5308	0.7489
6206100030	0.2359	0.3328
6206100040	0.1180	0.1664
6206100050	0.2359	0.3328
6206203010	0.0590	0.0832
6206203020	0.0590	0.0832
6206301000	1.1796	1.6642
6206302000	0.6488	0.9153
6206303003	0.9436	1.3314
6206303011	0.9436	1.3314
6206303021	0.9436	1.3314
6206303031	0.9436	1.3314
6206303041	0.9436	1.3314
6206303051	0.9436	1.3314
6206303061	0.9436	1.3314
6206401000	0.4128	0.5825
6206403010	0.2949	0.4161
6206403020	0.2949	0.4161
6206403025	0.2949	0.4161
6206403030	0.2949	0.4161
6206403040	0.2949	0.4161
6206403050	0.2949	0.4161
6206900010	0.5308	0.7489
6206900030	0.2359	0.3328
6206900040	0.1769	0.2496
6207110000	1.0281	1.4505
6207199010	0.3427	0.4835
6207199030	0.4569	0.6447
6207210010	1.0502	1.4817
6207210020	1.0502	1.4817
6207210030	1.0502	1.4817
6207210040	1.0502	1.4817
6207220000	0.3501	0.4939

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6207291000	0.1167	0.1646
6207299030	0.1167	0.1646
6207911000	1.0852	1.5311
6207913010	1.0852	1.5311
6207913020	1.0852	1.5311
6207997520	0.2412	0.3402
6207998510	0.2412	0.3402
6207998520	0.2412	0.3402
6208110000	0.2412	0.3402
6208192000	1.0852	1.5311
6208195000	0.1206	0.1701
6208199000	0.2412	0.3402
6208210010	1.0026	1.4146
6208210020	1.0026	1.4146
6208210030	1.0026	1.4146
6208220000	0.1180	0.1664
6208299030	0.2359	0.3328
6208911010	1.0852	1.5311
6208911020	1.0852	1.5311
6208913010	1.0852	1.5311
6208913020	1.0852	1.5311
6208920010	0.1206	0.1701
6208920020	0.1206	0.1701
6208920030	0.1206	0.1701
6208920040	0.1206	0.1701
6208992010	0.0603	0.0851
6208992020	0.0603	0.0851
6208995010	0.2412	0.3402
6208995020	0.2412	0.3402
6208998010	0.2412	0.3402
6208998020	0.2412	0.3402
6209201000	1.0967	1.5474
6209202000	1.0390	1.4659
6209203000	0.9236	1.3031
6209205030	0.9236	1.3031
6209205035	0.9236	1.3031
6209205045	0.9236	1.3031
6209205050	0.9236	1.3031
6209301000	0.2917	0.4116
6209302000	0.2917	0.4116
6209303010	0.2334	0.3293
6209303020	0.2334	0.3293
6209303030	0.2334	0.3293
6209303040	0.2334	0.3293
6209900500	0.1154	0.1629
6209901000	0.2917	0.4116
6209902000	0.2917	0.4116
6209903010	0.2917	0.4116
6209903015	0.2917	0.4116
6209903020	0.2917	0.4116
6209903030	0.2917	0.4116
6209903040	0.2917	0.4116
6210109010	0.2170	0.3062
6210109040	0.2170	0.3062
6210203000	0.0362	0.0510
6210205000	0.0844	0.1191
6210207000	0.1809	0.2552
6210303000	0.0362	0.0510
6210305000	0.0844	0.1191
6210307000	0.0362	0.0510
6210309020	0.4220	0.5954
6210403000	0.0370	0.0522
6210405020	0.4316	0.6090
6210405031	0.0863	0.1218
6210405039	0.0863	0.1218
6210405040	0.4316	0.6090
6210405050	0.4316	0.6090
6210407000	0.1110	0.1566
6210409025	0.1110	0.1566

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6210409033	0.1110	0.1566
6210409045	0.1110	0.1566
6210409060	0.1110	0.1566
6210503000	0.0370	0.0522
6210505020	0.0863	0.1218
6210505031	0.0863	0.1218
6210505039	0.0863	0.1218
6210505040	0.0863	0.1218
6210505055	0.0863	0.1218
6210507000	0.4316	0.6090
6210509050	0.1480	0.2088
6210509060	0.1480	0.2088
6210509070	0.1480	0.2088
6210509090	0.1480	0.2088
6211111010	0.1206	0.1701
6211111020	0.1206	0.1701
6211118010	1.0852	1.5311
6211118020	1.0852	1.5311
6211118040	0.2412	0.3402
6211121010	0.0603	0.0851
6211121020	0.0603	0.0851
6211128010	1.0852	1.5311
6211128020	1.0852	1.5311
6211128030	0.6029	0.8506
6211200410	0.7717	1.0888
6211200420	0.0965	0.1361
6211200430	0.7717	1.0888
6211200440	0.0965	0.1361
6211200810	0.3858	0.5444
6211200820	0.3858	0.5444
6211201510	0.7615	1.0744
6211201515	0.2343	0.3306
6211201520	0.6443	0.9091
6211201525	0.2929	0.4132
6211201530	0.7615	1.0744
6211201535	0.3515	0.4959
6211201540	0.7615	1.0744
6211201545	0.2929	0.4132
6211201550	0.7615	1.0744
6211201555	0.4100	0.5785
6211201560	0.7615	1.0744
6211201565	0.2343	0.3306
6211202400	0.1233	0.1740
6211202810	0.8016	1.1309
6211202820	0.2466	0.3480
6211202830	0.3083	0.4350
6211203400	0.1233	0.1740
6211203810	0.8016	1.1309
6211203820	0.2466	0.3480
6211203830	0.3083	0.4350
6211204400	0.1233	0.1740
6211204815	0.8016	1.1309
6211204835	0.2466	0.3480
6211204860	0.3083	0.4350
6211205400	0.1233	0.1740
6211205810	0.8016	1.1309
6211205820	0.2466	0.3480
6211205830	0.3083	0.4350
6211206400	0.1233	0.1740
6211206810	0.8016	1.1309
6211206820	0.2466	0.3480
6211206830	0.3083	0.4350
6211207400	0.1233	0.1740
6211207810	0.9249	1.3049
6211207820	0.2466	0.3480
6211207830	0.3083	0.4350
6211320003	0.6412	0.9047
6211320007	0.8016	1.1309
6211320010	0.9865	1.3919

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6211320015	0.9865	1.3919
6211320025	0.9865	1.3919
6211320030	0.9249	1.3049
6211320040	0.9249	1.3049
6211320050	0.9249	1.3049
6211320060	0.9249	1.3049
6211320070	0.9249	1.3049
6211320075	0.9249	1.3049
6211320081	0.9249	1.3049
6211330003	0.0987	0.1392
6211330007	0.1233	0.1740
6211330010	0.3083	0.4350
6211330015	0.3083	0.4350
6211330017	0.3083	0.4350
6211330025	0.3700	0.5220
6211330030	0.3700	0.5220
6211330035	0.3700	0.5220
6211330040	0.3700	0.5220
6211330054	0.3700	0.5220
6211330058	0.3700	0.5220
6211330061	0.3700	0.5220
6211390510	0.1233	0.1740
6211390520	0.1233	0.1740
6211390530	0.1233	0.1740
6211390540	0.1233	0.1740
6211390545	0.1233	0.1740
6211390551	0.1233	0.1740
6211399010	0.2466	0.3480
6211399020	0.2466	0.3480
6211399030	0.2466	0.3480
6211399040	0.2466	0.3480
6211399050	0.2466	0.3480
6211399060	0.2466	0.3480
6211399070	0.2466	0.3480
6211399090	0.2466	0.3480
6211410040	0.0617	0.0870
6211420003	0.6412	0.9047
6211420007	0.8016	1.1309
6211420010	0.9865	1.3919
6211420020	0.9865	1.3919
6211420025	1.1099	1.5659
6211420030	0.8632	1.2179
6211420040	0.9865	1.3919
6211420054	1.1099	1.5659
6211420056	1.1099	1.5659
6211420060	0.9865	1.3919
6211420070	1.1099	1.5659
6211420075	1.1099	1.5659
6211420081	1.1099	1.5659
6211430003	0.0987	0.1392
6211430007	0.1233	0.1740
6211430010	0.2466	0.3480
6211430020	0.2466	0.3480
6211430030	0.2466	0.3480
6211430040	0.2466	0.3480
6211430050	0.2466	0.3480
6211430060	0.2466	0.3480
6211430064	0.3083	0.4350
6211430066	0.2466	0.3480
6211430074	0.3083	0.4350
6211430076	0.3700	0.5220
6211430078	0.3700	0.5220
6211430091	0.2466	0.3480
6211499010	0.2466	0.3480
6211499020	0.2466	0.3480
6211499030	0.2466	0.3480
6211499040	0.2466	0.3480
6211499050	0.2466	0.3480
6211499060	0.2466	0.3480

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6211499070	0.2466	0.3480
6211499080	0.2466	0.3480
6211499090	0.2466	0.3480
6212105010	0.9138	1.2893
6212105020	0.2285	0.3223
6212105030	0.2285	0.3223
6212109010	0.9138	1.2893
6212109020	0.2285	0.3223
6212109040	0.2285	0.3223
6212200010	0.6854	0.9670
6212200020	0.2856	0.4029
6212200030	0.1142	0.1612
6212300010	0.6854	0.9670
6212300020	0.2856	0.4029
6212300030	0.1142	0.1612
6212900010	0.1828	0.2579
6212900020	0.1828	0.2579
6212900030	0.1828	0.2579
6212900050	0.0914	0.1289
6212900090	0.4112	0.5802
6213201000	1.1187	1.5784
6213202000	1.0069	1.4206
6213900700	0.4475	0.6314
6213901000	0.4475	0.6314
6213902000	0.3356	0.4735
6214300000	0.1142	0.1612
6214400000	0.1142	0.1612
6214900010	0.8567	1.2088
6214900090	0.2285	0.3223
6215100025	0.1142	0.1612
6215200000	0.1142	0.1612
6215900015	1.0281	1.4505
6216000800	0.0685	0.0967
6216001300	0.3427	0.4835
6216001720	0.6397	0.9025
6216001730	0.1599	0.2256
6216001900	0.3427	0.4835
6216002110	0.5780	0.8155
6216002120	0.2477	0.3495
6216002410	0.6605	0.9320
6216002425	0.1651	0.2330
6216002600	0.1651	0.2330
6216002910	0.6605	0.9320
6216002925	0.1651	0.2330
6216003100	0.1651	0.2330
6216003300	0.5898	0.8321
6216003500	0.5898	0.8321
6216003800	1.1796	1.6642
6216004100	1.1796	1.6642
6217109510	0.9646	1.3610
6217109520	0.1809	0.2552
6217109530	0.2412	0.3402
6217909003	0.9646	1.3610
6217909005	0.1809	0.2552
6217909010	0.2412	0.3402
6217909025	0.9646	1.3610
6217909030	0.1809	0.2552
6217909035	0.2412	0.3402
6217909050	0.9646	1.3610
6217909055	0.1809	0.2552
6217909060	0.2412	0.3402
6217909075	0.9646	1.3610
6217909080	0.1809	0.2552
6217909085	0.2412	0.3402
6301300010	0.8305	1.1718
6301300020	0.8305	1.1718
6301900030	0.2215	0.3125
6302100005	1.1073	1.5623
6302100008	1.1073	1.5623

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6302100015	1.1073	1.5623
6302213010	1.1073	1.5623
6302213020	1.1073	1.5623
6302213030	1.1073	1.5623
6302213040	1.1073	1.5623
6302213050	1.1073	1.5623
6302215010	0.7751	1.0936
6302215020	0.7751	1.0936
6302215030	0.7751	1.0936
6302215040	0.7751	1.0936
6302215050	0.7751	1.0936
6302217010	1.1073	1.5623
6302217020	1.1073	1.5623
6302217030	1.1073	1.5623
6302217040	1.1073	1.5623
6302217050	1.1073	1.5623
6302219010	0.7751	1.0936
6302219020	0.7751	1.0936
6302219030	0.7751	1.0936
6302219040	0.7751	1.0936
6302219050	0.7751	1.0936
6302221010	0.5537	0.7812
6302221020	0.3876	0.5468
6302221030	0.5537	0.7812
6302221040	0.3876	0.5468
6302221050	0.3876	0.5468
6302221060	0.3876	0.5468
6302222010	0.3876	0.5468
6302222020	0.3876	0.5468
6302222030	0.3876	0.5468
6302290020	0.2215	0.3125
6302313010	1.1073	1.5623
6302313020	1.1073	1.5623
6302313030	1.1073	1.5623
6302313040	1.1073	1.5623
6302313050	1.1073	1.5623
6302315010	0.7751	1.0936
6302315020	0.7751	1.0936
6302315030	0.7751	1.0936
6302315040	0.7751	1.0936
6302315050	0.7751	1.0936
6302317010	1.1073	1.5623
6302317020	1.1073	1.5623
6302317030	1.1073	1.5623
6302317040	1.1073	1.5623
6302317050	1.1073	1.5623
6302319010	0.7751	1.0936
6302319020	0.7751	1.0936
6302319030	0.7751	1.0936
6302319040	0.7751	1.0936
6302319050	0.7751	1.0936
6302321010	0.5537	0.7812
6302321020	0.3876	0.5468
6302321030	0.5537	0.7812
6302321040	0.3876	0.5468
6302321050	0.3876	0.5468
6302321060	0.3876	0.5468
6302322010	0.5537	0.7812
6302322020	0.3876	0.5468
6302322030	0.5537	0.7812
6302322040	0.3876	0.5468
6302322050	0.3876	0.5468
6302322060	0.3876	0.5468
6302390030	0.2215	0.3125
6302402010	0.9412	1.3280
6302511000	0.5537	0.7812
6302512000	0.8305	1.1718
6302513000	0.5537	0.7812
6302514000	0.7751	1.0936

IMPORT ASSESSMENT TABLE—Continued

[Raw cotton fiber]

HTS No.	Conv. factor.	Cents/kg.
6302593020	0.5537	0.7812
6302600010	1.1073	1.5623
6302600020	0.9966	1.4061
6302600030	0.9966	1.4061
6302910005	0.9966	1.4061
6302910015	1.1073	1.5623
6302910025	0.9966	1.4061
6302910035	0.9966	1.4061
6302910045	0.9966	1.4061
6302910050	0.9966	1.4061
6302910060	0.9966	1.4061
6302931000	0.4429	0.6249
6302932000	0.4429	0.6249
6302992000	0.2215	0.3125
6303191100	0.8859	1.2499
6303910010	0.6090	0.8593
6303910020	0.6090	0.8593
6303921000	0.2768	0.3906
6303922010	0.2768	0.3906
6303922030	0.2768	0.3906
6303922050	0.2768	0.3906
6303990010	0.2768	0.3906
6304111000	0.9966	1.4061
6304113000	0.1107	0.1562
6304190500	0.9966	1.4061
6304191000	1.1073	1.5623
6304191500	0.3876	0.5468
6304192000	0.3876	0.5468
6304193060	0.2215	0.3125
6304910020	0.8859	1.2499
6304910070	0.2215	0.3125
6304920000	0.8859	1.2499
6304996040	0.2215	0.3125
6507000000	0.3986	0.5624
9404901000	0.2104	0.2968
9404908020	0.9966	1.4061
9404908040	0.9966	1.4061
9404908505	0.6644	0.9374
9404908536	0.0997	0.1406
9404909505	0.6644	0.9374
9404909570	0.2658	0.3750

* * * * *

Authority: 7 U.S.C. 2101–2118.

Dated: June 6, 2012.

Ruihong Guo,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2012–14184 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1280

[No.AMS–LS–11–0038]

Lamb Promotion, Research, and Information Order; Amendment to the Order To Raise the Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Lamb Promotion, Research, and Information Order (Order) to increase the assessment rate on all live ovine animals sold from $.005 per pound to $.007 per pound for producers, feeders, and seedstock producers, and from $.30 per head of ovine animals purchased for slaughter to $.42 per head for first handlers. The increase is provided for under the Order, which is authorized by the Commodity Promotion, Research, and Information Act of 1996 (Act). The American Lamb Board (Board), which administers the Order, recommended this action to maintain and expand their promotional, research, advertising, and communications programs.

DATES: Written comments must be received by August 13, 2012.

ADDRESSES: Comments must be posted online at *www.regulations.gov* or sent to Kenneth Payne, Director, Marketing Programs Division, Livestock and Seed Program, Agricultural Marketing Service (AMS), USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue SW., Washington, DC 20250–0251; or fax to (202) 720–1125. All comments should reference the docket number, the date, and the page number of this issue of the **Federal Register**. Comments will be available for public inspection at the aforementioned address, as well as on the Internet at *http://www.regulations.gov/.*

FOR FURTHER INFORMATION CONTACT: Emily DeBord, Agricultural Marketing Specialist, Marketing Programs Division, on 202/720–1115, fax 202/720–1125, or by email at *emily.debord@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

Under section 519 of the Act, a person subject to the Order may file a petition with the Secretary stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not established in accordance with the law, and may request a modification of the Order or an exemption from the Order. Any petition filed challenging the Order, any provision of the Order, or any obligation imposed in connection with the Order, shall be filed within 2 years after the effective date of the Order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Secretary of Agriculture (Secretary) will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Secretary's final ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic effect of this action on small entities. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.

In the February 2011 publication of ''Farms, Land in Farms, and Livestock Operations,'' the U.S. Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS) estimates that in 2010 the number of operations in the United States with sheep totaled approximately 81,000. The majority of these operations that are subject to the Order may be classified as small entities.

The Small Business Administration defines, in 13 CFR Part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than $7 million. Under these definitions, the majority of the producers, feeders, seedstock producers, and first handlers that would be affected by this rule would be considered small entities

Funds collected under the programs are used for promotion, information, research, and advertising of American lamb and for the administration, maintenance, and functioning of the American Lamb Board (Board). At the current assessment rate of one-half of a cent ($.005) per pound on all live lambs sold by producers, feeders, and seedstock producers and thirty cents ($.30) per head of lamb purchased by first handlers for slaughter, the program generates about $1.8 million in annual

revenues. The current assessment rate was established in April 11, 2002, when the Order was issued (70 FR 17848). The Order is administered by the Board under USDA oversight. According to the Board, additional revenue is required in order to sustain and expand the promotional, research, advertising and communications programs. On May 26, 2011, the Board passed a motion to raise the assessment rate as authorized under the Act and Order. This proposed rule is consistent with section 1280.217(e) of the Order, which states that the rate of assessment for producers, seedstock producers, and feeders may be raised or lowered no more than twenty-hundredths of a cent ($.002) in any one year. In addition, section 1280.219 states the rate of assessment for first handlers shall be increased or decreased proportionately if the assessment paid by producers, feeders, and seedstock producers is increased or decreased. The current rate producers pay on a per pound basis, $0.005 per pound, is 1.67 percent of the rate first handlers pay on a per head basis, $0.30 per head. To keep the same proportionality when producers are assessed a rate of $0.007 per pound, the first handlers would be assessed a rate of $0.42 per head. Currently, section 1280.217 of the Order states that the rate of assessment shall be one-half of a cent ($.005 per pound) per pound on all live lambs sold. Section 1280.219 currently states each first handler, in addition to remitting the assessment collected pursuant to section 1280.217, shall pay an assessment equal to thirty cents ($.30) per head of lambs purchased by the first handler for slaughter or slaughtered by such first handler pursuant to a custom slaughter arrangement. This proposed rule would amend the aforementioned sections. The Board's most recent return on investment study, Analyzing the *Effectiveness of the Lamb Promotion, Research, and Information Order,* by Oral Capps, Jr. and Gary W. Williams, showed that for the period 2002 through 2010 the Lamb Checkoff Program continued to enhance the demand for American lamb. The analysis shows that the Board's promotion programs have generated roughly 7.1 to 7.5 additional pounds of total lamb consumption per dollar spent on advertising and promotion and $37.16 to $39.34 in additional lamb sales per dollar spent on advertising and promotion. Copies of this study can be obtained from the Board.

Over the last several fiscal years, however, several trends have asserted downward pressure on the Board's continued ability to sustain the industry's recognized high level of return. Domestic lamb production levels have continued to decrease. A growing percentage of domestic lamb is being sold into non-traditional markets and higher costs driven by worldwide inflation have increased the expense of implementing Board programs. The Board's assessment collections have continued to decrease from $2.8 million in 2003 to $2.0 million in 2010. Over the past few years the Board's budget has decreased and business costs have increased. The Board has explored ways to maintain effective programs by cutting programs that are not meeting the Board's expectations. The Board believes that marketing and promotions programs should not be reduced any further at a time when it is critical for the industry to protect American lamb's position in retail and foodservice and maintain market share.

The Board states that the proposed assessment rate increase would enable it to maintain, enhance, and expand its efforts to build demand, increase awareness and create preference for American lamb through targeted advertising, retail promotions, public relations campaigns and media outreach, foodservice programs, consumer events, social marketing, and nutrition education. The Board strongly believes that it is a critical time for the industry to protect their position in retail and foodservice and maintain market share in order for there to be a future for domestic lamb. The Board believes that it is essential to increase the lamb checkoff revenue and get its marketing and promotion budget back to the original budget levels in fiscal years 2003 and 2004 in order to maintain its efforts to promote American Lamb and deliver a good return on the industry's investment.

This rule does not impose additional recordkeeping requirements on producers, feeders, seedstock producers, or first handlers of American lamb. There are no Federal rules that duplicate, overlap, or conflict with this rule. In accordance with OMB regulation [5 CFR Part 1320], which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements have been approved previously under OMB control number 0581–0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved. We have performed this Initial Regulatory Flexibility Analysis regarding the impact of this proposed amendment to the Order on small entities, and we invite comments concerning potential effects of this amendment on small businesses.

Background and Proposed Action

Under the Order, which became effective April 11, 2002, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the position of, and to develop and expand the markets for, ovine animals and ovine products. This program is currently financed by assessments from producers, feeders, and seedstock producers who pay an assessment of one-half cent ($.005) per pound when live ovine animals are sold. First handlers, primarily packers, pay an additional $.30 per head on ovine animals purchased for slaughter. Importers are not assessed.

This rule proposes to increase the assessment rate on all live lambs sold from $.005 per pound to $.007 per pound for producers, feeders, and seedstock producers and from $.30 per head of lamb purchased for slaughter to $.42 per head for first handlers. According to the Board, in order to sustain and expand the promotion, research, and communications programs at present levels, the Board contends that additional revenue is required. The proposed assessment rate increase is estimated to generate $700,000 in new revenue, depending upon production levels.

The Board's budget is based on the amount of assessments collected on an annual basis. As assessments have continued to decline, the Board's budget has decreased from $2.8 million in 2003 to a projected $1.8 million in 2011. As expenses to successfully promote and increase the consumption of American lamb continue to rise, the Board feels it is necessary to amend the Order to increase the rate of assessment.

On May 26, 2011, the Board unanimously approved a motion to request that the Secretary amend sections 1280.217(e) and 1280.219 of the Order to increase the assessment rate on all live lambs sold from $.005 per pound to $.007 per pound for producers, feeders, and seedstock producers and from $.30 per head of lamb purchased for slaughter to $.42 per head for first handlers. The Board has not amended the Order to raise or lower the assessment rate since the inception of the program. The vote to recommend the assessment increase was unanimous.

The Act provides for the creation of and amendments to the Order. The Order provides in section 1280.210 that the Board shall have the powers and duties to recommend to the Secretary

such amendments to the Order as the Board considers appropriate.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received in response to this rule by the date specified would be considered prior to finalizing this action.

List of Subjects in 7 CFR Part 1280

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Lamb and Lamb products, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, it is proposed that 7 CFR part 1280 be amended as follows:

PART 1280—LAMB PROMOTION, RESEARCH, and INFORMATION

1. The authority citation for 7 CFR part 1280 continues to read as follows:

Authority: 7 U.S.C. 7411–7425.

2. § 1280.217, paragraph (e) and § 1280.219 are revised to read as follows:

§ 1280.217 Lamb Purchases.

(e) Rate. Except as otherwise provided, the rate of assessment shall be seven-tenths of a cent ($.007 per pound) per pound on all live lambs sold. The rate of assessment may be raised or lowered no more than twenty-hundredths of a cent ($.002) in any one year. The Board may recommend any change to the Department. Prior to a change in the assessment rate, the Department will provide notice by publishing in the **Federal Register** any proposed changes with interested parties allowed to provide comment.

§ 1280.219 First Handlers.

Each first handler, in addition to remitting the assessment collected pursuant to § 1280.217, shall pay an assessment equal to forty-two cents ($.42) per head of lambs purchased by the first handler for slaughter or slaughtered by such first handler pursuant to a custom slaughter arrangement. The rates of assessment for first handlers shall be increased or decreased proportionately. If the assessment paid by producers, seedstock producers, and feeders is increased or decreased. Such assessment shall be remitted with the assessments collected pursuant to § 1280.217.

* * * * *

Dated: June 6, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–14187 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0592; Directorate Identifier 2011–NM–253–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The existing AD currently requires a one-time inspection of the shafts of the main landing gear (MLG) side-brace fittings to detect corrosion, and the forward and aft bushings in the left-hand and right-hand MLG side-brace fittings to detect discrepancies. The existing AD also requires corrective and related actions if necessary. Since we issued that AD, we have received reports that the side brace fitting shafts of the MLG continue to fail. This proposed AD would require repetitive detailed inspections for corrosion and damage of the MLG side-brace fitting and replacing the side-brace fitting shaft with the re-designed side-brace fitting shaft of the MLG if necessary. This AD would also require eventual replacement of certain side-brace fitting shafts with the re-designed part. Replacement with a re-designed side-brace fitting shaft of the MLG is terminating action for the repetitive inspections. We are proposing this AD to prevent fractures of the side-brace fitting shafts of the MLG, and possible collapse of the MLG.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Jeffrey Zimmer, 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) 228–7306; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0592; Directorate Identifier 2011–NM–253–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each

substantive verbal contact we receive about this proposed AD.

Discussion

On October 20, 2004, we issued AD 2004–22–23, Amendment 39–13851 (69 FR 64856, November 9, 2004). That AD required actions intended to address an unsafe condition on Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes.

Since we issued AD 2004–22–23, Amendment 39–13851 (69 FR 64856, November 9, 2004), we received reports that the side-brace fitting shaft of the MLG continued to fail which meant the existing AD did not adequately address the unsafe condition. Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2011–39, dated October 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Due to the failure of the main landing gear (MLG) side brace fitting shaft, caused by corrosion, [TCCA] Airworthiness Directive (AD) CF–2002–41 was issued to require inspection and if needed, parts replacement. However, the existing MLG side-brace fitting shafts continued to fail. Failure of the MLG side brace fitting shaft could result in the collapse of the main landing gear.
> This [TCCA] directive mandates the repetitive detailed visual inspection [for cracking and corrosion] of the MLG side brace fitting and the incorporation of the re-designed MLG side brace fitting shaft part number (P/N) 605R10247–3 as the terminating action.

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

Relevant Service Information

Bombardier has issued Service Bulletin 601R–57–052, dated July 28, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 584 products of U.S. registry. We estimate that it would take about 10 work-hours per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $496,400, or $850 per product.

In addition, we estimate that any necessary follow-on actions would take about 14 work-hours and require parts costing $3,860, for a cost of $5,050 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2004–22–23, Amendment 39–13851 (69 FR 64856, November 9, 2004), and adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2012–0592; Directorate Identifier 2011–NM–253–AD.

(a) Comments Due Date

We must receive comments by July 27, 2012.

(b) Affected ADs

This AD supersedes AD 2004–22–23, Amendment 39–13851 (69 FR 64856, November 9, 2004).

(c) Applicability

This AD applies to Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes; certificated in any category; serial numbers 7003 through 7990 inclusive, and 8000 through 8999 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 57: Wings.

(e) Reason

This AD was prompted by reports of failure of the side brace fitting shaft of the main landing gear (MLG), due to corrosion. We are issuing this AD to prevent fractures of the side-brace fitting shafts of the MLG, and possible collapse of the MLG.

(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) Inspection of Main Landing Gear Side-Brace Fitting Shaft and Replacement

(1) At the applicable times specified in paragraphs (g)(1)(i), (g)(1)(ii), (g)(1)(iii), and (g)(1)(iv) of this AD, do a detailed inspection for corrosion and damage of each side-brace fitting shaft of the MLG, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–57–052, dated July 28, 2011. Repeat the inspections at the applicable times specified in paragraphs (g)(1)(i), (g)(1)(ii), (g)(1)(iii), and (g)(1)(iv) of this AD.

(i) For airplanes that average greater than 900 flight hours per year and have side-brace shafts part number (P/N) 601R10237–1 installed in either the left- or right-hand MLG, or if the side brace shaft part number cannot be identified without removal: Within 1,000 flight hours after the effective date of this AD, do the inspection. Repeat the inspections thereafter at intervals not to exceed 1,000 flight hours until the replacement specified in paragraph (g)(2) or (h) of this AD is done.

(ii) For airplanes that average 900 flight hours or less per year and have side-brace shafts P/N 601R10237–1 installed on either the left- or right-hand MLG, or if the side brace shaft part number cannot be identified without removal: Within 18 months after the effective date of this AD, do the inspection. Repeat the inspections thereafter at intervals not to exceed 18 months until the replacement specified in paragraph (g)(2) or (h) of this AD is done.

(iii) For airplanes that average greater than 900 flight hours per year and have side-brace shafts P/N 601R10237–3 installed on either the left- or right-hand MLG: Within 36 months after the effective date of this AD, do the inspection. Repeat the inspections thereafter at intervals not to exceed 36 months until the replacement specified in paragraph (g)(2) or (h) of this AD is done.

(iv) For airplanes that average 900 flight hours or less per year and have side brace shafts P/N 601R10237–3 installed on either the left- or right-hand MLG: Within 60 months after the effective date of this AD, do the inspection. Repeat the inspections thereafter at intervals not to exceed 60 months until the replacement specified in paragraph (g)(2) or (h) of this AD is done.

(2) If any corrosion or damage is found during any inspection required by paragraph (g) of this AD: Before further flight, replace the side-brace fitting shaft with a new shaft P/N 601R10247–3, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–57–052, dated July 28, 2011. Doing this replacement terminates the inspection requirements of paragraph (g) of this AD.

(h) Replacement

Do the replacement at the applicable time in paragraph (h)(1) or (h)(2) of this AD.

(1) For any airplanes that have side-brace shafts P/N 601R10237–1 installed or if the side-brace shaft part number cannot be identified without removal: Within 27 months after the effective date of this AD, replace the side-brace fitting shaft of the MLG with a new shaft having P/N 601R10247–3, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–57–052, dated July 28, 2011. Doing this replacement terminates the inspection requirements of paragraph (g) of this AD.

(2) For airplanes that have side-brace shafts P/N 601R10237–3 installed: Within 117 months after the effective date of this AD, replace the side-brace fitting shaft of the MLG with a new shaft P/N 601R10247–3, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–57–052, dated July 28, 2011. Doing this replacement terminates the inspection requirements of paragraph (g) of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, 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–2011–39, dated October 25, 2011; and Bombardier Service Bulletin 601R–57–052, dated July 28, 2011; for related information.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14208 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0593; Directorate Identifier 2011–NM–238–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes. This proposed AD was prompted by reports of burned contacts in a certain production break plug and its corresponding receptacle. This proposed AD would require modifying galley power supply wiring by disconnecting it from the affected plug/receptacle and reconnecting the power supply wiring through splices. We are proposing this AD to prevent a high electrical load which may lead to overheating of the galley power supply wiring and/or the electrical connector and consequent smoke or fire in the galley area, which could result in damage to the airplane and injury to occupants.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252–627–350; fax +31 (0)252–627–211; email: *technicalservices.fokkerservices@stork.com*; Internet *http://www.myfokkerfleet.com.* You may review copies of the referenced service information at the FAA, Transport

Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 227–1137; fax: (425) 425–227–1149; email: *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0593; Directorate Identifier 2011–NM–238–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the aviation authority for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0183, dated September 23, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Reports have been received about burned contacts in production break plug P4259B and corresponding receptacle J 4259A. After investigation, it was concluded that the high electrical load on the contacts M, L and X, in combination with the electrical loads on the adjacent connections, may have resulted in these occurrences.

This condition, if not detected and corrected, can lead to overheating of the galley power supply wiring and/or the electrical connector and consequent smoke or fire in the galley area, possibly resulting in damage to the aeroplane and injury to occupants.

For the reasons described above, this [EASA] AD requires modification of the galley power supply wiring by disconnecting it from the affected plug/receptacle and reconnecting the power supply wiring through splices.

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

Relevant Service Information

Fokker Services B.V has issued Fokker Service Bulletin SBF100–24–044, dated July 14, 2011, which includes the following attachment:

- Fokker Manual Change Notification—Maintenance Documentation MCNM–F100–148, dated July 14, 2011.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 4 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $210 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,200, or $550 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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 proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Fokker Services B.V.: Docket No. FAA–2012–0593; Directorate Identifier 2011–NM–238–AD.

(a) Comments Due Date

We must receive comments by July 27, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes; certificated in any category; serial number (s/n) 11340 through 11343 inclusive, 11347, 11348, 11350 through 11356 inclusive, 11359, 11360, 11361, 11367 through 11371 inclusive, 11374 through 11378 inclusive, 11382 through 11385 inclusive, 11387 through 11390 inclusive, 11394 through 11397 inclusive, 11400 through 11423 inclusive, 11425 through 11432 inclusive, 11434 through 11439 inclusive, 11441 through 11453 inclusive, and 11456 through 11585 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Reason

This AD was prompted by reports of burned contacts in a certain production break plug and its corresponding receptacle. We are issuing this AD to prevent a high electrical load which may lead to overheating of the galley power supply wiring and/or the electrical connector and consequent smoke or fire in the galley area, which could result in damage to the airplane and injury to occupants.

(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) Modification

Within 24 months after the effective date of this AD: Modify the galley power supply wiring, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–24–044, dated July 14, 2011, which includes Fokker Manual Change Notification—Maintenance Documentation MCNM–F100–148, dated July 14, 2011.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9–ANM–116–AMOC–REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

(i) Related Information

Refer to MCAI EASA Airworthiness Directive 2011–0183, dated September 23, 2011; and Fokker Service Bulletin SBF 100–24–044, dated July 14, 2011, which includes Fokker Manual Change Notification—Maintenance Documentation MCNM–F100–148, dated July 14, 2011; for related information.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14211 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0594; Directorate Identifier 2012–NM–019–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes. This proposed AD was prompted by reports of movement of the rudder pedals being impeded due to corrosion of the trunnion shaft of the rudder feel trim unit (RFTU). This proposed AD would require inspecting to determine if certain RFTUs are installed, an operational check for signs of seizure of affected parts, repetitive lubrication for certain RFTUs, and replacing the RFTU with a new RFTU if necessary. Installation of replaced RFTUs with conformal bushings terminates the repetitive lubrication requirements. We are proposing this AD to detect and correct any sign of seizure of the trunnion shaft and its bushing, which could cause a rudder control jam or a large and rapid alternating rudder input leading to a structural failure of the vertical fin.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., Q–Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in

the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0594; Directorate Identifier 2011–NM–019–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2012–02, dated January 9, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> There have been several reported incidents on DHC–8 Series 400 aeroplanes where the movement of the rudder pedals has been impeded. An investigation showed that the Rudder Feel Trim Unit (RFTU) trunnion shaft was corroded. The root cause of the corrosion was a quality escape where cadmium plating on the trunnion bushing within the RFTU assembly was not removed. Corrosion on the shaft and in the trunnion bushing seized the trunnion and caused difficulties in controlling the rudder movement.
> This condition, if not corrected, could cause a rudder control jam or a large and rapid alternating rudder input leading to a structural failure of the vertical fin.
> This [TCCA] Airworthiness Directive (AD) is issued [inspect to determine serial number, an operational check for seizure, repetitive lubrication and] to replace the affected RFTUs to limit the possibility of binding and replace the affected RFTUs with units that have been reworked with conformal bushings to terminate the lubrication requirements.

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

Relevant Service Information

Bombardier, Inc. has issued Service Bulletin 84–27–57, dated July 22, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 83 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $35,275, or $425 per product.

In addition, we estimate that any necessary follow-on actions would take about 10 work-hours and require parts costing $0, for a cost of $850 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2012–0594; Directorate Identifier 2012–NM–019–AD.

(a) Comments Due Date

We must receive comments by July 27, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes; certificated in any category; serial numbers 4001, 4003 and subsequent, equipped with rudder feel trim unit part number 399500–1007.

(d) Subject

Air Transport Association (ATA) of America Code 27: Flight Controls.

(e) Reason

This AD was prompted by reports of movement of the rudder pedals being impeded due to corrosion of the trunnion shaft of the rudder feel trim unit (RFTU).

We are issuing this AD to detect and correct any sign of seizure of the trunnion shaft and its bushing, which could cause a rudder control jam or a large and rapid alternating rudder input leading to a structural failure of the vertical fin.

(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) Inspection

Within 600 flight hours or six months after the effective date of this AD whichever occurs first, inspect the RTFU to determine whether the serial number (S/N) is in the range from 0009 through 0388 without a suffix ''A,'' in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–57, dated July 22, 2011. A review of airplane maintenance records is acceptable in lieu of this inspection if the serial number of the RFTU can be conclusively determined from that review.

(1) If the RFTU's serial number is not in the range from 0009 through 0388 or if the serial number has a suffix ''A,'' no further action is required for this paragraph.

(2) If the RFTU's serial number is in the range from 0009 through 0388 without a suffix ''A,'' before further flight, perform an operational check of the RFTU for any sign of seizure of the trunnion and its bushing, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–57, dated July 22, 2011.

(i) If a seizure of the RFTU trunnion and its bushings is found: Before further flight, replace the RFTU with a new RFTU, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–57, dated July 22, 2011.

(ii) If no seizure of the RFTU trunnion and its bushings is found: Before further flight, lubricate the RFTU, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–57, dated July 22, 2011. Repeat the lubrication of the RFTU at intervals not to exceed 600 flight hours until the replacement required by paragraph (h) is done.

(h) Replacement

For airplanes identified in paragraph (g)(2) of this AD: Within 6,000 flight hours after the effective date of this AD, replace all affected RFTUs with units that have a serial number outside the range from 0009 through 0388 or that have a serial number with a suffix ''A,'' in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–27–57, dated July 22, 2011.

(i) Parts Installation

As of the effective date of this AD, no person may install a RFTU P/N 399500–1007 with a serial number from 0009 through 0388 without a suffix ''A'' on any airplane.

(j) 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.

(k) Related Information

(1) Refer to MCAI Canadian Airworthiness Directive CF–2012–02, dated January 9, 2012; and Bombardier Service Bulletin 84–27–57, dated July 22, 2011; for related information.

(2) For service information identified in this AD, contact Bombardier, Inc., Q–Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14212 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0595; Directorate Identifier 2012–NM–055–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 777 airplanes. This proposed AD was prompted by reports of failure of wire support clamps in the forward section of the aft pressure bulkhead. This proposed AD would require a detailed inspection of the clamps on the power feeder cable auxiliary power unit (APU) to determine if certain clamps are installed, and related investigative and corrective actions if necessary. We are proposing this AD to prevent failure of the clamp, which could result in wire chafing and potential arcing and consequent fire in section 48 (a flammable fluid leakage zone) or heat damage to the APU power feeder cable, insulation blankets, or pressure bulkhead.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact 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; 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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6482; fax: (425) 917–6590; email: *georgios.roussos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0595; Directorate Identifier 2012–NM–055–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received reports of failure of wire support clamps in the forward section of the aft pressure bulkhead. This condition, if not corrected, could result in wire chafing and potential arcing and consequent fire in section 48 (a flammable fluid leakage zone) or heat damage to the APU power feeder cable, insulation blankets, or pressure bulkhead.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011. The service information describes procedures for a detailed inspection of the clamps on the APU power feeder cable to determine if certain clamps are installed, and related investigative and corrective actions if necessary.

The related investigative actions include a general visual inspection for damage of the APU power feeder cable and heat damage of the insulation blanket adjacent to the clamp, a detailed inspection for primer discoloration and structural deterioration of the fuselage structure, and an eddy current inspection for heat damage of the aluminum structure.

The corrective actions include replacing the affected clamps, repairing the APU power feeder cable, the installation blanket, and the aluminum structure.

Clarification of Requirements

Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011, does not include a step for the corrective action if no damage is found during the detailed inspection for primer discoloration and structural deterioration of the section 47 and 48 fuselage structure. For the corrective action, this AD requires repairing the APU power feeder cable and insulation blanket and replacing the existing non-TA027063 clamps with TA027063 clamps, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

Differences Between the Proposed AD and the Service Information

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 164 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection and Clamp Replacement	8 work-hours × $85 per hour = $680	$500	$1,180	$193,520

We estimate the following costs to do any necessary repair that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need this repair:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspection and Repair of the Pressure Bulkhead	48 work-hours × $85 per hour = $4,080	$0	$4,080

We have received no definitive data that would enable us to provide parts cost estimates for the on-condition repairs specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0595; Directorate Identifier 2012–NM–055–AD.

(a) Comments Due Date

We must receive comments by July 27, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 2421; AC Generator/Alternator.

(e) Unsafe Condition

This AD was prompted by reports of failure of wire support clamps in the forward section of the aft pressure bulkhead. We are issuing this AD to prevent failure of the clamp, which could result in wire chafing and potential arcing and consequent fire in section 48 (a flammable fluid leakage zone) or heat damage to the auxiliary power unit (APU) power feeder cable, insulation blankets, or pressure bulkhead.

(f) Compliance

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

(g) Detailed Inspection of the Clamps

Within 48 months after the effective date of this AD: Do a detailed inspection of the clamps on the APU power feeder cable to determine if TA027063 clamps are installed, and all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011, except as required by paragraph (h) and (i) of this AD. Do all related investigative and corrective actions before further flight.

(h) Exception to the Service Bulletin

If during any inspection of the fuselage structure required by paragraph (g) of this AD, no primer discoloration or structural deterioration is found, before further flight, repair the APU power feeder cable and insulation blanket and replace the existing clamps, in accordance with steps 3.B.7, 3.B.8, and 3.B.9 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–24A0119, dated November 11, 2011.

(i) Repair Approval

Where the service bulletin specifies to do the repair in accordance to the instruction from Boeing, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) 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.

(3) An AMOC that provides an acceptable level of safety may be used for any structural repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a structural repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(k) Related Information

(1) For more information about this AD, contact Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6482; fax: (425) 917–6590; email: *georgios.roussos@faa.gov*.

(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; 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.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14252 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0591; Directorate Identifier 2012–NM–015–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain The Boeing Company Model 737–600, –700, –700C, –800, and –900 series airplanes. The existing AD currently requires replacing the drain tube assemblies and support clamps on the aft fairing of the engine struts. Since we issued that AD, we received an additional report of a broken drain tube assembly on the aft fairing of the left engine strut at the clamp support location under the aft fairing compartment, inside the heat shield cavity of the aft fairing. There have also been reports of tube wear at the clamp location on additional airplanes. This proposed AD would require replacing the drain tube assembly of the left and right engine strut aft fairings with a new one which includes an integral support clamp made of nickel alloy 625. This proposed AD would also add airplanes to the applicability. We are proposing this AD to prevent failure of the drain tube assemblies and clamps on the aft fairings of the engine struts. Such failure could allow leaked flammable fluids in the drain systems to discharge onto the heat shields of the aft fairings of the engine struts, which could result in an undetected and uncontrollable fire.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact 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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Ansel James, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6497; fax: 425–917–6590; email: *ansel.james@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0591; Directorate Identifier 2012–NM–015–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On April 8, 2008, we issued AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008), for certain Model 737–600, –700, –700C, –800, and –900 series airplanes. That AD requires replacing the drain tube assemblies and support clamps on the aft fairing of the engine struts. That AD resulted from reports of failure of the drain tube assembly and clamp on the aft fairings of an engine strut. We issued that AD to prevent failure of the drain tube assemblies and clamps on the aft fairings of the engine struts. Failure of the drain tube assemblies could allow leaked flammable fluids in the drain systems to discharge onto the heat shields of the aft fairings of the engine struts, which could result in an undetected and uncontrollable fire.

Actions Since Existing AD Was Issued

AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008), refers to Boeing Special Attention Service Bulletin 737–54–1043, dated May 2, 2007, as the appropriate source of service information for the required actions.

Boeing then issued Special Attention Service Bulletin 737–54–1043, Revision 1, dated October 19, 2009, to replace the drain tube assembly of the engine strut aft fairing and support clamp.

Since we issued AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008), an airplane on which the actions specified in Boeing Special Attention Service Bulletin 737–54–1043, Revision 1, dated October 19, 2009, had been incorporated in production, was reported to have a broken drain tube assembly on the aft fairing of the left engine strut at the clamp support location under the aft fairing compartment, inside the heat shield cavity of the aft fairing (the same location identified in the existing AD).

This airplane had accumulated 4,127 total flight cycles and 6,845 total flight hours. There have also been reports of tube wear at the clamp location.

Boeing subsequently issued Special Attention Service Bulletin 737–54–1043, Revision 2, dated November 4, 2011, which describes procedures for replacing the drain tube assembly of the engine strut aft fairing with a new one which includes an integral support clamp made of nickel alloy 625.

Boeing Special Attention Service Bulletin 737–54–1043, Revision 2, dated November 4, 2011, includes Model 737–900ER series airplanes, which were not included in Boeing Special Attention Service Bulletin 737–54–1043, dated May 2, 2007.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

Proposed AD Requirements

This proposed AD would retain none of the requirements of AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008). This proposed AD would add airplanes to the applicability statement of the existing AD. This proposed AD would also require accomplishing the actions specified in Boeing Special Attention Service Bulletin 737–54–1043, Revision 2, dated November 4, 2011, described in this NPRM.

Costs of Compliance

We estimate that this proposed AD affects 1,098 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement	14 work-hours × $85 per hour = $1,190	$12,326	$13,516	$14,840,568

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008), and adding the following new AD:

The Boeing Company: Docket No. FAA–2012–0591; Directorate Identifier 2012–NM–015–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by July 27, 2012.

(b) Affected ADs

This AD supersedes AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008).

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes; certificated in any category; as identified in Boeing Special Attention Service Bulletin 737–54–1043, Revision 2, dated November 4, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 54, Nacelles/pylons.

(e) Unsafe Condition

This AD was prompted by a report of a broken drain tube assembly on the aft fairing of the left engine strut at the clamp support location under the aft fairing compartment, inside the heat shield cavity of the aft fairing. There have also been reports of tube wear at the clamp location on additional airplanes. We are issuing this AD to prevent failure of the drain tube assemblies and clamps on the aft fairings of the engine struts. Such failure could allow leaked flammable fluids in the drain systems to discharge onto the heat shields of the aft fairings of the engine struts, which could result in an undetected and uncontrollable fire.

(f) Compliance

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

(g) Replacement

Within 60 months after the effective date of this AD, replace the drain tube assemblies and support clamps on the aft fairing of the struts of engines 1 and 2 with new drain tube assemblies and clamps, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–54–1043, Revision 2, dated November 4, 2011.

(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.

(3) AMOCs approved previously in accordance with AD 2008–08–24, Amendment 39–15478 (73 FR 21242, April 21, 2008), are not approved as AMOCs with this AD.

(i) Related Information

(1) For more information about this AD, contact Ansel James, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6497; fax: 425–917–6590; email: *ansel.james@faa.gov.*

(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.* 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.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14245 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0498; Directorate Identifier 2011–NM–212–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 747–400, –400D, and –400F series airplanes. This proposed AD was prompted by reports of crown frame web cracking at left buttock line (LBL) 15.0, station (STA) 320. This proposed AD would require a measurement of the web at STA 320 and, depending on findings, various inspections for cracks and missing fasteners, web and fastener replacement, and related investigative and corrective actions. We are proposing this AD to prevent complete fracture of the crown frame assembly, and consequent damage to the skin and in-flight decompression of the airplane.

DATES: We must receive comments on this proposed AD by July 27, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact 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 proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *Bill.Ashforth@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0498; Directorate Identifier 2011–NM–212–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received five reports of crown frame web cracking at left buttock line (LBL) 15.0, station (STA) 320. One airplane crack length was not specified and reported at 9,456 flight cycles. Three cracks of 0.65 inch in length were reported after 9,354 flight cycles on one airplane, 12,851 flight cycles on the second airplane, and 29,866 flight cycles on the third airplane. A crack of 0.85 inch was reported at 29,956 flight cycles on another airplane.

Investigation revealed that in these airplanes, the web was made from 0.08-inch thick material and did not conform to production drawings. Also, an operator reported missing fasteners from locations common to the frame web and lower chord on the first delivered Model 747–400 after 10,317 flight cycles. This airplane also had a web made from 0.08-inch thick material and did not conform to production drawings.

This condition, if not corrected, could result in complete fracture of the crown frame assembly, and consequent damage to the skin and in-flight decompression of the airplane.

Relevant Service Information

We reviewed Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011. For information on the procedures and compliance times, see this service information at *http://*

www.regulations.gov by searching for Docket No. FAA No. FAA–2012–0498.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information identified previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.'' This proposed AD also provides options for accomplishing the actions that are required for airplanes on which no cracking is found in the crown frame web.

The phrase ''related investigative actions'' is used in this proposed AD. ''Related investigative actions'' are those actions that are identified as follow-on actions that are: (1) Related to the preceding required action, and (2) are on-condition actions that further investigate the nature of any condition found. Related investigative actions could include, for example, inspections and operational tests.

In addition, the phrase ''corrective actions'' is used in this proposed AD. ''Corrective actions'' are those actions that are on-condition actions that correct or address any condition found. Corrective actions could include, for example, repairs, removal and replacement, and modifications.

Accomplishment of the inspection required by AD 2009–19–05, Amendment 39–16022 (74 FR 48138, September 22, 2009), would terminate the requirements of the post-replacement inspections required by paragraph (j) of this proposed AD.

Differences Between the Proposed AD and the Service Information

Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 29 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Measurement	1 work-hour × $85 per hour = $85.	$0	$85	$2,465.
Inspection and web replacement.	208 work-hours × $85 per hour = $17,680.	Up to $21,887	Up to $39,567	Up to $1,147,443.
Post-replacement inspection	135 work-hours × $85 per hour = $11,475 per inspection cycle.	$0	$11,475 per inspection cycle	$332,775 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition crack repairs specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0498; Directorate Identifier 2011–NM–212–AD.

(a) Comments Due Date

We must receive comments by July 27, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 747–400, –400D, and –400F series airplanes, certificated in any category, as specified in Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of crown frame web cracking at left buttock line (LBL) 15.0, station (STA) 320. We are proposing this AD to prevent complete fracture of the crown frame assembly, and consequent damage to the skin and in-flight decompression of the airplane.

(f) Compliance

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

(g) Crown Frame Web Measurement

At the applicable compliance time specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as specified in paragraph (k)(1) of this AD, measure the thickness of the crown frame web at station (STA) 320, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011. For airplanes with a 0.136 to 0.145-inch-thick web, no further action is required by this AD.

(h) Detailed Inspection and Web Replacement With No Web Repair Doubler

For airplanes on which the web measures 0.078- to 0.083-inch thick during the measurement required by paragraph (g) of this AD, and on which repair doubler is not installed: At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as specified in paragraph (k)(1) of this AD, do a detailed inspection for cracks and a general visual inspection for missing fasteners of the crown frame web at STA 320; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as specified in paragraph (k)(2) of this AD. Do the applicable related investigative and corrective actions at the applicable times in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as specified in paragraph (k)(1) of this AD. Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, provides options for accomplishing the actions that are required for airplanes on which no cracking is found in the crown frame web.

(i) Detailed Inspection and Web Replacement With Web Repair Doubler

For airplanes on which the web measures 0.078- to 0.083-inch thick during the measurement required by paragraph (g) of this AD, and on which a repair doubler is installed: At the applicable compliance time specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as specified in paragraph (k)(1) of this AD, do the actions specified in paragraphs (i)(1) and (i)(2) of this AD, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as provided by paragraph (k)(2) of this AD. Do all applicable corrective actions before further flight.

(1) Replace the web with a new web and do all applicable related investigative actions.

(2) Do a detailed inspection for cracks in the upper or lower chord of the crown frame web at STA 320.

(j) Post-Replacement Repetitive Inspections of Replaced Web

Following any web replacement required by this AD, at the times specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011: Do a detailed inspection for cracks of the web, upper chord, lower chord, and lower chord splice, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, except as provided by paragraph (k)(2) of this AD. Do all applicable corrective actions before further flight. If no crack is found, repeat the inspection thereafter at the intervals specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011. Accomplishment of the inspections required by AD 2009–19–05, Amendment 39–16022 (74 FR 48138, September 22, 2009), terminates the requirements of this paragraph.

(k) Exceptions to the Service Information

(1) Where Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, specifies a compliance time ''after the original issue date of the service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Service Bulletin 747–53A2784, Revision 1, dated September 14, 2011, specifies to contact Boeing for appropriate action, accomplish applicable actions before further flight using a method approved in accordance with the procedures specified in paragraph (l) of this AD.

(l) 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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(m) Related Information

(1) For more information about this AD, contact Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *Bill.Ashforth@faa.gov.*

(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.* You may also review the referenced service information in the docket at *www.regulations.gov* (refer to Docket No. FAA–2012–0498). 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.

Issued in Renton, Washington, on May 31, 2012.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–14253 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

15 CFR Part 1400

[Docket No. 120517080–2132–02]

Petition for Inclusion of the Arab-American Community in the Groups Eligible for MBDA Services

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice of proposed rulemaking and request for comments; amendment.

SUMMARY: On May 30, 2012, the Minority Business Development Agency (MBDA) published a notice of proposed rulemaking and request for comments regarding a petition received on January 11, 2012 from the American-Arab Anti-Discrimination Committee (ADC) requesting formal designation of Arab-Americans as a minority group that is socially or economically disadvantaged pursuant to 15 CFR part 1400. The Notice includes a thirty-day comment deadline of June 29, 2012, but also states that MBDA will make a decision on the petition no later than June 27, 2012.

Due to the complexity of the subject matter, the Department finds that it is not practicable to complete an in depth review of the issues involved in the petition, give adequate consideration to all comments, and make a reasoned determination on the petition by June 27, 2012. Therefore, the Department has determined that it is necessary to extend the time in which it will make its decision on the petition until July 30, 2012. This extension will not prejudice the petitioner. The deadline for the comments on the petition remains unchanged, and continues to be June 29, 2012.

FOR FURTHER INFORMATION CONTACT: For further information about this Notice, contact Josephine Arnold, Minority Business Development Agency, 1401 Constitution Avenue NW, Room 5053, Washington, DC 20230, (202) 482–2332, and *jarnold@mbda.gov.*

David Hinson,

National Director, Minority Business Development Agency.

[FR Doc. 2012–14225 Filed 6–11–12; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–134042–07]

RIN 1545–BG81

Basis of Indebtedness of S Corporations to Their Shareholders

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to basis of indebtedness of S corporations to their shareholders. These proposed regulations provide that S corporation shareholders increase their basis of indebtedness of the S corporation to the shareholder only if the indebtedness is bona fide. The proposed regulations affect shareholders of S corporations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 10, 2012. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for October 8, 2012, must be received by September 10, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–134042–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–134042–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–134042–07). The public hearing will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Caroline E. Hay at (202) 622–3070; concerning the submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) P. Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document proposes amendments to § 1.1366–2 of the Income Tax Regulations. In addition, this document proposes conforming changes to the effective date rules provided in § 1.1366–5.

Under section 1366(d)(1) of the Internal Revenue Code (Code), the aggregate amount of losses and deductions that a shareholder takes into account for any taxable year cannot exceed the sum of that shareholder's adjusted basis in stock and adjusted basis of any indebtedness of the S corporation to that shareholder. The Senate Report discussing section 1374 (the predecessor statute to section 1366) illustrates Congress's intent to limit the loss that a shareholder takes into account to that shareholder's investment in the corporation; that is, to the adjusted basis of the stock in the corporation owned by the shareholder and the adjusted basis of any indebtedness of the corporation to the shareholder. S. Rept. 1983, 85th Cong., 2d Sess. 219–220 (1958) (1958–3 CB 922, 1141).

Section 1.1366–2 provides rules relating to limitations on deduction of passthrough items of an S corporation to its shareholder. Under § 1.1366–2(a)(1), a shareholder's aggregate amount of losses and deductions taken into account under § 1.1366–1(a)(2), (3), and (4) for any taxable year of the S corporation cannot exceed that shareholder's adjusted basis in stock in the corporation and adjusted basis of any indebtedness of the corporation to that shareholder. These proposed amendments to the regulations provide that, in order to increase a shareholder's basis of indebtedness, a loan must represent bona fide indebtedness of the S corporation that runs directly to the shareholder. These proposed regulations also reaffirm that a shareholder acting as guarantor of S corporation indebtedness does not create or increase basis of indebtedness simply by becoming a guarantor.

Explanation of Provisions

Section 1366(d)(1) provides that a shareholder can take into account losses and deductions to the extent of the adjusted basis of the shareholder's stock and the adjusted basis of any indebtedness of the S corporation to the shareholder (basis of indebtedness). The Code does not define basis of indebtedness, but several court cases involving passthrough losses from an S corporation interpret section 1366 to require an investment in the S corporation that constitutes ''an actual economic outlay'' by the shareholder to create basis of indebtedness. See, for example, *Maloof* v. *Comm'r,* 456 F.3d 645, 649–650 (6th Cir. 2006); *Spencer* v. *Comm'r,* 110 T.C. 62, 78–79 (1998), aff'd without published opinion, 194 F.3d 1324 (11th Cir. 1999); *Hitchins* v. *Comm'r,* 103 T.C. 711, 715 (1994); *Perry* v. *Comm'r,* 54 T.C. 1293, 1296 (1970). Often, the cases involve attempts by an S corporation shareholder to obtain basis of indebtedness by borrowing from another person—typically, a related entity—and then lending the proceeds to the S corporation (a back-to-back loan transaction). Alternatively, an S corporation shareholder might seek to restructure an existing loan of the S corporation into a back-to-back loan by assuming the S corporation's liability on the loan and creating a commensurate obligation from the S corporation to the shareholder. Disputes continue to arise concerning when a back-to-back loan gives rise to an actual economic outlay,

in particular whether a shareholder has been made ''poorer in a material sense'' as a result of the loan. See, for example, *Oren* v. *Comm'r,* 357 F.3d 854, 857–859 (8th Cir. 2004); *Bergman* v. *U.S.,* 174 F.3d 928, 932 (8th Cir. 1999).

The frequency of disputes between S corporation shareholders and the government regarding whether certain loan transactions involving multiple parties, including back-to-back loan transactions, create shareholder basis of indebtedness demonstrates the complexity of and uncertainty about this issue for both shareholders and the government. The Treasury Department and the IRS propose these regulations to clarify the requirements for increasing basis of indebtedness and to assist S corporation shareholders in determining with greater certainty whether their particular arrangement creates basis of indebtedness. These proposed regulations require that loan transactions represent bona fide indebtedness of the S corporation to the shareholder in order to increase basis of indebtedness; therefore, an S corporation shareholder need not otherwise satisfy the ''actual economic outlay'' doctrine for purposes of section 1366(d)(1)(B).

The key requirement of these proposed regulations is that purported indebtedness of the S corporation to a shareholder must be bona fide indebtedness to the shareholder. These proposed regulations do not attempt to provide a different standard for purposes of section 1366 as to what constitutes bona fide indebtedness. Rather, general Federal tax principles—many of which have developed outside of section 1366—determine whether indebtedness is bona fide. See, for example, *Knetsch* v. *U.S.,* 364 U.S. 361 (1960) (disallowing interest deductions for lack of actual indebtedness); *Geftman* v. *Comm'r,* 154 F.3d 61, 68–75 (3d Cir. 1998) (based on the objective attributes and the economic realities of the transaction, holding that the transaction at issue was not a bona fide debt); *Estate of Mixon* v. *U.S.,* 464 F.2d 394, 402 (5th Cir. 1972) (discussion of factors indicative that debt is bona fide); *Litton Business Systems, Inc.* v. *Comm'r,* 61 T.C. 367, 376–77 (1973).

By contrast, shareholder guarantees of S corporation debt do not result in basis of indebtedness. An overwhelming majority of courts considering whether shareholders may increase basis of indebtedness from their guarantees of S corporation debt determined that the shareholders' guarantees did not create basis of indebtedness. Where an S corporation shareholder acts merely as a guarantor of a loan made by another party directly to the S corporation, or acts in a capacity similar to a guarantor (for example, as a surety or accommodation party), then the courts have held that the shareholder adjusts basis of indebtedness only to the extent the shareholder actually performs under the guarantee. See, for example, *Estate of Leavitt* v. *Comm'r,* 875 F.2d 420 (4th Cir. 1989); *Frankel* v. *Comm'r,* 61 T.C. 343 (1973), aff'd without published opinion, 506 F.2d 1051 (3d Cir. 1974); *Raynor* v. *Comm'r,* 50 T.C. 762 (1968); *Weisberg* v. *Comm'r,* T.C. Memo. 2010–55; *Maloof* v. *Comm'r,* T.C. Memo. 2005–75, aff'd, 456 F.3d 645 (6th Cir. 2006); *Wise* v. *Comm'r,* T.C. Memo. 1997–135. But see *Selfe* v. *U.S.,* 778 F.2d 769 (11th Cir. 1985) (holding that under unique and limited circumstances, a shareholder who guarantees a loan to an S corporation may increase basis of indebtedness where, in substance, that shareholder has borrowed funds and subsequently advanced them to the S corporation). These proposed regulations provide that an S corporation shareholder who merely acts as a guarantor or in a similar capacity has not created basis of indebtedness unless the shareholder actually makes a payment, and then only to the extent of such payment. See also Rev. Rul. 70–50 (1970–1 CB 178), (see § 601.601(d)(2)).

Additionally, some taxpayers have relied on an ''incorporated pocketbook'' theory to claim an increase in basis of indebtedness in circumstances that involve a loan directly to the S corporation from an entity related to the S corporation shareholder. In these transactions, an S corporation shareholder claims that a transfer from the related entity directly to the shareholder's S corporation was made on the shareholder's behalf and is, in substance, a loan from the related entity to the shareholder, followed by a loan from the shareholder to the S corporation. A limited number of court decisions have allowed shareholders to increase basis of indebtedness as a result of incorporated pocketbook transactions. See *Yates* v. *Comm'r,* T.C. Memo. 2001–280; *Culnen* v. *Comm'r,* T.C. Memo. 2000–139. Under these proposed regulations, an incorporated pocketbook transaction increases basis of indebtedness only where the transaction creates a bona fide creditor-debtor relationship between the shareholder and the borrowing S corporation.

These proposed regulations only address whether a shareholder has basis of indebtedness for purposes of section 1366(d)(1)(B) and do not address how to determine the basis of the shareholder's stock in the S corporation for purposes of section 1366(d)(1)(A). Therefore, these proposed regulations leave unchanged the conclusion found in published guidance that a shareholder of an S corporation does not increase basis in stock for purposes of section 1366(d)(1)(A) upon the contribution of the shareholder's own unsecured demand promissory note to the corporation. Rev. Rul. 81–187 (1981–2 CB 167). This conclusion is consistent with published guidance and case law in the partnership context that the contribution of the partner's own note will not increase such partner's basis in its partnership interest under section 722. Rev. Rul. 80–235 (1980–2 CB 229); *Oden* v. *Comm'r,* T.C. Memo. 1981–184, aff'd without published opinion, 679 F.2d 885 (4th Cir. 1982) (because the partner incurred no cost in making the note, the partner's basis in the note to him was zero). In developing this project, the Treasury Department and the IRS have considered whether the principal holding of Rev. Rul. 81–187, and the holding of Rev. Rul. 80–235 as it relates to a partner's basis in its partnership interest upon the contribution of the partner's own note, should be promulgated as regulations. The Treasury Department and the IRS have considered alternatives to the discussion of the applicable law in those revenue rulings. As one model, the Treasury Department and the IRS have, with respect to basis calculations in the S corporation and partnership context, considered adopting a rule similar to the one currently in § 1.704–1(b)(2)(iv)(d)(2), which provides that a partner's capital account is increased with respect to non-readily tradable partner notes only (i) when there is a taxable disposition of such note by the partnership, or (ii) when the partner makes principal payments on such note. The Treasury Department and the IRS request comments concerning the propriety of this model in the S corporation and the partnership context.

Proposed Effective Date

The regulations, as proposed, apply to loan transactions entered into on or after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of

the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. Because these proposed regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying.

A public hearing has been scheduled for October 8, 2012, beginning at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 10, 2012. A period of 10 minutes is allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are Caroline E. Hay, Michael H. Beker, and Stacy L. Short, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

§ 1.108–7 [Amended]

Par. 2. Section 1.108–7 is amended by:

1. Removing the language ''§ 1.1366–2(a)(5)'' in paragraph (d)(2)(iii) and adding ''§ 1.1366–2(a)(6)'' in its place.

2. Adding a sentence to the end of paragraph (f)(2).

The addition reads as follows:

§ 1.108–7 Reduction of attributes.

* * * * *

(f) *Effective/applicability date.*

(2) * * * The revision to the citation to § 1.1366–2(a) in paragraph (d)(2)(iii) of this section is applicable on and after the date these proposed regulations are published as final in the **Federal Register**.

* * * * *

§ 1.1366–0 [Amended]

Par. 3. Section 1.1366–0 is amended by:

1. Redesignating paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) as paragraphs (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7) in the table of contents for § 1.1366–2, respectively, and adding a new paragraph (a)(2).

2. Revising the title of § 1.1366–5 in the table of contents.

The additions read as follows:

§ 1.1366–0 Table of contents.

* * * * *

§ 1.1366–2 Limitations on deduction of passthrough items of an S corporation to its shareholders.

(a) * * *

(2) Basis of indebtedness.

(i) In general.

(ii) Guarantees.

(iii) Examples.

* * * * *

§ 1.1366–5 Effective/Applicability date.

§ 1.1366–2 [Amended]

Par. 4. Section 1.1366–2 is amended by:

1. Redesignating paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) as paragraphs (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7) respectively, and adding a new paragraph (a)(2).

2. Removing the language ''(a)(3)(i)'' in paragraph (a)(1)(i), and adding the language ''(a)(4)(i)'' in its place.

3. Removing the language ''paragraph (a)(3)(ii)'' in paragraph (a)(1)(ii), and adding the language ''paragraphs (a)(2) and (a)(4)(ii)'' in its place.

4. Removing the language ''(a)(3)(i) and (ii)'' in newly redesignated paragraph (a)(3), and adding the language ''(a)(4)(i) and (ii)'' in its place.

5. Removing the language ''paragraphs (a)(1)(i) and (2)'' in newly redesignated paragraph (a)(4)(i), and adding the language ''paragraphs (a)(1)(i) and (3)'' in its place.

6. Removing the language ''paragraphs (a)(1)(ii) and (2)'' in newly redesignated paragraph (a)(4)(ii), and adding ''paragraphs (a)(1)(ii) and (3)'' in its place.

7. Removing the language ''(a)(3)(i)'' and ''(a)(3)(ii)'' in newly redesignated paragraph (a)(5), and adding the language ''(a)(4)(i)'' and ''(a)(4)(ii)'', respectively, in their place.

8. Removing the language ''(a)(5)(ii)'' in newly redesignated paragraph (a)(6)(i) and (a)(6)(iii), and adding the language ''(a)(6)(ii)'' in its place.

9. Removing the language ''(a)(4)'' in newly redesignated paragraph (a)(6)(ii), and adding the language ''(a)(5)'' in its place.

10. Removing the language ''paragraphs (a)(1)(i) and (2)'' in newly redesignated paragraph (a)(7), and adding the language ''paragraphs (a)(1)(i) and (3)'' in its place.

The additions read as follows:

§ 1.1366–2 Limitations on deduction of passthrough items of an S corporation to its shareholders.

(a) * * *

(2) *Basis of indebtedness*—(i) *In general.* The term *basis of any indebtedness of the S corporation to the shareholder* means the shareholder's adjusted basis (as defined in § 1.1011–1 and as specifically provided in section 1367(b)(2)) in any bona fide indebtedness of the S corporation that runs directly to the shareholder. Whether indebtedness is bona fide indebtedness to a shareholder is determined under general Federal tax principles and depends upon all of the facts and circumstances.

(ii) *Guarantees.* A shareholder does not obtain basis of indebtedness in the S corporation merely by guaranteeing a loan or acting as a surety, accommodation party, or in any similar

capacity relating to a loan. When a shareholder makes a payment on bona fide indebtedness for which the shareholder has acted as guarantor or in a similar capacity, based on the facts and circumstances, the shareholder may increase its basis of indebtedness to the extent of that payment.

(iii) *Examples.* The following examples illustrate the provisions of paragraph (a)(2)(i) and (ii) of this section:

Example 1. Shareholder loan transaction. A is the sole shareholder of S, an S corporation. S received a loan from A. Whether the loan from A to S constitutes bona fide indebtedness from S to A is determined under general Federal tax principles and depends upon all of the facts and circumstances. See paragraph (a)(2)(i) of this section. If the loan constitutes bona fide indebtedness from S to A, A's loan to S increases A's basis of indebtedness under paragraph (a)(2)(i) of this section. The result is the same if A made the loan to S through an entity that is disregarded as an entity separate from A under § 301.7701–3.

Example 2. Guarantee. A is a shareholder of S, an S corporation. In 2013, S received a loan from Bank. Bank required A's guarantee as a condition of making the loan to S. Beginning in 2014, S could no longer make payments on the loan and A made payments directly to Bank from A's personal funds until the loan obligation was satisfied. For each payment A made on the note, A obtains basis of indebtedness under paragraph (a)(2)(ii) of this section. Thus, A's basis of indebtedness is increased during 2014 under paragraph (a)(2)(ii) of this section to the extent of A's payments to Bank pursuant to the guarantee agreement.

Example 3. Back-to-back loan transaction. A is the sole shareholder of two S corporations, S1 and S2. S1 loaned $200,000 to A. A then loaned $200,000 to S2. Whether the loan from A to S2 constitutes bona fide indebtedness from S2 to A is determined under general Federal tax principles and depends upon all of the facts and circumstances. See paragraph (a)(2)(i) of this section. If A's loan to S2 constitutes bona fide indebtedness from S2 to A, A's back-to-back loan increases A's basis of indebtedness in S2 under paragraph (a)(2)(i) of this section.

Example 4. Loan restructuring through distributions. A is the sole shareholder of two S corporations, S1 and S2. In March 2013, S1 made a loan to S2. In December 2013, S1 assigned its creditor position in the note to A by making a distribution to A of the note. Under local law, after S1 distributed the note to A, S2 was relieved of its liability to S1 and was directly liable to A. Whether S2 is indebted to A rather than S1 is determined under general Federal tax principles and depends upon all of the facts and circumstances. See paragraph (a)(2)(i) of this section. If the note constitutes bona fide indebtedness from S2 to A, the note increases A's basis of indebtedness in S2 under paragraph (a)(2)(i) of this section.

* * * * *

§ 1.1366–5 [Amended]

Par. 5. Section 1.1366–5 is amended by:

1. Removing the language ''Sections 1.1366–2(a)(5)(i), (ii) and (iii)'', and adding the language ''Sections 1.1366–2(a)(6)(i), (ii) and (iii)'' in its place.

2. Adding two sentences to the end of the paragraph.

The additions read as follows:

§ 1.1366–5 Effective/Applicability date.

* * * Upon the publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, § 1.1366–2(a)(2) will apply to transactions entered into on or after the date these proposed regulations are published as final in the **Federal Register**. In addition, the revisions to §§ 1.1366–0, 1.1366–2, and this section are applicable on and after the date these proposed regulations are published as final in the **Federal Register**.

§ 1.1367–1 [Amended]

Par. 6. Section 1.1367–1(h) *Example 5*(iii) is amended by removing the language ''§ 1.1366–2(a)(2)'' in the third and fourth sentences and adding the language ''§ 1.1366–2(a)(3)'' in its place.

§ 1.1367–3 [Amended]

Par. 7. Section 1.1367–3 is amended by adding one sentence to the end of the paragraph to read as follows:

§ 1.1367–3 Effective/Applicability date.

* * * The revisions to citations to § 1.1366–2(a) in § 1.1367–1(h) *Example 5*(iii) are applicable on and after the date these proposed regulations are published as final in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–14188 Filed 6–11–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG 107889–12]

RIN 1545–BK85

Substantial Business Activities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS and the Treasury Department are issuing temporary regulations regarding whether a foreign corporation has substantial business activities in a foreign country. These regulations affect certain domestic corporations and partnerships (and certain parties related thereto), and foreign corporations that acquire substantially all of the properties of such domestic corporations or partnerships. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by September 10, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–107889–12), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–107889–12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS and REG–107889–12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Mary W. Lyons, (202) 622–3860 and David A. Levine, (202) 622–3860; concerning submissions of comments or requests for a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) relating to section 7874 of the Code. The temporary regulations provide guidance regarding whether a foreign corporation has substantial business activities in a foreign country for purposes of whether a foreign corporation is treated as a surrogate foreign corporation under section 7874(a)(2)(B). The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains these amendments.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a

significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 553(b) does not apply to these regulations. These regulations do not impose a collection of information. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The complexity and cost of a transaction to which section 7874 may apply make it unlikely that a substantial number of small entities will engage in such a transaction. In addition, any economic impact to entities affected by section 7874, large or small, is derived from the operation of the statute or its intended application, and not from the temporary regulations. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Mary W. Lyons and David A. Levine of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.7874–3 is also issued under 26 U.S.C. 7874(c)(6) and (g). * * *

Par. 2. Section 1.7874–3 is added to read as follows:

§ 1.7874–3 Substantial business activities.

[The text of proposed § 1.7874–3 is the same as the text of § 1.7874–3T published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–14238 Filed 6–7–12; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

[KY–255–FOR; OSM–2012–0004]

Kentucky Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: We are announcing receipt of a proposed amendment to the Kentucky Regulatory Program (hereinafter, the ''Kentucky program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). On January 30, 2012, Kentucky submitted to OSM a proposed Kentucky Administrative Regulations (KAR) that authorizes electronic notification of enforcement documents.

DATES: We will accept written comments until 4:00 p.m., e.s.t., July 12, 2012. If requested, we will hold a public hearing on July 9, 2012. We will accept requests to speak until 4:00 p.m., e.s.t., on June 27, 2012.

ADDRESSES: You may submit comments, identified by ''Docket Number OSM–2012–0004'' by either of the following two methods:

Federal eRulemaking Portal: www.regulations.gov. The proposed rule has been assigned Docket ID: OSM–2012–0004. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and follow the instructions; or

Mail/Hand Delivery/Courier: Joseph L. Blackburn, Field Office Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 2675 Regency Road, Lexington, Kentucky 40503.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section in this document.

Docket: In addition to obtaining copies of documents at *www.regulations.gov,* you may also obtain information at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Lexington Field Office.

Joseph L. Blackburn, Field Office Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 2675 Regency Road, Lexington, Kentucky 40503, (859) 260–3900.

Steve Hohmann, Commissioner, Department for Natural Resources, 2 Hudson Hollow, Frankfort, Kentucky 40601, Telephone: (502) 564–6940.

FOR FURTHER INFORMATION CONTACT: Joseph L. Blackburn, Telephone: (859) 260–3900. Email: *jblackburn@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Kentucky Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Kentucky Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Kentucky program on May 18, 1982. You can find background information on the Kentucky program, including the Secretary's findings, the disposition of comments, and conditions of approval

of the Kentucky program in the May 18, 1982, **Federal Register** (47 FR 21434). You can also find later actions concerning Kentucky's program and program amendments at 30 CFR 917.11, 917.12, 917.13, 917.15, 917.16, and 917.17.

II. Description of the Proposed Amendment

On January 30, 2012, Kentucky submitted a proposed program amendment containing administrative regulations regarding electronic notification of enforcement documents. These proposed changes are intended to be cost saving measures that are as effective, but not more stringent than those required under SMCRA and the Federal regulations. The substantial changes to the administrative regulations were in the service section, Section 5, for both administrative regulations. Also, the Legislative Research Commission suggested changes that are not intended to change the meaning of the administrative regulations but rather clarify content or are made to make the regulation comply with KRS 13A drafting requirements.

Below is a summary of Kentucky's proposed changes. The full text of the amendment is available for you to read at the locations listed above under **ADDRESSES** or at *www.regulations.gov.*

1. 405 KAR 7:091 General Practice Provisions

Section 4(1)(a), (b), (2)(b), and Section 6 (3) offer the option of using electronic mail to submit documents. Although there are no specific Federal requirements governing electronic mail, the general Federal counterparts to these proposed revisions are in sections 518 and 525 of SMCRA, in 30 CFR Part 845, and in 43 CFR 4.1100, 4.1200, and 4.1300.

In addition, the last sentence of 405 KAR 7:091, Section 2(1)(a), General Provisions for Conducting Administrative Hearings, is revised by adding the phrase ''that is not the result of a lack of diligence on the part of the corporate party or its counsel.'' As amended, the entire sentence states that: ''The failure of a corporate party to appear by counsel, without good cause that is not the result of a lack of diligence on the part of the corporate party or its counsel shall be grounds for default.'' The Federal counterpart to this provision is in 43 CFR 1.3.

2. 405 KAR 12:020 Enforcement

Section 5(2)(a)4, (3), (3)(a), (3)(b), and (3)(c) offer the option of using electronic mail to submit documents. Although there are no specific Federal requirements governing electronic mail, the general Federal counterparts to these proposed revisions are in sections 521 and 525 of SMCRA, in 30 CFR Part 843, and in 43 CFR 4.1100, 4.1200 and 4.1300.

In addition, 405 KAR 12:020. Section 2(5), is modified by adding the phrase ''including correction of errors, changes in responsible parties, changes to remedial measures, and changes in abatement dates.'' As amended, Section 2(5) states that ''[a]n authorized representative of the cabinet may, by written notice, modify an order for remedial measures for good cause including correction of errors, changes in responsible parties, changes to remedial measures, and changes in abatement dates.'' While this provision has no specific Federal counterpart, the general Federal counterparts are in section 521 of SMCRA and in 30 CFR 843.12.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the Kentucky program now satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve these revisions, they will become part of the Kentucky program.

Written or Electronic Comments

If you submit written comments they should be specific and confined to issues pertinent to the proposed regulations and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent state or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) will be included and considered in the docket for this rulemaking.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review; we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.s.t. on June 27, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, that if possible, each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss this amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will include a written summary of each meeting as part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We

conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 917

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 26, 2012.

Thomas D. Shope,

Regional Director Appalachian Region.

[FR Doc. 2012–14310 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[SATS No. OK–034–FOR; Docket ID OSM–2012–0008]

Oklahoma Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Oklahoma regulatory program (Oklahoma program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Oklahoma proposes revisions to its regulations regarding: Definitions; review of permit applications; general provisions for review of permit application information and entry of information into AVS; review of applicant, operator, and ownership and control information; review of permit history; review of compliance history; permit eligibility determination; unanticipated events or conditions at remining sites; eligibility for provisionally issued permits; written findings for permit application approval; performance bond submittal; initial review and finding requirements for improvidently issued permits; notice requirements for improvidently issued permits; suspension or rescission requirements for improvidently issued permits; who may challenge ownership or control listings and findings; how to challenge an owner and controller listing or finding; burden of proof for ownership or control challenges; written agency decision on challenges to ownership or control listings or findings; post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information; post-permit issuance information requirements for permittees; transfer, assignment, or sale of permit rights; certifying and updating existing permit application information; providing applicant and operator information; providing permit history information; providing property interest information; providing violation information; facilities or structures used in common; hydrologic balance—siltation structures; cessation orders; alternative enforcement—general provisions; criminal penalties; and civil actions for relief. Oklahoma intends to revise its program to be no less effective than the Federal regulations and to improve operational efficiency.

This document gives the times and locations that the Oklahoma program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., c.d.t., July 12, 2012. If requested, we will hold a public hearing on the amendment on July 9, 2012. We will accept requests to speak at a hearing until 4:00 p.m., c.d.t. on June 27, 2012.

ADDRESSES: You may submit comments, identified by SATS No. OK–034–FOR, by any of the following methods:

- *Mail/Hand Delivery:* Alfred L. Clayborne, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 1645 South 101st East Avenue, Suite 145, Tulsa, Oklahoma 74128–4629.
- *Fax:* (918) 581–6419.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Oklahoma program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Tulsa Field Office or the full text of the program amendment is available for you to read at *www.regulations.gov*.

Alfred L. Clayborne, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 1645 South 101st East Avenue, Suite 145, Tulsa, Oklahoma 74128–4629, Telephone: (918) 581–6430, Email: *aclayborne@osmre.gov*.

In addition, you may review a copy of the amendment during regular business hours at the following location:

Oklahoma Department of Mines, 2915 N. Classen Blvd., Suite 213, Oklahoma City, Oklahoma 73106–5406, Telephone: (405) 427–3859.

FOR FURTHER INFORMATION CONTACT: Alfred L. Clayborne, Director, Tulsa Field Office. Telephone: (918) 581–6430. Email: *aclayborne@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Oklahoma Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''* * * State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Oklahoma program on January 19, 1981. You can find background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Oklahoma program in the January 19, 1981, **Federal Register** (46 FR 4902). You can also find later actions concerning the Oklahoma program and program amendments at 30 CFR 936.10, 936.15, and 936.16.

II. Description of the Proposed Amendment

By letter dated March 16, 2012 (Administrative Record No. OK–1001), Oklahoma sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Oklahoma submitted the proposed amendment in response to a September 30, 2009, letter (Administrative Record No. OK–999.01) that OSM sent to Oklahoma in accordance with 30 CFR 732.17(c), with additional changes submitted on its own initiative. Below is a summary of Oklahoma's proposed changes. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES** or at *www.regulations.gov*.

Oklahoma proposes to make changes to Title 460. Department of Mines: Chapter 20, The Permanent Regulations Governing the Coal Reclamation Act of 1979, in the following subchapters.

1. Subchapter 3. Permanent Regulatory Program

Oklahoma proposes to add new definitions at 460:20–3–5. for Applicant/Violator System (AVS); Control or controller; Own, owner, or ownership; Violation; Violation, failure or refusal; and Willful or willfully. Oklahoma proposes this change to closely follow the Federal regulation at 30 CFR 701.5.

2. Subchapter 15. Requirements for Permits and Permit Processing

Oklahoma proposes to revoke sections 460:20–15–2. Definitions; 460:20–15–6. Review of permit applications; 460:20–15–9. Improvidently issued permits: General procedures; 460:20–15–10. Improvidently issued permits: Rescission procedures; 460:20–15–13. Procedures for challenging ownership or control links shown in AVS; and 460:20–15–14. Standards for challenging ownership or control links and the status of violations.

Oklahoma proposes to add new sections 460:20–15–6.1. Review of permit applications; 460:20–15–6.2. General provisions for review of permit application information and entry of information into AVS; 460:20–15–6.3. Review of applicant, operator, and ownership and control information; 460:20–15–6.4. Review of permit history; 460:20–15–6.5. Review of compliance history; 460:20–15–6.6. Permit eligibility determination; 460:20–15–6.7. Unanticipated events or conditions at remining sites; 460:20–15–6.8. Eligibility for provisionally issued permits; 460:20–15–6.9. Written findings for permit application approval; 460:20–15–6.10. Performance bond submittal; 460:20–15–9.1. Initial review and finding requirements for improvidently issued permits; 460:20–15–9.2. Notice requirements for improvidently issued permits; 460:20–15–10.1. Suspension or rescission requirements for improvidently issued permits; 460:20–15–10.2. Who may challenge ownership or control listings and findings; 460:20–15–13.1. How to challenge an owner and controller listing or finding; 460:20–15–14.1. Burden of proof for ownership or control challenges; and 460:20–15–14.2. Written agency decision on challenges to ownership or control listings or findings. Oklahoma proposes these changes to closely follow the Federal regulations at 30 CFR 773.7–773.16 and 30 CFR 773.21–773.28.

3. Subchapter 17. Revision; Renewal; and Transfer, Assignment, or Sale of Permit Rights

Oklahoma proposes to revoke section 460:20–17–1. Scope and purpose; and replace it with new section 460:20–17–1.1. Scope and purpose. Oklahoma proposes this change to closely follow the Federal regulation at 30 CFR 774.1.

Oklahoma proposes to add new sections 460:20–17–2.1. Post-permit issuance requirements for regulatory authorities and other actions based on ownership, control, and violation information; and 460:20–17–2.2. Post-permit issuance information requirements for permittees. Oklahoma proposes these changes to closely follow the Federal regulations at 30 CFR 774.11 and 774.12.

Oklahoma proposes to add language in paragraph (a) of section 460:20–17–5. Transfer, assignment, or sale of permit rights. Oklahoma proposes this change to closely follow the Federal regulation at 30 CFR 774.17(a).

4. Subchapter 23. Permit Applications: Minimum Requirements for Legal, Financial, Compliance, and Related Information

Oklahoma proposes to revoke sections 460:20–23–2. Identification of interests; and 460:20–23–3. Violation information.

Oklahoma proposes to add new sections 460:20–23–2.1. Certifying and updating existing permit application information; 460:20–23–2.2. Providing applicant and operator information; 460:20–23–2.3. Providing permit history information; 460:20–23–2.4. Providing property interest information; 460:20–23–3.1. Providing violation information; and 460:20–23–10. Facilities or structures used in common. Oklahoma proposes these changes to closely follow the Federal regulations at 30 CFR 778.9–778.14 and 30 CFR 778.22.

5. Subchapter 43. Permanent Program Performance Standards: Surface Mining Standards

Oklahoma proposes to revoke a portion of paragraph (b)(2) in section 460:20–43–12. Hydrologic balance: Siltation structures, which is identical to the Federal regulation at 30 CFR 816.46(b)(2), and replace it with new language regarding surface draining control, siltation structures, and alternative techniques.

6. Subchapter 59. State Enforcement

Oklahoma proposes to revoke the definition of Willful Violation from section 460:20–59–2. Definitions. Oklahoma proposes this change to closely follow the Federal regulation at 30 CFR 843.5.

Oklahoma proposes to revise paragraph (f) and add new paragraph (g) in section 460:20–59–3. Cessation orders. Oklahoma proposes this change to closely follow paragraphs (f) and (g) of the Federal regulation at 30 CFR 843.11.

7. Subchapter 63. Individual Civil Penalties

Oklahoma proposes to revoke section 460:20–63–2. Definitions. Oklahoma proposes this change to more closely follow the Federal regulation at 30 CFR Part 846 individual civil penalties.

8. Subchapter 64. Alternative Enforcement

Oklahoma proposes to add new subchapter 64 and add new sections 460:20–64–1. Scope; 460:20–64–2. General provisions; 460:20–64–3. Criminal penalties; and 460:20–64–4. Civil action relief. Oklahoma proposes these changes to closely follow the Federal regulations at 30 CFR 847.1–847.16.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those

that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., c.d.t. on June 27, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 10, 2012.

Ervin J. Barchenger,

Regional Director, Mid-Continent Region.

[FR Doc. 2012–14313 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 944

[SATS No. [UT–048–FOR]; Docket ID [OSM–2012–0011]]

Utah Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Utah regulatory program (hereinafter, the ''Utah program'') under the Surface Mining Control and Reclamation Act of 1977 (''SMCRA'' or ''the Act''). Utah proposes a change to the Judicial Code, Title 78 of the Utah Code, that requires plaintiffs who obtain temporary relief (administrative stay or preliminary injunction) in an environmental action to post a surety bond or equivalent pending state judicial review. Utah sent the amendment to include changes made at its own initiative.

This document gives the times and locations that the Utah program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., m.d.t. July 12, 2012. If requested, we will hold a public hearing on the amendment on July 9, 2012. We will accept requests to speak until 4:00 p.m., m.d.t. on June 27, 2012.

ADDRESSES: You may submit comments by either of the following two methods:

- *Federal eRulemaking Portal: www.regulations.gov.* This proposed rule has been assigned Docket ID: OSM–2012–0011. If you would like to submit comments through the Federal eRulemaking Portal, go to *www.regulations.gov* and follow the instructions.
- *Mail/Hand Delivery/Courier:* Kenneth Walker, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway Suite 3320, Denver, CO 80202.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''III. Public Comment Procedures'' in the **SUPPLEMENTARY INFORMATION** section of this document.

In addition to viewing the docket and obtaining copies of documents at *www.regulations.gov,* you may review copies of the Utah program, this amendment, a listing of any public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may also receive one free copy of the amendment by contacting OSM's Denver Office.

Kenneth Walker, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, 1999 Broadway Suite 3320, Denver, CO 80202, (303)293–5012, *KWalker@osmre.gov;*

John Baza, Director, Utah Division of Oil, Gas and Mining, 1594 West North

Temple, Suite 1210, PO Box 145801, Salk Lake City, UT 84114–5801, (801)538–5334, *johnbaza@utah.gov.*

FOR FURTHER INFORMATION CONTACT: Kenneth Walker, Telephone: (303)293–5012. Internet: *KWalker@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Utah Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Utah Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Utah program on January 21, 1981. You can find background information on the Utah program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Utah program in the January 21, 1981, **Federal Register** (46 FR 5899). You can also find later actions concerning Utah's program and program amendments at 30 CFR 944.15, 944.16, and 944.30.

II. Description of the Proposed Amendment

By letter dated April 18, 2012, Utah sent us a proposed amendment to its approved program (Administrative Record Document ID No. OSM–2012–0011–0002) under SMCRA (30 U.S.C. 1201 *et seq.*). Utah sent the amendment in response to a February 24, 2012, letter (Document ID No. OSM–2012–0011–0006) that OSM sent to Utah in accordance with 30 CFR 732.17(e)(2).

Utah House Bill 399 (H.B. 399) (Document ID No. OSM–2012–0011–0001) was approved by the Utah Legislature on March 4, 2011, and signed into law by Utah's Governor on March 21, 2011. H.B. 399 (Environmental Litigation Bond) enacted a change to the Judicial Code, Title 78 of the Utah Code, that in pertinent part mandates that state agencies and courts require plaintiffs who obtain temporary relief (administrative stay or preliminary injunction) in an environmental action to post a surety bond or cash equivalent in an amount the court or state agency considers sufficient to compensate each defendant opposing the temporary relief for damages they may sustain as a result of the administrative stay or preliminary injunction. An environmental action is a cause of action that seeks judicial review of a final agency action to issue a permit by the Department of Natural Resources.

OSM's review of H.B. 399 determined that the newly-enacted environmental litigation bond provisions represent a condition or event that has changed the implementation, administration or enforcement of the approved Utah program under 30 CFR 732.17(e)(2). Consequently, in a letter dated February 24, 2012, OSM required Utah to submit the proposed changes contained in H.B. 399 as an amendment to its Coal Program regulations for review and approval before they can take effect. Utah responded in a letter dated April 18, 2012, (Document ID No. OSM–2012–0011–0003) by submitting the changes enacted by H.B. 399 as a formal amendment to their State program. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the Utah program.

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent state or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

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 in the electronic docket for this rulemaking at *www.regulations.gov.* 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.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., m.d.t. on June 27, 2012. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, our

regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 26, 2012.

Allen D. Klein,

Director, Western Region.

[FR Doc. 2012–14312 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 950

[SATS No WY–041–FOR; Docket ID OSM–2011–0020]

Wyoming Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing the withdrawal of a proposed rule pertaining to an amendment to the Wyoming regulatory program (the Wyoming program) and its coal rules and regulations. Wyoming submitted the amendment to address required ownership and control rule changes that OSM identified in a letter to Wyoming dated October 2, 2009, under 30 CFR 732.17(c), and four deficiencies that were identified by OSM during the review of a previous program amendment (WY–038–FOR; Docket ID #OSM–2009–0012).

DATES: The proposed rule published December 23, 2011, at 76 FR 80310, is withdrawn June 12, 2012.

FOR FURTHER INFORMATION CONTACT: Jeffrey Fleischman, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Dick Cheney Federal Building, POB 11018, 150 East B Street, Casper, Wyoming 82601–1018; Telephone: 307–261–6550, email address: *jfleischman@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Wyoming Program
II. Submission of the Withdrawal

I. Background on the Wyoming Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a) (1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Wyoming program on November 26, 1980. You can find background information on the Wyoming program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Wyoming program in the November 26, 1980, **Federal Register** (45 FR 78637). You can also find later actions concerning Wyoming's program and program amendments at 30 CFR 950.12, 950.15, 950.16, and 950.20.

II. Submission of the Withdrawal

By letter dated October 24, 2011, Wyoming sent us a proposed amendment to its approved regulatory program (Administrative Record Docket ID No. OSM–2011–0020) under SMCRA (30 U.S.C. 1201 *et seq.*). Wyoming submitted the amendment to address required rule changes OSM identified in a letter to Wyoming dated October 2, 2009, under 30 CFR 732.17(c) (''732 letter''). These included changes to Wyoming's rules for ownership and control. Wyoming also submitted the amendment to address four deficiencies that OSM identified in response to Wyoming's formally submitted revegetation rule package (WY–038–FOR; Docket ID #OSM–2009–0012) and correct numerous inaccurate citations to other sections of Wyoming's rules and regulations.

We announced receipt of the proposed amendment in the December 23, 2011, **Federal Register** (76 FR 80310). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendment's adequacy (Administrative Record Document ID No. OSM–2011–0020–0001). We did not hold a public hearing or meeting because no one requested one. The public comment period ended on January 23, 2012. We received comments from three Federal agencies (Mine Safety and Health Administration, USDA Forest Service, U.S. Geological Survey) and one State agency (Wyoming Game and Fish Department). In a letter dated March 16, 2012, Wyoming notified us that it was withdrawing the proposed amendment at this time so that it can draft additional rule language to address the issues in the October 2, 2009, 732 letter and resubmit the amendment by January of 2013. The required rule changes identified by OSM in the October 2, 2009, 732 letter to Wyoming remain effective.

List of Subjects in 30 CFR Part 950

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 20, 2012.

Allen D. Klein,

Regional Director, Western Region.

[FR Doc. 2012–14314 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0385]

RIN 1625–AA00

Safety Zone; Bostock 50th Anniversary Fireworks, Long Island Sound; Manursing Island, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the navigable waters of Long Island Sound in the vicinity of Manursing Island, NY for a fireworks display. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with fireworks displays. This rule is intended to restrict all vessels from a portion of Long Island Sound before, during, and immediately after the fireworks event.

DATES: Comments and related material must be received by the Coast Guard on or before July 12, 2012.

Requests for public meetings must be received by the Coast Guard on or before June 19, 2012.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Kimberly Farnsworth, Coast Guard; Telephone (718) 354–4163, email *Kimberly.A.Farnsworth@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2012–0385 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2012–0385 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

There is no prior Regulatory history for this proposed safety zone.

C. Basis and Purpose

The legal basis for the proposed rule is 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

This proposed safety zone is necessary to ensure the safety of spectators and vessels from hazards associated with the fireworks display. Based on the inherent hazards associated with fireworks, the Captain of the Port (COTP) New York has determined that fireworks launches in close proximity to water crafts pose a significant risk to public safety and property. The combination of increased number of recreational vessels, congested waterways, darkness punctuated by bright flashes of light, and debris especially burning debris falling on passing or spectator vessels has the potential to result in serious injuries or fatalities. The proposed temporary safety zone will restrict vessel movement in the Long Island Sound around the location of the fireworks launch platform before, during, and after the fireworks display.

D. Discussion of Proposed Rule

Bay Fireworks is sponsoring a fireworks display for an anniversary party on the navigable waters of Long Island Sound in the vicinity of Manursing Island, NY. The proposed safety zone is necessary to ensure the safety of spectators and vessels from hazards associated with the fireworks display.

The fireworks display will occur from 10:15 p.m. until 10:20 p.m. In order to coordinate the safe movement of vessels within the area and to ensure that the area is clear of unauthorized persons and vessels before, during, and immediately after the fireworks launch, this zone will be enforced from 9:45 p.m. until 10:50 p.m. on September 8, 2012.

The proposed safety zone will include all navigable waters of Long Island Sound within a 240-yard radius of the fireworks barge located in approximate position 40°58′01″ N, 073°39′24″ W, approximately 775-yards northeast of the southern tip of Manursing Island, NY. Vessels will still be able to transit the surrounding area and may be authorized to transit through the proposed safety zone with the permission for the COTP. The COTP

does not anticipate any negative impact on vessel traffic due to this proposed safety zone.

The fireworks barge will also have a sign on its port and starboard side labeled ''FIREWORKS—STAY AWAY.'' The sign will consist of 10'' high by 1.5'' wide red lettering on a white background.

This rule is being proposed to provide for the safety of life on navigable waters during the event and to give the marine community the opportunity to comment on the proposed zone location, size, and length of time the zone will be activated.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The Coast Guard's enforcement of this proposed safety zone will be of short duration, approximately 75 minutes during the scheduled fireworks event. The proposed safety zone will restrict access to only a small portion of the navigable waterways of the Long Island Sound. Vessels will be able to navigate around the proposed safety zone. Furthermore, vessels may be authorized to transit through the proposed safety zone with the permission of the COTP.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This proposed rule will affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in a small portion of the Long Island Sound during the effective period.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule would be in effect for only 75 minutes late at night when vessel traffic is low. Vessel traffic could pass safely around the safety zone. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the waterway.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the ''**FOR FURTHER INFORMATION CONTACT**'' section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of

energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

F. List of Subjects in 33 CFR Part 165

Marine safety, Navigation (water), Reporting and record keeping requirements, waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREA

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

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

2. Add § 165.T01.0385 to read as follows:

§ 165.T01–0385 Safety Zone; Bostock 50th Anniversary Fireworks, Long Island Sound; Manursing Island, NY.

(a) *Regulated Area.* The following area is a temporary safety zone: all navigable waters of the Long Island Sound within a 240-yard radius of the fireworks barge located in approximate position 40°58′01″ N, 073°39′24″ W, in the vicinity of Manursing Island, NY.

(b) *Effective Period.* This rule will be effective from 9:45 p.m. to 10:50 p.m. on September 8, 2012.

(c) *Definitions.* The following definitions apply to this section:

(1) Designated Representative. A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) Official Patrol Vessels. Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(d) *Regulations.*

(1) The general regulations contained in 33 CFR 165.23, as well as the following regulations, apply.

(2) No vessels, except for fireworks barge and accompanying vessels, will be allowed to transit the safety zone without the permission of the COTP.

(3) All persons and vessels shall comply with the instructions of the COTP or the designated representative. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(4) Vessel operators desiring to enter or operate within the regulated area shall contact the COTP or the designated representative via VHF channel 16 or 718–354–4353 (Sector New York command center) to obtain permission to do so.

Dated: May 24, 2012.

G.P. Hitchen,

Captain, U.S. Coast Guard, Acting Captain of the Port New York.

[FR Doc. 2012–14220 Filed 6–11–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0394; FRL–9685–1]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Permit to Construct Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Maryland pertaining to sources which are exempt from preconstruction permitting requirements under Maryland's New Source Review (NSR) program. In the Final Rules section of this **Federal Register,** EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by July 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0394 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0394, Ms. Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0394. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your

identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Mr. David Talley, (215) 814–2117, or by email at *talley.david@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, also entitled ''Approval and Promulgation of Air Quality Implementation Plans; Maryland; Permit to Construct Exemptions,'' that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: June 1, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–14107 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0402; FRL–9686–1]

Approval and Promulgation of Implementation Plans; Mississippi; 110(a)(1) and (2) Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plan (SIP), submitted by the State of Mississippi, through the Mississippi Department of Environmental Quality (DEQ), as meeting certain requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or the Act) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an ''infrastructure'' SIP. Mississippi certified that the Mississippi SIP contains provisions that ensure that the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in Mississippi (hereafter referred to as ''infrastructure submission''). EPA is proposing to determine that Mississippi's infrastructure submissions, provided to EPA on December 7, 2007, and on October 6, 2009, addressed all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with the exception of sections 110(a)(2)(E)(ii) and 110(a)(2)(G), both of which will be addressed in a separate action.

DATES: Written comments must be received on or before July 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0402, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4–RDS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2012–0402,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2012–0402. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy

form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. What elements are required under sections 110(a)(1) and (2)?
III. Scope of Infrastructure SIPs
IV. What is EPA's analysis of how Mississippi addressed the elements of sections 110(a)(1) and (2) ''infrastructure'' provisions?
V. Proposed Action
VI. Statutory and Executive Order Reviews

I. Background

On July 18, 1997 (62 FR 36852), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m³. See 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a new 24-hour NAAQS of 35 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$ NAAQS, no later than October 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the ''infrastructure'' requirements for the 1997 annual $PM_{2.5}$ NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 $PM_{2.5}$ NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled, ''Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter ($PM_{2.5}$) NAAQS'' making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 $PM_{2.5}$ NAAQS (*See* 73 FR 62902). For those states that did receive findings, the findings of failure to submit for all or a portion of a state's implementation plan established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs.

The findings that all or portions of a state's submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k). Mississippi's infrastructure submissions were received by EPA on December 7, 2007, for the 1997 annual $PM_{2.5}$ NAAQS and on October 6, 2009, for the 2006 24-hour $PM_{2.5}$ NAAQS. The submissions were determined to be complete on June 7, 2008, and April 6, 2010, respectively. Mississippi was among other states that did not receive findings of failure to submit because it had provided a complete submission to EPA to address the infrastructure elements for the 1997 $PM_{2.5}$ NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the ''infrastructure'' requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's final action either approving, disapproving, or approving in part and disapproving in part the Mississippi 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittal addressing the applicable requirements of sections 110(a)(2)(A)-(H), (J)-(M), except for section 110(a)(2)(C) the nonattainment area requirements and section 110(a)(2)(D)(i) interstate transport requirements, by September 30, 2012.

Today's action is proposing to approve Mississippi's infrastructure submission for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS for sections 110(a)(2)(A)-(H), (J)-(M), except for sections 110(a)(2)(C) nonattainment area requirements, 110(a)(2)(D)(i) interstate transport requirements, 110(a)(2)(E)(ii) state board requirements, and 110(a)(2)(G) emergency power requirements. Section 110(a)(2)(E)(ii) and (G) will be addressed in a separate action.[1] This action is not approving any specific rule, but rather proposing that Mississippi's already approved SIP meets certain CAA requirements.

II. What elements are required under sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, some states may need to adopt language specific to the $PM_{2.5}$ NAAQS to ensure that they have adequate SIP provisions to implement the $PM_{2.5}$ NAAQS.

[1] As described further below in Section II, EPA is not taking on action on sections 110(a)(2)(C) nonattainment area requirements and 110(a)(2)(D)(i) interstate transport requirements.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are listed below [2] and in EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' and September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24–Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards.''

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.[3]
- 110(a)(2)(D): Interstate transport.[4]
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.[5]
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

III. Scope of Infrastructure SIPs

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and $PM_{2.5}$ NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.[6] Those Commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources (SSM), that may be contrary to the CAA and EPA's policies addressing such excess emissions; and (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (director's discretion). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address separately: (i) Existing provisions for minor source new source review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (minor source NSR); and (ii) existing provisions for Prevention of Significant Deterioration (PSD) programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIPs for the 1997 and 2006 $PM_{2.5}$ NAAQS from Mississippi.

EPA intended the statements in the other proposals concerning these four issues merely to be informational and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a re-approval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that ''in this rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at facilities.'' EPA further explained, for informational purposes, that ''EPA plans to address such State regulations in the future.'' EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and $PM_{2.5}$ NAAQS should not be construed as explicit or implicit re-approval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the infrastructure SIP for Mississippi.

Unfortunately, the Commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be

[2] Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) but does provide detail on how Mississippi's SIP addresses 110(a)(2)(C).

[3] This rulemaking only addresses requirements for this element as they relate to attainment areas.

[4] Today's proposed rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 and 2006 $PM_{2.5}$ NAAQS. Interstate transport requirements were formerly addressed by Mississippi consistent with the Clean Air Interstate Rule (CAIR). On December 23, 2008, CAIR was remanded by the DC Circuit Court of Appeals, without vacatur, back to EPA. *See North Carolina* v. *EPA,* 531 F.3d 896 (DC Cir. 2008). Prior to this remand, EPA took final action to approve Mississippi SIP revision, which was submitted to comply with CAIR. *See* 72 FR 56268 (October 3, 2007). In so doing, Mississippi CAIR SIP revision addressed the interstate transport provisions in section 110(a)(2)(D)(i) for the 1997 and 2006 $PM_{2.5}$ NAAQS. In response to the remand of CAIR, EPA has recently finalized a new rule to address the interstate transport of nitrogen oxides and sulfur oxides in the eastern United States. *See* 76 FR 48208 (August 8, 2011) (''the Transport Rule''). That rule was recently stayed by the DC Circuit Court of Appeals. EPA's action on element 110(a)(2)(D)(i) will be addressed in a separate action.

[5] This requirement was inadvertently omitted from EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' and the September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards,'' but as mentioned above is not relevant to today's proposed rulemaking.

[6] *See* Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)'' and that these SIPs are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as ''infrastructure SIPs.'' This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as ''nonattainment SIP'' submissions required to address the nonattainment planning requirements of part D, ''regional haze SIP'' submissions required to address the visibility protection requirements of CAA section 169A, NSR permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[7] Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.[8]

Notwithstanding that section 110(a)(2) provides that ''each'' SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).[9] This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general ''infrastructure SIP'' for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter ''interstate transport'' provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.[10] This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's implementation plans. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.[11]

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.,* the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section

[7] For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

[8] For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,'' 70 FR 25162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[9] *See Id.,* 70 FR 25162, at 63—65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[10] EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. *See* ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

[11] For example, implementation of the 1997 $PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements ''as applicable.'' In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and $PM_{2.5}$ NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.[12] Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the ''infrastructure'' elements for SIPs, which it further described as the ''basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.''[13] As further identification of these basic structural SIP requirements, ''attachment A'' to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended ''to constitute an interpretation of'' the requirements, and was merely a ''brief description of the required elements.''[14] EPA also stated its belief that with one exception, these requirements were ''relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.''[15] However, for the one exception to that general assumption (*i.e.,* how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS), EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 $PM_{2.5}$ NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the state's implementation plans for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS.[16] In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS, but were germane to these SIP submissions for the 2006 $PM_{2.5}$ NAAQS (e.g., the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and $PM_{2.5}$ NAAQS). Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions. The same holds true for this action on the infrastructure SIPs for Mississippi.

EPA believes that this approach to the infrastructure SIP requirement is reasonable because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the

[12] *See* ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the ''2007 Guidance'').

[13] *Id.,* at page 2.

[14] *Id.,* at attachment A, page 1.

[15] *Id.,* at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so ''self explanatory,'' and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

[16] *See* ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' from William T, Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the ''2009 Guidance'').

Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.[17] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[18] Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.[19]

IV. What is EPA's analysis of how Mississippi addressed the elements of sections 110(a)(1) and (2) ''infrastructure'' provisions?

Mississippi's infrastructure submissions address the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): Emission limits and other control measures: Mississippi's infrastructure submissions provide an overview of the provisions of the Mississippi Air Pollution Control (APC) Regulations relevant to air quality control. The regulations described below have been federally approved into the Mississippi SIP and include enforceable emission limitations and other control measures. Mississippi SIP Regulations APC–S–1—*Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants,* and APC–S–3—*Regulations for the Prevention of Air Pollution Emergency Episodes,* generally authorizes DEQ to adopt rules for the control of air pollution, including those necessary to obtain EPA approval under section 110 of the CAA. The most recent federally approved revision in this regulation was on October 3, 2007 (72 FR 56268). EPA has made the preliminary determination that the provisions contained in these regulations and Mississippi's practices are adequate to protect the $PM_{2.5}$ annual and 24-hour NAAQS in the State.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown'' (September 20, 1999), and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having deficient SSM provisions to take steps to correct it as soon as possible.

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) Ambient air quality monitoring/data system: Mississippi's infrastructure submissions cite SIP Regulation APC–S–1—*Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants,* with regard to the monitoring program within the State. Annually, EPA approves the ambient air monitoring network plan for the state agencies. On October 6, 2011, EPA approved Mississippi's 2011 monitoring network plan. Mississippi's approved monitoring network plan can be accessed at *www.regulations.gov* using Docket ID No. EPA–R04–OAR–2012–0402. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the ambient air quality monitoring and data systems related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

3. 110(a)(2)(C) Program for enforcement of control measures including review of proposed new sources: Mississippi's authority to regulate new and modified sources so as to provide for the protection of air quality in nonattainment, attainment or unclassifiable areas is established in the Mississippi SIP Regulations APC–S–1—*Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants,* APC–S–2—*Permit Regulations for the Construction and/or Operation of Air Emissions Equipment,* and APC–S–5—*Regulations for the Prevention of Significant Deterioration of Air Quality.* Mississippi's regulations provide the permitting requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. This permitting program is designed to ensure that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Additionally, on May 18, 2011, Mississippi submitted a SIP revision to its NSR/PSD and Nonattainment New Source Review (NNSR) programs. Mississippi's May 18, 2011, SIP submittal would incorporate by reference the federal NSR provisions for fine particulate matter (also known as $PM_{2.5}$) as amended in EPA's 2008 NSR $PM_{2.5}$ Implementation Rule (hereafter referred to as the ''NSR $PM_{2.5}$ Rule'') into the Mississippi SIP at APC–S–5—*Regulations for the Prevention of Significant Deterioration of Air Quality.* In the May 18, 2011, SIP revision, Mississippi includes revisions to rules that address the infrastructure requirements (C) and (J). As such, today's proposed approval of Mississippi's SIP respecting infrastructure element 110(a)(2)(C) is contingent upon EPA first taking final action to approve the May 18, 2011, NSR $PM_{2.5}$ Rule revision into the State's SIP. EPA will propose approval of Mississippi's May 18, 2011, NSR $PM_{2.5}$ Rule revision in a rulemaking separate from today's action.

In this action, EPA is proposing to approve Mississippi's infrastructure SIP for the 1997 annual and 2006 24-hour

[17] EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 (April 18, 2011).

[18] EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. *See* ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. *See* 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[19] EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). *See* 75 FR 42342, 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

$PM_{2.5}$ NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for program enforcement of control measures including review of proposed new sources related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. As discussed above, final approval of this rule is contingent upon the Agency first taking final action to approve Mississippi's May 18, 2011, $PM_{2.5}$ NSR Update.

4. 110(a)(2)(D)(ii) Interstate and International transport provisions: In Regulation APC–S–2—*Permit Regulations For The Construction and/or Operation of Air Emissions Equipment,* Mississippi provides how it will notify neighboring states of potential impacts from new or modified sources. The most recent federally approved revision in this regulation was on July 10, 2006 (71 FR 38773). Mississippi does not have any pending obligation under section 115 and 126 of the CAA. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

5. 110(a)(2)(E) Adequate resources: Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions. As with the remainder of the infrastructure elements addressed by this notice, EPA is proposing to approve Mississippi's SIP as meeting the requirements of sub-elements 110(a)(2)(E)(i) and (iii). With respect to 110(a)(2)(E)(ii) (regarding state boards), EPA is not taking action on this sub-element today, and will instead address this requirement in a separate action. EPA's rationale for today's proposals respecting sub-element 110(a)(2)(E)(i) and (iii) is described in turn below.

In support of EPA's proposal to approve sub-elements 110(a)(2)(E)(i) and (iii), DEQ is responsible for promulgating rules and regulations for the NAAQS, emissions standards general policies, a system of permits, fee schedules for the review of plans, and other planning needs. As evidence of the adequacy of DEQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Mississippi on March 8, 2012, outlining 105 grant commitments and the current status of these commitments for fiscal year 2011. The letter EPA submitted to Mississippi can be accessed at *www.regulations.gov* using Docket ID No. EPA–R04–OAR–2012–0402. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. Mississippi satisfactorily met all commitments agreed to in the Air Planning Agreement for fiscal year 2011, therefore Mississippi's grants were finalized and closed out. EPA has made the preliminary determination that Mississippi has adequate resources for implementation of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. In addition, the requirements of 110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under state law has been used to carry out the state's implementation plan and related issues. Mississippi's authority is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Mississippi has adequate resources for implementation of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

6. 110(a)(2)(F) Stationary source monitoring system: Regulation APC–S–2—*Permit Regulations for the Construction and/or Operation of Air Emissions Equipment,* of the Mississippi SIP establishes requirements for emissions compliance testing utilizing emissions sampling and analysis. It further describes how the State ensures the quality of its data through observing emissions and monitoring operations. Mississippi DEQ uses these data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with emission regulations and additional EPA requirements.

Additionally, Mississippi is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System (EIS). States report emissions data for the six criteria pollutants and the precursors that form them—nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Mississippi made its latest update to the NEI on December 30, 2011. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the Web site *http://www.epa.gov/ttn/chief/eiinformation.html.* EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the stationary source monitoring systems related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

7. 110(a)(2)(G) Emergency power: Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to

implement the emergency episode provisions in their SIPs. Today, EPA is not proposing any action with respect to element 110(a)(2)(G). This element will be addressed in a separate action.

8. 110(a)(2)(H) Future SIP revisions: DEQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Mississippi. DEQ has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS. Mississippi does not have any nonattainment areas for the 1997 annual or 2006 24-hour $PM_{2.5}$ standard but has submitted an infrastructure submission for these standards, which is the subject of this rulemaking. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

9. 110(a)(2)(J) (121 consultation) Consultation with government officials: Mississippi Code Annotated Regulation 49–17–3, as well as Mississippi's Regional Haze Implementation Plan (which allows for consultation between appropriate state, local, and tribal air pollution control agencies as well as the corresponding Federal Land Managers), provide for consultation with government officials whose jurisdictions might be affected by SIP development activities. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate consultation with government officials related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

10. 110(a)(2)(J) (127 public notification) Public notification: APC–S–3—*Regulations for the Prevention of Air Pollution Emergency Episodes,* of the Mississippi SIP requires that DEQ notify the public of any air pollution episode or NAAQS violation. DEQ's has public notice mechanisms in place to notify the public of PM and other pollutant forecasting, including an air quality monitoring Web site providing ground level ozone alerts, *http://opc.deq.state.ms.us/aqi/* specifically for the Jackson Metropolitan Area, DeSoto County, and the Mississippi Gulf Coast. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide public notification related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

11. 110(a)(2)(J) (PSD) PSD and visibility protection: Mississippi demonstrates its authority to regulate new and modified sources of PM to assist in the protection of air quality in Regulation APC–S–5—*Regulations for the Prevention of Significant Deterioration for Air Quality.* Mississippi's SIP provides the permitting requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. These provisions are designed to prevent significant deterioration of air quality in areas that are in attainment of the NAAQS at the time of designations. As with infrastructure element 110(a)(2)(C), infrastructure element 110(a)(2)(J) also requires compliance with applicable provisions of the PSD program described in part C of the Act. Accordingly, final action to approve the May 18, 2011, NSR $PM_{2.5}$ Rule SIP revision, is a prerequisite to today's proposed action to approve the State's infrastructure element 110(a)(2)(J). See the discussion for element 110(a)(2)(C) above for a description of the submitted NSR $PM_{2.5}$ Rule SIP revision to the Mississippi SIP. EPA will not take final action to approve Mississippi's SIP as meeting the requirements infrastructure element 110(a)(2)(J) prior to taking final action to approve the State's May 10, 2011, NSR $PM_{2.5}$ Rule SIP revision

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, EPA finds that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. This would be the case even in the event a secondary $PM_{2.5}$ NAAQS for visibility is established, because that NAAQS would not affect visibility requirements under part C. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to implement PSD programs and to provide for visibility protection related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary. As noted above, final approval of this element is contingent upon the Agency first taking final action to approve Mississippi's May 18, 2011, $PM_{2.5}$ NSR Update submittal.

12. 110(a)(2)(K) Air quality and modeling/data: DEQ has authority pursuant to Mississippi SIP Regulation APC–S–5—*Regulations for the Prevention of Significant Deterioration for Air Quality,* (which incorporates 40 CFR part 51.21 by reference) to conduct air quality modeling and report the results of such modeling to EPA. Additionally, Mississippi supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, for the Southeastern states. Taken as a whole, Mississippi's air quality regulations demonstrate that DEQ has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide for air quality and modeling (including analysis of the associated data) related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

13. 110(a)(2)(L) Permitting fees: Mississippi addresses the review of construction permits as previously discussed in 110(a)(2)(C) above. Permitting fees are collected through the State's title V fees program, which has been federally approved. EPA has made the preliminary determination that Mississippi's SIP and practices adequately provide for permitting fees related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

14. 110(a)(2)(M) Consultation/participation by affected local entities: DEQ coordinates with local governments affected by the SIP. Specifically, as described in Section IV of Regulation APC–S–2, *Public Participation and Public Availability Of Information,* Mississippi requires that State and local air pollution control agencies be notified of modifications to stationary sources or the construction of new sources within their region of jurisdiction. Furthermore, DEQ has demonstrated consultation with, and participation by, affected local entities through its work with local political subdivisions during the developing of its Regional Haze Implementation Plan. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate consultation with affected local entities related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

V. Proposed Action

EPA is proposing to approve that DEQ's CAA 110(a)(1) and (2) infrastructure SIP submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS meet the above described

infrastructure SIP requirements consistent with EPA's October 2, 2007, and September 25, 2009, guidance. Mississippi's infrastructure submissions, which are the subject of today's proposed rulemaking, were submitted on December 7, 2007, for purposes of the 1997 annual $PM_{2.5}$ NAAQS, and on October 6, 2009, for purposes of the 2006 24-hour annual $PM_{2.5}$ NAAQS. This proposed approval, however, does not include infrastructure elements 110(a)(2)(E)(ii) and 110(a)(2)(G) for either the 1997 annual or 2006 24-hour $PM_{2.5}$ NAAQS. These elements will be addressed by EPA in a separate action. In addition, final approval of the infrastructure elements 110(a)(2)(C) and (J) proposed for approval today is contingent upon the Agency first taking final action to approve Mississippi's May 18, 2011, $PM_{2.5}$ NSR Update.

VI. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: June 1, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–14267 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0382; FRL–9686–2]

Approval and Promulgation of Implementation Plans; Florida; 110(a)(1) and (2) Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State Implementation Plans (SIPs), submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP), as demonstrating that the State meets the requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or the Act) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an ''infrastructure'' SIP. Florida certified that the Florida SIP contains provisions that ensure the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in Florida (hereafter referred to as ''infrastructure submission''). EPA is proposing to determine that Florida's infrastructure submissions, provided to EPA on April 18, 2008, and on September 23, 2009, addressed all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. As discussed further below, final action to approve elements 110(a)(2)(C), (E)(ii), and (J) is contingent upon the Agency first taking final action on submitted SIP revisions associated with these elements. Final action on those SIP revisions will be addressed in a separate action.

DATES: Written comments must be received on or before July 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0382, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4–RDS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2012–0382,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2012–0382. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information

claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. What elements are required under sections 110(a)(1) and (2)?
III. Scope of Infrastructure SIPs
IV. What is EPA's analysis of how Florida addressed the elements of sections 110(a)(1) and (2) ''infrastructure'' provisions?
V. Proposed Action
VI. Statutory and Executive Order Reviews

I. Background

On July 18, 1997 (62 FR 36852), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m³. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a new 24-hour NAAQS of 35 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$ NAAQS, no later than October 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the ''infrastructure'' requirements for the 1997 annual $PM_{2.5}$ NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 $PM_{2.5}$ NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled, ''Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter ($PM_{2.5}$) NAAQS'' making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 $PM_{2.5}$ NAAQS (*See* 73 FR 62902). For those states that did receive findings, the findings of failure to submit for all or a portion of a state's implementation plan established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs.

The findings that all or portions of a state's submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k). Florida's infrastructure submissions were received by EPA on April 18, 2008, for the 1997 annual $PM_{2.5}$ NAAQS and on September 23, 2009, for the 2006 24-hour $PM_{2.5}$ NAAQS. The submissions were determined to be complete on October 18, 2008, and March 23, 2010, respectively. Florida was among other states that did not receive findings of failure to submit because it had provided a complete submission to EPA to address the infrastructure elements for the 1997 $PM_{2.5}$ NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the ''infrastructure'' requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's final action either approving, disapproving, or approving in part and disapproving in part the Florida 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittal addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), except for section 110(a)(2)(C) the nonattainment area requirements and section 110(a)(2)(D)(i) interstate transport requirements, by September 30, 2012.

Today's action is proposing to approve Florida's infrastructure submission for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS for sections

110(a)(2)(A)–(H), (J)–(M), except for section 110(a)(2)(C) nonattainment area requirements and section 110(a)(2)(D)(i) interstate transport requirements. EPA notes that final action to approve elements 110(a)(2)(C), (E)(ii), and (J) is contingent upon the Agency first taking final action on submitted SIP revisions associated with each of these elements. Final action on those SIP revisions will be addressed in separate actions.

Today's action is not approving any specific rule, but rather proposing that Florida's already approved SIP meets certain CAA requirements.

II. What elements are required under sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, some states may need to adopt language specific to the $PM_{2.5}$ NAAQS to ensure that they have adequate SIP provisions to implement the $PM_{2.5}$ NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are listed below[1] and in EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' and September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards.''

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.[2]
- 110(a)(2)(D): Interstate transport.[3]
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.[4]
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

III. Scope of Infrastructure SIPs

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and $PM_{2.5}$ NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.[5] Those Commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction (SSM) at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions; and (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (director's discretion). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address separately: (i) Existing provisions for minor source new source review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (minor source NSR''\); and (ii) existing provisions for Prevention of Significant Deterioration (PSD) programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIPs

[1] Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I), but does provide detail on how Florida's SIP addresses 110(a)(2)(C).

[2] This rulemaking only addresses requirements for this element as they relate to attainment areas.

[3] Today's proposed rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 and 2006 $PM_{2.5}$ NAAQS. Interstate transport requirements were formerly addressed by Florida consistent with the Clean Air Interstate Rule (CAIR). On December 23, 2008, CAIR was remanded by the DC Circuit Court of Appeals, without vacatur, back to EPA. *See North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008). Prior to this remand, EPA took final action to approve Florida SIP revision, which was submitted to comply with CAIR. *See* 72 FR 58016 (October 12, 2007). In so doing, Florida CAIR SIP revision addressed the interstate transport provisions in section 110(a)(2)(D)(i) for the 1997 and 2006 $PM_{2.5}$ NAAQS. In response to the remand of CAIR, EPA has recently finalized a new rule to address the interstate transport of nitrogen oxides and sulfur oxides in the eastern United States. *See* 76 FR 48208 (August 8, 2011) (''the Transport Rule''). That rule was recently stayed by the DC Circuit Court of Appeals. EPA's action on element 110(a)(2)(D)(i) will be addressed in a separate action.

[4] This requirement was inadvertently omitted from EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' and the September 25, 2009, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards,'' but as mentioned above is not relevant to today's proposed rulemaking.

[5] *See* Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

for the 1997 and 2006 $PM_{2.5}$ NAAQS from Florida.

EPA intended the statements in the other proposals concerning these four issues merely to be informational and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a re-approval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that ''in this rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at facilities.'' EPA further explained, for informational purposes, that ''EPA plans to address such State regulations in the future.'' EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and $PM_{2.5}$ NAAQS should not be construed as explicit or implicit re-approval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the infrastructure SIP for Florida.

Unfortunately, the Commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)'' and that these SIPs are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as ''infrastructure SIPs.'' This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as ''nonattainment SIP'' submissions required to address the nonattainment planning requirements of part D, ''regional haze SIP'' submissions required to address the visibility protection requirements of CAA section 169A, NSR permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[6] Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.[7]

Notwithstanding that section 110(a)(2) provides that ''each'' SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).[8] This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general ''infrastructure SIP'' for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter ''interstate transport'' provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.[9] This illustrates that EPA

[6] For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

[7] For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. *See* ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,'' 70 FR 25162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[8] *See Id.,* 70 FR 25162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[9] EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. *See* ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy

Continued

may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's implementation plans. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.[10]

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.,* the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements ''as applicable.'' In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and $PM_{2.5}$ NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.[11] Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the ''infrastructure'' elements for SIPs, which it further described as the ''basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.'' [12] As further identification of these basic structural SIP requirements, ''attachment A'' to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended ''to constitute an interpretation of'' the requirements, and was merely a ''brief description of the required elements.'' [13] EPA also stated its belief that with one exception, these requirements were ''relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.'' [14] However, for the one exception to that general assumption (*i.e.,* how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS), EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 $PM_{2.5}$ NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the state's implementation plans for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS.[15] In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS, but were germane to these SIP submissions for the 2006 $PM_{2.5}$ NAAQS (e.g., the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and $PM_{2.5}$ NAAQS). Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from

Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

[10] For example, implementation of the 1997 $PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

[11] *See* ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the ''2007 Guidance'').

[12] *Id.,* at page 2.

[13] *Id.,* at attachment A, page 1.

[14] *Id.,* at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so ''self explanatory,'' and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

[15] *See* ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24–Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' from William T, Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the ''2009 Guidance'').

the pending infrastructure SIP actions. The same holds true for this action on the infrastructure SIPs for Florida.

EPA believes that this approach to the infrastructure SIP requirement is reasonable because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.[16] Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.[17] Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.[18]

IV. What is EPA's analysis of how Florida Addressed the elements of sections 110(a)(1) and (2) ''infrastructure'' provisions?

Florida's infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): *Emission limits and other control measures:* Florida's infrastructure submissions provide an overview of the provisions of Florida's Air Pollution Control Requirements relevant to air quality control regulations. There are several regulations within Florida's SIP relevant to air quality control regulations which include enforceable emission limitations and other control measures. Chapters 62–204, *Air Pollution Control Provisions;* 62–210, *Stationary Sources—General Requirements;* and 62–296, *Stationary Sources—Emissions Standards,* establish emission limits and address the required control measures, means and techniques for compliance with the $PM_{2.5}$ NAAQS respectively. EPA has made the preliminary determination that the provisions contained in these chapters and Florida's practices are adequate to protect the $PM_{2.5}$ annual and 24-hour NAAQS in the State.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown'' (September 20, 1999), and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having deficient SSM provisions to take steps to correct it as soon as possible.

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) *Ambient air quality monitoring/data system:* Chapters 62–204, *Air Pollution Control Provisions,* 62–210, *Stationary Sources—General Requirements, 62–212, Stationary Sources—Preconstruction Review,* 62–296, *Stationary Sources—Emissions Standards,* and 62–297, *Stationary Sources—Emissions Monitoring* of the Florida SIP, along with the Florida Network Description and Ambient Air Monitoring Network Plan, provide for an ambient air quality monitoring system in the State. Annually, EPA approves the ambient air monitoring network plan for the state agencies. In May 2011 Florida submitted its plan to EPA. On October 17, 2011, EPA approved Florida's monitoring network plan. Florida's approved monitoring network plan can be accessed at *www.regulations.gov* using Docket ID No. EPA–R04–OAR–2012–0382. EPA has made the preliminary determination that Florida's SIP and practices are adequate for the ambient air quality monitoring and data systems related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

3. 110(a)(2)(C) *Program for enforcement of control measures including review of proposed new sources:* Florida's authority to regulate new and modified sources to assist in the protection of air quality in

[16] EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 (April 18, 2011).

[17] EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. *See* ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. *See* 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[18] EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). *See* 75 FR 42342, 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

nonattainment, attainment or unclassifiable areas is established in Chapters 62–210, *Stationary Sources—General Requirements,* and 62–212, *Stationary Sources—Preconstruction Review, Deterioration,* of the Florida SIP. Florida's regulations describe the permit requirements for new major sources or major modifications of existing sources and set the permitting requirements in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. The regulations are designed to prevent sources in areas attaining the NAAQS at the time of designations from causing any significant deterioration in air quality. Additionally, on March 15, 2012, Florida submitted a SIP revision to its NSR/PSD and Nonattainment New Source Review (NNSR) programs. Florida's March 15, 2012, SIP revision incorporates NSR provisions for fine particulate matter (also known as $PM_{2.5}$) as amended in EPA's 2008 NSR $PM_{2.5}$ Implementation Rule (hereafter referred to as the ''NSR $PM_{2.5}$ Rule'') into the Florida SIP. In the March 15, 2012, SIP revision, Florida includes revisions to rules that address the infrastructure requirements (C) and (J). EPA is proposing approval of Florida's March 15, 2012, submission in a rulemaking separate from today's action.

In this action, EPA is proposing to approve Florida's infrastructure SIP for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

EPA has made the preliminary determination that Florida's SIP and practices are adequate for program enforcement of control measures including review of proposed new sources related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Final action to approve this element, however, is contingent upon the Agency first taking final action to approve Florida's March 15, 2012, $PM_{2.5}$ NSR Update. As discussed above, such action the March 15, 2012, submission will occur in a separate rulemaking.

4. 110(a)(2)(D)(ii) *Interstate and International transport provisions:* Chapter 62–210, *Stationary Sources—General Requirements* of Florida's SIP, outlines how Florida will notify neighboring states of potential impacts from new or modified sources. Florida does not have any pending obligation under sections 115 and 126 of the CAA. EPA has made the preliminary determination that Florida's SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

5. 110(a)(2)(E) *Adequate resources:* Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Florida's SIP as meeting the requirements of sub-elements 110(a)(2)(E)(i) and (iii). EPA is also proposing to approve sub-element 110(a)(2)(E)(ii) (regarding state boards), however, final approval of this sub-element is contingent upon the Agency first taking final action to approve proposed revisions the Florida's SIP related to this sub-element. *See* 77 FR 29581. EPA's rationale for today's proposals respecting each sub-element is described in turn below.

In support of EPA's proposal to approve sub-elements 110(a)(2)(E)(i) and (iii), Florida's submissions note that FDEP is responsible for promulgating rules and regulations for the NAAQS, emissions standards general policies, a system of permits, fee schedules for the review of plans, and other planning needs. As evidence of the adequacy of FDEP's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Florida on March 13, 2012, outlining the 105 grant commitments and current status of these commitments for fiscal year 2011. The letter EPA submitted to Florida can be accessed at www.regulations.gov using Docket ID No. EPA–R04–OAR–2012–0382. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. Florida satisfactorily met all commitments agreed to in the Air Planning Agreement for fiscal year 2011, therefore Florida's grants were finalized and closed out. EPA has made the preliminary determination that Florida has adequate resources for implementation of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. In addition, the requirements of 110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under state law has been use to carry out the state's implementation plan and related issues. Florida's authority is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Florida has adequate resources for implementation of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

Section 110(a)(2)(E)(ii) requires that the state comply with section 128 of the CAA. Section 128 requires that: (1) The majority of members of any state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and (2) any potential conflicts of interest by such board or body, or head of an executive agency with similar powers be adequately disclosed. For purposes of section 128(a)(1), Florida has no boards or bodies with authority over air pollution permits or enforcement actions. Such matters are instead handled by an appointed Secretary. Appeals of final administrative orders and permits are available only through the judicial appellate process described at Florida Statute 120.68. As such, a ''board or body'' is not responsible for approving permits or enforcement orders in Florida, and the requirements of section 128(a)(1) are not applicable.

Regarding section 128(a)(2) (also made applicable to the infrastructure

SIP pursuant to section 110(a)(2)(E)(ii)), on April 19, 2012, Florida submitted Florida Statutes112.3143(4) and 112.3144 for incorporation into the SIP. In a separate action, EPA has proposed approval of this revision to the Florida SIP. *See* 77 FR 29581. EPA is today proposing that this revision, once finalized, will be sufficient to satisfy the 110(a)(2)(E)(ii) conflict of interest provisions applicable to the head of FDEP and all public officers within the Department. Final approval of today's proposed rule is contingent upon the Agency first taking final action to approve a final SIP revision consistent with the April 19, 2012, SIP revision.

6. 110(a)(2)(F) *Stationary source monitoring system:* Florida's infrastructure submission describes how the State establishes requirements for emissions compliance testing and utilizes emissions sampling and analysis. It further describes how the State ensures the quality of its data through observing emissions and monitoring operations. Florida DEP uses these data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with emission regulations and additional EPA requirements. These requirements are provided in Florida SIP Chapters 62–210, *Stationary Sources—General Requirements;* 62–212, *Stationary Sources—Preconstruction Review;* 62–296, *Stationary Sources—Emissions Standards;* and 62–297, *Stationary Sources—Emissions Monitoring.*

Additionally, Florida is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System (EIS). States report emissions data for the six criteria pollutants and the precursors that form them—NO_X, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds (VOCs). Many states also voluntarily report emissions of hazardous air pollutants. Florida made its latest update to the NEI on November 22, 2011. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the Web site *http://www.epa.gov/ttn/chief/eiinformation.html.* EPA has made the preliminary determination that Florida's SIP and practices are adequate for the stationary source monitoring systems related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

7. 110(a)(2)(G) *Emergency power:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs. On September 25, 2009, EPA released the guidance entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particulate ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS).'' This guidance clarified that ''to address the section 110(a)(2)(G) element, states with air quality control regions identified as either Priority I, IA, or Priority II by the 'Prevention of Air Pollution Emergency Episodes' rule at 40 CFR 51.150, must develop emergency episode contingency plans.'' EPA's September 25, 2009, guidance also states that ''until the Agency finalized changes to the emergency episode regulation to establish for $PM_{2.5}$ specific levels for classifying areas as Priority I, IA, or II for $PM_{2.5}$, and to establish a significant harm level (SHL)* * *,'' it recommends that states with a 24-Hour $PM_{2.5}$ concentration above 140 μg/m³ (using the most recent three years of data) develop an emergency episode plan. For states where this level has not been exceeded, the state can certify that it has appropriate general emergency powers to address $PM_{2.5}$ related episodes, and that no specific emergency episode plans are needed at this time. On September 19, 2009, FDEP submitted a letter to EPA verifying that it is a Class III Priority Area and is exempt from adopting emergency episode plan for $PM_{2.5}$. On September 23, 2009, FDEP submitted certification that its SIP adequately addressed the section 110(a)(2)(G) requirements for the 2006 $PM_{2.5}$ NAAQS. Florida had not previously public noticed its certification submissions with regard to 110(a)(2)(G) for the $PM_{2.5}$ NAAQS, so on May 20, 2011, Florida provided public notice for this element.

EPA has reviewed Florida's April 18, 2008, and September 23, 2009, certifications and has determined that the ambient air quality monitoring data from 2006 to 2011 for Florida did not exceed 140 μg/m³. The $PM_{2.5}$ levels have consistently remained below this level (140 μg/m³). As a result, EPA is proposing to approve Florida's infrastructure submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS.

8. 110(a)(2)(H) *Future SIP revisions:* FDEP is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Florida. FDEP has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS. Florida does not have any nonattainment areas for the 1997 annual or 2006 24-hour $PM_{2.5}$ standard, but has made an infrastructure submission for these standards, which is the subject of this rulemaking. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

9. 110(a)(2)(J) (121 consultation) *Consultation with government officials:* Chapters 62–204, *Air Pollution Control Provisions,* and 62–212, *Stationary Sources—Preconstruction Review,* of the Florida SIP, as well as Florida's Regional Haze Implementation Plan (which allows for consultation between appropriate state, local, and tribal air pollution control agencies as well as the corresponding Federal Land Managers), provide for consultation with government officials whose jurisdictions might be affected by SIP development activities. Florida adopted state-wide consultation procedures for the implementation of transportation conformity. These consultation procedures include the development of mobile inventories for SIPs. Implementation of transportation conformity, as outlined in the consultation procedures, requires FDEP to consult with federal, state and local transportation and air quality agency officials on the development of motor vehicle emissions budgets. EPA approved Florida's consultation procedures on August 11, 2003 as part of the approval of the State's transportation conformity rule (*See* 68 FR 47468). EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate consultation with government officials related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

10. 110(a)(2)(J) (127 public notification) *Public notification:* FDEP has public notice mechanisms in place to notify the public of pollutant

forecasting, including an air quality monitoring Web site providing fine particulate alerts, *http://www.dep.state.fl.us/air/air_quality/countyaqi.htm.* Florida Statutes, 403.131, *Injunctive relief, remedies* and 120.569 *Decisions which affect substantial interests* (subsection (2)(n) relating to emergency orders), provide authority for the State to seek injunctive relief to prevent irreparable damage to air quality. In addition Chapter 62–256.300, *Prohibitions,* of the Florida SIP includes provisions to monitor air pollution episodes for ozone and particulate matter. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to provide public notification related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

11. 110(a)(2)(J) (PSD) *PSD and visibility protection:* Florida demonstrates its authority to regulate new and modified sources of PM to assist in the protection of air quality in Florida. Chapters 62–210, *Stationary Sources—General Requirements,* Section 200—*Definitions,* and 62–212, *Stationary Sources—Preconstruction Review,* Section 400—*Prevention of Significant Deterioration,* of Florida's SIP provide the permitting requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. These provisions are designed to prevent significant deterioration in air quality in areas that are in attainment of the NAAQS at the time of designations. As with infrastructure element 110(a)(2)(C), infrastructure element 110(a)(2)(J) also requires compliance with applicable provisions of the PSD program described in part C of the Act. Accordingly, the pending EPA action on the March 15, 2012, SIP revision (NSR Revisions), is a prerequisite to today's proposed action to approve the State's infrastructure element 110(a)(2)(J). See the discussion for element 110(a)(2)(C) above for a description of the pending revision to the Florida SIP. The March 15, 2012, SIP revision addresses requisite requirements of infrastructure element 110(a)(2)(J) (PSD and visibility protection), therefore, today's action to propose approval of infrastructure SIP element 110(a)(2)(J) (PSD and visibility protection) is contingent upon EPA taking final action to approve the March 15, 2012, SIP revision into the Florida SIP.

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, EPA finds that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. This would be the case even in the event a secondary $PM_{2.5}$ NAAQS for visibility is established, because this NAAQS would not affect visibility requirements under part C. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to implement PSD programs and to provide for visibility protection related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary. As discussed above, final approval of this element is contingent upon the Agency first taking final action to approve Florida's March 15, 2012, $PM_{2.5}$ NSR Update.

12. 110(a)(2)(K) *Air quality and modeling/data:* Chapter 62–204.800, *Federal Regulations Adopted by Reference,* of the Florida SIP incorporates by reference 40 CFR 52.21(l), which specifies that air modeling be conducted in accordance with 40 CFR part 51, Appendix W ''Guideline on Air Quality Models.'' This regulation demonstrates that Florida has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Additionally, Florida supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, for the Southeastern states. Taken as a whole, Florida's air quality regulations demonstrate that FDEP has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate the State's ability to provide for air quality and modeling, along with analysis of the associated data, related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

13. 110(a)(2)(L) *Permitting fees:* Florida addresses the review of construction permits as previously discussed in 110(a)(2)(C). Permitting fees in Florida are collected through the State's federally-approved title V fees program, according to State Statute 403.087(6)(a), *Permit Fees.* EPA has made the preliminary determination that Florida's SIP and practices adequately provide for permitting fees related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

14. 110(a)(2)(M) *Consultation/participation by affected local entities:* Chapter 62–204, *Air Pollution Control Provisions,* of the Florida SIP requires that SIPs be submitted in accordance with 40 CFR part 51, subpart F, for permitting purposes. Florida statute 403.061(21) authorizes FDEP to ''[a]dvise, consult, cooperate and enter into agreements with other agencies of the state, the Federal Government, other states, interstate agencies, groups, political subdivisions, and industries affected by the provisions of this act, rules, or policies of the department.'' Furthermore, FDEP has demonstrated consultation with, and participation by, affected local entities through its work with local political subdivisions during the developing of its Transportation Conformity SIP and Regional Haze Implementation Plan. EPA has made the preliminary determination that Florida's SIP and practices adequately demonstrate consultation with affected local entities related to the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS when necessary.

V. Proposed Action

As described above, FDEP has addressed the required elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA's October 2, 2007, and September 25, 2009, guidance to ensure that the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in Florida. EPA is proposing to approve Florida's infrastructure submissions, provided to EPA on April 18, 2008, and on September 23, 2009, with the exception of section 110(a)(2)(E)(ii) which will be addressed in a separate action. EPA is proposing to determine that Florida's infrastructure submission, provided to EPA on April 18, 2008, addressed all the required infrastructure elements for the 1997 annual $PM_{2.5}$ NAAQS and on September 23, 2009, addressed all the required infrastructure elements for the 2006 24-hour $PM_{2.5}$ NAAQS. Final approval of this rule is contingent upon the Agency first taking final action to approve Florida's March 15, 2012, $PM_{2.5}$ NSR Update submission [19] and May 18, 2012 proposed rule to approve Florida's

[19] As noted above, EPA has yet to propose action on the March 15, 2012, $PM_{2.5}$ NSR Update submission. Such proposed action will occur in a separate rulemaking.

April 19, 2012, submission addressing section 110(a)(2)(E)(ii).

VI. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: June 1, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–14244 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2011–0542; FRL–9680–8]

Notice of Data Availability Concerning Renewable Fuels Produced From Grain Sorghum Under the RFS Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: This notice of data availability provides an opportunity to comment on EPA's analyses of grain sorghum used as a feedstock to produce ethanol under the Renewable Fuel Standard (RFS) program. EPA's analysis shows that ethanol from grain sorghum has estimated lifecycle greenhouse gas (GHG) emission reductions of 32% compared to the baseline petroleum fuel it would replace. This analysis indicates that grain sorghum ethanol qualifies as a conventional renewable fuel under the RFS program. Furthermore, this analysis shows that, when produced via certain pathways that utilize advanced process technologies (e.g., biogas in addition to combined heat and power), grain sorghum ethanol has lifecycle GHG emission reductions of over 50% compared to the baseline petroleum fuel it would replace, and would qualify as an advanced biofuel under RFS.

DATES: Comments must be received on or before July 12, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0542, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Email: asdinfo@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0542. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or *asdinfo@epa.gov*. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and

Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT:

Jefferson Cole, Office of Transportation and Air Quality, Transportation and Climate Division, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460 (MC: 6041A); telephone number: 202–564–1283; fax number: 202–564–1177; email address: *cole.jefferson@epa.gov*.

SUPPLEMENTARY INFORMATION:

Outline of This Preamble

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for EPA?
1. Submitting CBI
2. Tips for Preparing Your Comments
II. Analysis of Lifecycle Greenhouse Gas Emissions
A. Methodology
1. Scope of Analysis
2. Models Used
3. Scenarios Modeled for Impacts of Increased Demand for Grain Sorghum
4. Model Modifications
B. Results
1. Agro-Economic Impacts
2. International Land Use Change Emissions
3. Grain Sorghum Ethanol Processing
4. Results of Lifecycle Analysis for Ethanol From Grain Sorghum (Using Dry Mill Natural Gas)
5. Results of Lifecycle Analysis for Ethanol From Grain Sorghum (Using Biogas and CHP)
6. Other Advanced Technologies
C. Consideration of Lifecycle Analysis Results
1. Implications for Threshold Determinations
2. Consideration of Uncertainty

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as biodiesel and renewable diesel. Regulated categories include:

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	324110	2911	Petroleum Refineries.
Industry	325193	2869	Ethyl alcohol manufacturing.
Industry	325199	2869	Other basic organic chemical manufacturing.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

[1] North American Industry Classification System (NAICS).
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to engage in activities that may be affected by today's action. To determine whether your activities would be affected, you should carefully examine the applicability criteria in 40 CFR Part 80, Subpart M. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI

Do not submit this information to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Analysis of Lifecycle Greenhouse Gas Emissions

A. Methodology

1. Scope of Analysis

On March 26, 2010 (75 FR 14670), the Environmental Protection Agency (EPA) published changes to the Renewable Fuel Standard program regulations as required by 2007 amendments to CAA 211(o). This rulemaking is commonly referred to as the ''RFS2'' final rule. As part of the RFS2 final rule we analyzed various categories of biofuels to determine whether the complete lifecycle GHG emissions associated with the production, distribution, and use of those fuels meet minimum lifecycle greenhouse gas reduction thresholds as specified by CAA 211(o) (i.e., 60% for cellulosic biofuel, 50% for biomass-based diesel and advanced biofuel, and 20% for other renewable fuels). Our final rule focused our lifecycle analyses on fuels that were anticipated to contribute relatively large volumes of renewable fuel by 2022 and thus did not cover all fuels that either are contributing or could potentially contribute to the program. In the preamble to the final rule EPA indicated that it had not completed the GHG emissions impact analysis for several specific biofuel production pathways

but that this work would be completed through a supplemental rulemaking process. Since the final rule was issued, we have continued to examine several additional pathways. This Notice of Data Availability (''NODA'') focuses on our analysis of the grain sorghum ethanol pathway. The modeling approach EPA used in this analysis is the same general approach used in the final RFS2 rule for lifecycle analyses of other biofuels.[1] The RFS2 final rule preamble and Regulatory Impact Analysis (RIA) provides further discussion of our approach.

This notice of data availability provides an opportunity to comment on EPA's analyses of lifecycle GHG emissions related to the production and use of ethanol from grain sorghum prior to EPA taking any final rulemaking action to add ethanol from grain sorghum as an available pathway in the RFS program. We intend to consider all of the relevant comments received. In general, comments will be considered relevant if they pertain to EPA's analysis of lifecycle GHG emissions of grain sorghum ethanol, and especially if they provide specific information for consideration in our modeling.

2. Models Used

The analysis EPA has prepared for grain sorghum ethanol uses the same set of models that was used for the final RFS2 rule. To estimate the domestic agricultural impacts presented in the following sections, we used the Forestry and Agricultural Sector Optimization Model (FASOM) developed by Texas A&M University. To estimate the international agricultural section impacts presented below, we used the Food and Agricultural Policy and Research Institute international models as maintained by the Center for Agricultural and Rural Development (FAPRI–CARD) at Iowa State University. For more information on the FASOM and FAPRI–CARD models, refer to the RFS2 final rule preamble (75 FR 14670) or the RFS2 Regulatory Impact Analysis (RIA).[2] The models require a number of inputs that are specific to the pathway being analyzed, including projected yields of feedstock per acre planted, projected fertilizer use, and energy use in feedstock processing and fuel production. The docket includes detailed information on model inputs, assumptions, calculations, and the results of our assessment of the lifecycle GHG emissions performance for producing ethanol from grain sorghum (''grain sorghum ethanol'').

3. Scenarios Modeled for Impacts of Increased Demand for Grain Sorghum

To assess the impacts of an increase in renewable fuel volume from business-as-usual (what is likely to have occurred without the RFS biofuel mandates) to levels required by the statute, we established reference and control cases for a number of biofuels analyzed for the RFS2 final rulemaking. The reference case includes a projection of renewable fuel volumes without the RFS renewable fuel volume mandates. The control cases are projections of the volumes of renewable fuel that might be used in the future to comply with the volume mandates. The final rule reference case volumes were based on the Energy Information Administration's (EIA) Annual Energy Outlook (AEO) 2007 reference case projections. In the RFS2 rule, for each individual biofuel, we analyzed the incremental GHG emission impacts of increasing the volume of that fuel to the total mix of biofuels needed to meet the EISA requirements.

For the analysis of grain sorghum ethanol, a new control case was developed to account for the current production of grain sorghum ethanol which is approximately 200 million gallons per year (see Chapter 1 of the RFS2 RIA). All other volumes for each individual biofuel in this new control case remain identical to the control case used in the RFS2 rule. For the ''grain sorghum'' case, our modeling assumes approximately 300 million gallons of sorghum ethanol would be consumed in the United States in 2022. The modeled scenario includes 2.06 billion lbs of grain sorghum to be used to produce the additional 100 million gallons of ethanol in 2022.

Our volume scenario of approximately 200 million gallons of grain sorghum ethanol in the new control case, and 300 million gallons in the grain sorghum case in 2022, is based on several factors including historical volumes of grain sorghum ethanol production, potential feedstock availability and other competitive uses (e.g., animal feed or exports). Our assessment is described further in the inputs and assumptions document that is available through the docket (EPA 2011). Based in part on consultation with experts at the United States Department of Agriculture (USDA) and industry representatives, we believe that these volumes are reasonable for the purposes of evaluating the impacts of producing additional volumes of ethanol from grain sorghum.

The FASOM and FAPRI–CARD models, described above, project how much grain sorghum will be supplied to ethanol production from a combination of increased production, decreases in others uses (e.g., animal feed), and decreases in exports, in going from the control case to the grain sorghum case.

4. Model Modifications

Based on information from industry stakeholders, as well as in consultation with USDA, both the FASOM and FAPRI–CARD models assume perfect substitution in the use of grain sorghum and corn in the animal feed market in the U.S. Therefore, when more grain sorghum is used for ethanol production, grain sorghum used in feed decreases. Either additional corn or sorghum will be used in the feed market to make up for this decrease, depending upon the relative cost of additional production. This assumption is based on conversations with industry and the USDA, reflecting the primary use of sorghum in the U.S. as animal feed, just like corn.

The United States is one of the largest producers and exporters of grain sorghum. However, two large producers of grain sorghum, India and Nigeria, do not actively participate in the global trade market for sorghum. Rather, all grain sorghum in those two countries is produced for domestic consumption. Therefore, as the U.S. diverts some of its exports of grain sorghum for the purposes of ethanol production, we would expect close to no reaction in the production levels of grain sorghum in India and Nigeria. Historical data on prices, production, and exports from USDA, FAOSTAT, and FAPRI support this assumption.[3]

B. Results

As we did for our analysis of other feedstocks in the RFS2 final rule, we assessed what the GHG emissions impacts would be from the use of additional volumes of sorghum for biofuel production. The information provided in this section discusses the assumptions and outputs of the analysis using the FASOM and FAPRI–CARD agro-economic models to determine changes in the agricultural and livestock markets. These results from FASOM and FAPRI–CARD are then used to determine the GHG emissions impacts

[1] EPA. 2010. Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. *http://www.epa.gov/oms/renewablefuels/420r10006.pdf*

[2] EPA. 2010. Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis. EPA–420–R–10–006. *http://www.epa.gov/oms/renewablefuels/420r10006.pdf*. Additional RFS2 related documents can be found at *http://www.epa.gov/otaq/fuels/renewablefuels/regulations.htm*

[3] See Memo to the Docket, Docket Number EPA–HQ–OAR–2011–0542, Dated May 18, 2012 and personal communication with USDA.

due to land use change and other factors. Finally, we include our analysis of the GHG emissions associated with different processing pathways and how these technologies affect the lifecycle GHG emissions associated with grain sorghum ethanol.

As discussed in the final RFS2 rule and the accompanying peer review, there are inherent challenges in reconciling the results from two different models. However, using two models provides a more complete and robust analysis than either model would be able to provide alone. We have attempted to align as many of the key assumptions as possible to get a consistent set of modeling results although there are structural differences in the models that account for some of the differences in the model results. For example, since FASOM is a long-term dynamic optimization model, short-term spikes are smoothed out over the five year reporting period. In comparison, the FAPRI–CARD model captures annual fluctuations that may include short-term supply and demand responses. In addition, some of the discrepancies may be attributed to different underlying assumptions pertaining to elasticities of supply and demand for different commodities. These differences, in turn, affect projections of imports and exports, acreage shifting, and total consumption and production of various commodities.

1. Agro-Economic Impacts

As biofuel production causes increased demand for a particular commodity, the supply generally comes from a mix of increased production, decreased exports, increased imports, and decreases in other uses of the commodity. In the case of grain sorghum, FASOM estimates that the majority of sorghum necessary to produce 100 million additional gallons of ethanol (2.06 billion lbs) by 2022 comes from a decrease in grain sorghum used in the animal feed market (2.05 billion lbs). This gap in the feed market is primarily filled by distillers grains (627 million lbs), a byproduct from the grain sorghum ethanol production process also known as DG, as well as additional corn production (1.6 billion lbs). This is reasonable given the close substitutability of corn and grain sorghum in the U.S. animal feed markets. When DG are produced at an ethanol facility, they contain a certain amount of moisture and are referred to as ''wet'' DG. If an ethanol facility is interested in transporting DG long distances to sell to distant feedlots, then the DG must be dried so they do not spoil. Information about the energy required for this drying process, as well as the different amounts of wet versus dry DG production that we considered can be found below in Sections II.B.3 and II.B.5. In those sections, we detail not only how much energy is required for drying DG, but show that this amount of energy is not significantly large enough to affect the overall threshold determinations.

TABLE II–1—SUMMARY OF PROJECTED CHANGE IN FEED USE IN THE U.S. IN 2022 IN THE FASOM MODEL

[Millions of lbs]

	Control case	Grain sorghum case	Difference
Sorghum	38,998	36,947	−2,051
Corn	324,731	326,365	1,635
Distillers Grains (DG)	79,388	80,014	627
Other	71,881	71,873	−8
Total	514,998	515,200	202

As demand for both grain sorghum for ethanol production and corn for animal feed increases, harvested crop area in the U.S. are predicted to increase by 92 thousand acres in 2022. The increase in grain sorghum area harvested is relatively modest, at an additional 4 thousand acres, due to the fact that demand for grain sorghum for use in ethanol production is being met by a shift of grain sorghum from one existing use (in the animal feed market) to another (ethanol production). Meeting the subsequent gap in supply of animal feed, however, leads to an increase of 141 thousand corn acres in 2022. Due to the increased demand for corn production and harvested area, soybean harvested area would decrease by 105 thousand acres (corn and soybeans often compete for land). Other crops in the U.S., such as wheat, hay, and rice, are projected to have a net increase of 53 thousand acres.

TABLE II–2—SUMMARY OF PROJECTED CHANGE IN CROP HARVESTED AREA IN THE U.S. IN 2022 IN THE FASOM MODEL

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Sorghum	11,108	11,111	4
Corn	77,539	77,680	141
Soybeans	69,896	69,791	−105
Other	154,511	154,564	53
Total	313,054	313,146	92

As demand for grain sorghum increases for ethanol production in the U.S., the FAPRI–CARD model estimates that the U.S. will decrease exports of grain sorghum by 789 million lbs. Additionally, the U.S. will increase exports of corn by 106 million lbs to partially satisfy the gap of having less grain sorghum in the worldwide feed market. This combination of impacts on the world trade of grain sorghum and corn has effects both on major importers, as well as on other major exporters. For example, Mexico, one of the largest importers of grain sorghum,

decreases its imports of grain sorghum by 395 million lbs, and increases its imports of corn by 256 million lbs. Brazil also contributes more corn to the global market by increasing its exports by 198 million lbs. Details for other major importers and exporters of grain sorghum and corn can be found in Table II–3 and Table II–4, respectively.

TABLE II–3—SUMMARY OF PROJECTED CHANGE IN NET EXPORTS OF GRAIN SORGHUM BY COUNTRY IN 2022 IN THE FAPRI–CARD MODEL

[Millions of lbs]

	Control case	Grain sorghum case	Difference
U.S.	10,580	9,791	−789
Mexico	−4,735	−4,340	395
Japan	−3,159	−3,106	53
Argentina	2,577	2,653	75
India	−219	−219	0
Nigeria	110	110	0
Rest of World	−4,655	−4,389	266

Note: A country with negative Net Exports is a Net Importer.

TABLE II–4—SUMMARY OF PROJECTED CHANGE IN NET EXPORTS OF CORN BY COUNTRY IN 2022 IN THE FAPRI–CARD MODEL

[Millions of lbs]

	Control case	Grain sorghum case	Difference
U.S.	122,688	122,795	106
Brazil	24,661	24,859	198
China	12,748	12,840	93
Japan	−38,787	−38,877	−91
Mexico	−29,008	−29,264	−256
Rest of World	−91,423	−91,474	−51

Note: A country with negative Net Exports is a Net Importer.

The change in trade patterns directly impacts the amount of production and harvested crop area around the world. Harvested crop area for grain sorghum is not only predicted to increase in the U.S., but also in Mexico (7.8 thousand acres) and other parts of the world. Worldwide grain sorghum harvested area outside of the U.S. would increase by 39.3 thousand acres. Similarly, the increase in the demand for corn would lead to an increase of 36.8 thousand harvested acres outside of the U.S. While soybean harvested area would decrease in the U.S., Brazil would increase its soybean harvested area (18.4 thousand acres) to satisfy global demand. Although worldwide soybean harvested area decreases by 11.7 thousand acres, non-U.S. harvested area increases by 11.2 thousand acres.

Overall harvested crop area in other countries also increase, particularly in Brazil. Brazil's total harvested area is predicted to increase by 32.6 thousand acres by 2022. This is mostly comprised of an increase in corn of 18.1 thousand acres, and an increase in soybeans of 18.4 thousand acres, along with minor changes in other crops. More details on projected changes in world harvested crop area in 2022 can be found below in Table II–5, Table II–6, Table II–7, and Table II–8.

TABLE II–5—SUMMARY OF PROJECTED CHANGE IN INTERNATIONAL (NON-U.S.) HARVESTED AREA BY COUNTRY IN 2022 IN THE FAPRI–CARD MODEL

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Brazil	137,983	138,016	33
China	272,323	272,334	11
Africa and Middle East	315,843	315,892	48
Rest of World	1,301,417	1,301,441	24
International Total (non-U.S.)	2,027,567	2,027,682	115

TABLE II–6—SUMMARY OF PROJECTED CHANGE IN INTERNATIONAL (NON-U.S.) HARVESTED AREA BY CROP IN 2022 IN THE FAPRI–CARD MODEL

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Sorghum	95,108	95,148	39

TABLE II–6—SUMMARY OF PROJECTED CHANGE IN INTERNATIONAL (NON-U.S.) HARVESTED AREA BY CROP IN 2022 IN THE FAPRI–CARD MODEL—Continued

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Corn	307,342	307,379	37
Soybeans	202,980	202,991	11
Other	1,422,137	1,422,165	28
International Total (non-U.S.)	2,027,567	2,027,682	115

TABLE II–7—SUMMARY OF PROJECTED CHANGE IN INTERNATIONAL (NON-U.S.) GRAIN SORGHUM HARVESTED AREA BY COUNTRY IN 2022 IN THE FAPRI–CARD MODEL

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Mexico	4,569	4,576	8
Argentina	1,915	1,917	2
India	22,261	22,261	0
Nigeria	18,841	18,841	0
Other Africa and Middle East	37,833	37,856	23
Rest of World	9,689	9,695	6
International Total (non-U.S.)	95,108	95,148	39

* The change in grain sorghum harvested area in India and Nigeria is zero.

TABLE II–8—SUMMARY OF PROJECTED CHANGE IN INTERNATIONAL (NON-U.S.) CORN HARVESTED AREA BY COUNTRY IN 2022 IN THE FAPRI–CARD MODEL

[Thousands of acres]

	Control case	Grain sorghum case	Difference
Africa and Middle East	77,220	77,223	4
Asia	108,751	108,764	13
Brazil	20,935	20,953	18
India	20,176	20,180	5
Other Latin America	39,599	39,594	−5
Rest of World	40,661	40,664	2
International Total (non-U.S.)	307,342	307,379	37

More detailed information on the agro-economic modeling can be found in the accompanying docket. We invite comment on all aspects of these modeling results.[4]

2. International Land Use Change Emissions

The methodology used in today's assessment of grain sorghum as an ethanol feedstock is the same as was used in the final RFS2 rule for analyses of other biofuel pathways. However, we have updated some of the data underlying the GHG emissions from international land use changes therefore we are providing additional detail on these modifications in this section.

In our analysis, GHG emissions per acre of land conversion internationally (i.e., outside of the United States) are determined using the emissions factors developed for the RFS2 final rule following IPCC guidelines. In addition, estimated average forest carbon stocks were updated based on a new study which uses a more robust and higher resolution analysis. For the RFS2 final rule, international forest carbon stocks were estimated from several data sources each derived using a different methodological approach. Two new peer-reviewed analyses on forest carbon stock estimation were completed since the release of the final RFS2 rule, one for three continental regions by Saatchi et al.[5] and the other for the EU by Gallaun et al.[6] We have updated our forest carbon stock estimates based on these new studies because they represent significant improvements as compared to the data used in the RFS2 rule. These updated forest carbon stock estimates were previously used in EPA's January 27, 2012, Notice of Data Availability Concerning Renewable Fuels Produced From Palm Oil Under the RFS Program (77 FR 4300). Forest carbon stocks across the tropics are important in our analysis of grain sorghum ethanol because a significant amount of the land use changes in the

[4] See Memo to the Docket, Docket Number EPA–HQ–OAR–2011–0542, Dated May 18, 2012.

[5] Saatchi, S.S., Harris, N.L. Brown, S., Lefsky, M., Mitchard, E.T.A., Salas, W., Zutta, B.R., Buermann, W., Lewis, S.L., Hagen, S., Petrova, S., White, L., Silman, M. And Morel, A. 2011. Benchmark map of forest carbon stocks in tropical regions across three continents. *PNAS* doi: 10.1073/pnas.1019576108.

[6] Gallaun H., Zanchi, G., Nabuurs, G.J. Hengeveld, G., Schardt, M., Verkerk, P.J. 2010. EU-wide maps of growing stack and above-ground biomass in forests based on remote sensing and and field measurements. *Forest Ecology and Mangement* 260: 252–261.

scenarios modelled occur in tropical regions such as Brazil. In the scenarios modelled there are also much smaller amounts of land use change impacts in the EU related to grain sorghum ethanol production. In the interest of using the best available data we have incorporated the improved forest carbon stocks data in our analysis of lifecycle GHG emissions related to grain sorghum ethanol.

Preliminary results for Latin America and Africa from Saatchi et al. were incorporated into the final RFS2 rule, but Asia results were not included due to timing considerations. The Saatchi et al. analysis is now complete, and so the final map was used to calculate updated area-weighted average forest carbon stocks for the entire area covered by the analysis (Latin America, sub-Saharan Africa and South and Southeast Asia). The Saatchi et al. results represent a significant improvement over previous estimates because they incorporate data from more than 4,000 ground inventory plots, about 150,000 biomass values estimated from forest heights measured by space-borne light detection and ranging (LIDAR), and a suite of optical and radar satellite imagery products. Estimates are spatially refined at 1-km grid cell resolution and are directly comparable across countries and regions.

In the final RFS2 rule, forest carbon stocks for the EU were estimated using a combination of data from three different sources. Issues with this 'patchwork' approach were that the biomass estimates were not comparable across countries due to the differences in methodological approaches, and that estimates were not spatially derived (or, the spatial data were not provided to EPA). Since the release of the final rule, Gallaun et al. developed EU-wide maps of above-ground biomass in forests based on remote sensing and field measurements. MODIS data were used for the classification, and comprehensive field measurement data from national forest inventories for nearly 100,000 locations from 16 countries were also used to develop the final map. The map covers the whole European Union, the European Free Trade Association countries, the Balkans, Belarus, the Ukraine, Moldova, Armenia, Azerbaijan, Georgia and Turkey.

For both data sources, Saatchi et al. and Gallaun et al., we added belowground biomass to reported aboveground biomass values using an equation in Mokany et al.[7]

In our analysis, forest stocks are estimated for over 750 regions across 160 countries. For some regions the carbon stocks increased as a result of the updates and in others they declined. For comparison, we ran our grain sorghum analysis using the old forest carbon stock values used in the RFS2 rule and with the updated forest carbon values described above. Using the updated forest carbon stocks increased the land use change GHG emissions related to grain sorghum ethanol by approximately 1.2 kilograms of carbon-dioxide equivalent emissions per million British thermal units of grain sorghum ethanol ($kgCO_2e/mmBtu$). Table II–9 includes the international land use change GHG emissions results for the scenarios modeled, in terms of $kgCO_2e/mmBtu$. International land use change GHG emissions for grain sorghum is estimated at 30 $kgCO_2e/mmBtu$.

TABLE II–9—INTERNATIONAL LAND USE CHANGE GHG EMISSIONS

[$kgCO_2e/mmBtu$]

Region	Emissions
Africa and Middle East	9
Asia	5
Brazil	14
India	1
Other Latin America	1
Rest of World	1
International Total (non-U.S.)	30

More detailed information on the land-use change emissions can be found in the accompanying docket. We invite comment on all aspects of these modeling results.[8]

3. Grain Sorghum Ethanol Processing

We expect the dry milling process will be the basic production method for producing ethanol from grain sorghum and therefore this is the ethanol production process considered here. In the dry milling process, the grain sorghum is ground and fermented to produce ethanol. The remaining DG are then either left wet if used in the near-term or dried for longer term use as animal feed.

For this analysis the amount of grain sorghum used for ethanol production as modeled by the FASOM and FAPRI–CARD models was based on yield assumptions built into those two models. Specifically, the models assume sorghum ethanol yields of 2.71 gallons per bushel for dry mill plants (yields represents pure ethanol).

As per the analysis done in the RFS2 final rule, the energy consumed and emissions generated by a renewable fuel plant must be allocated not only to the renewable fuel produced, but also to each of the by-products. For grain sorghum ethanol production, this analysis accounts for the DG co-product use directly in the FASOM and FAPRI–CARD agricultural sector modeling described above. DG are considered a replacement animal feed and thus reduce the need to make up for the grain sorghum production that went into ethanol production. Since FASOM takes the production and use of DG into account, no further allocation was needed at the ethanol plant and all plant emissions are accounted for there.

In terms of the energy used at grain sorghum ethanol facilities, significant variation exists among plants with respect to the production process and type of fuel used to provide process energy (e.g., coal versus natural gas). Variation also exists between the same type of plants using the same fuel source based on the design of the production process such as the technology used to separate the ethanol from the water, the extent to which the DG are dried and whether other co-products are produced. Such different pathways were considered for ethanol made from corn. Since for the most part these same production processes are available for ethanol produced from sorghum, our analyses considered a similar set of different production pathways for grain sorghum ethanol production. Our focus was to differentiate among facilities based on key differences, namely the type of plant and the type of process energy fuel used. As shown in Section C, the current data shows that the type of RIN that different sorghum facilities will be able to generate will depend upon the types of process energy used and whether advanced technologies are included (but not on the amount of DG that are dried).

Ethanol production is a relatively resource-intensive process that requires the use of water, electricity, and steam. In most cases, water and electricity are purchased from the municipality and steam is produced on-site using boilers fired by natural gas, coal, or in some cases, alternative fuels (described in more detail below).[9]

[7] Mokany, K., R.J. Raison, and A.S. Prokushkin. 2006. Critical analysis of root: shoot ratios in terrestrial biomes. Global Change biology 12: 84–96.

[8] See Memo to the Docket, Docket Number EPA–HQ–OAR–2011–0542, Dated May 18, 2012.

[9] Some plants pull steam directly from a nearby utility.

Purchased process fuel and electricity use for grain sorghum ethanol production was based on the energy use information for corn ethanol production from the RFS2 final rule analysis. For the RFS2 final rule, EPA modeled future plant energy use to represent plants that would be built to meet requirements of increased ethanol production, as opposed to current or historic data on energy used in ethanol production. The energy use at dry mill ethanol plants was based on ASPEN models developed by USDA and updated to reflect changes in technology out to 2022 as described in the RFS 2 final rule RIA Chapter 1.

The work done on grain ethanol production for the RFS2 final rule was based on converting corn to ethanol. Converting grain sorghum to ethanol will result in slightly different energy use based on difference in the grains and how they are processed. For example, grain sorghum has less oil content than corn and therefore requires less processing and mass transfer of the oil which results in a decrease in energy use compared to processing corn to ethanol. The same ASPEN USDA models used for corn ethanol in the final rule were also developed for grain sorghum ethanol. Based on the numbers from USDA, a sorghum ethanol plant uses 96.3% of the thermal process energy of a corn ethanol plant (3.7% less), and 99.3% of the electrical energy (0.7% less).

The GHG emissions from production of ethanol from grain sorghum were calculated in the same way as other fuels analyzed as part of the RFS2 final rule. The GHG emissions were calculated by multiplying the BTUs of the different types of energy inputs at the grain sorghum ethanol plant by emissions factors for combustion of those fuel sources. The BTU of energy input was determined based on analysis of the industry and work done as part of the RFS2 final rule as well as considering the impact of different technology options on plant energy needs. The emission factors for the different fuel types are the same as those used in the RFS2 final rule and were based on assumed carbon contents of the different process fuels. The emissions from producing electricity in the U.S. were also the same as used in the RFS2 final rule, which were taken from the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation Model (GREET) and represent average U.S. grid electricity production emissions.

One of the energy drivers of ethanol production is drying of the DG. Plants that are co-located with feedlots have the ability to provide the co-product without drying. This energy use has a large enough impact on overall results in previous analyses that we defined a specific category for wet versus dry co-product as part of the RFS2 final rule. For grain sorghum ethanol production we also consider wet versus dry DG. For corn ethanol production, as discussed in the RFS2 final rule, the industry average for wet DG is approximately 37%. Industry provided data that approximately 92% of grain sorghum DG is wet. However, in the case of grain sorghum ethanol production, the current data shows that energy used for DG drying does not change whether a facility meets the 20% GHG emission threshold (conventional renewable fuel) or the 50% GHG emission threshold (advanced renewable fuel). The amount of btu per gallon of ethanol produced for processes where DG are dried, and where they are not, can be found in Table II–10 below. Overall lifecycle GHG emission reductions for grain sorghum ethanol facilities that do and do not dry DG can be found below in Table II–11.

For this NODA, we analyzed several combinations of different advanced process technologies and fuels to determine their impacts on lifecycle GHG emissions from grain sorghum ethanol. As noted above, many of the same technologies that were considered as part of the RFS2 final rule for corn ethanol can also be applied to grain sorghum ethanol production. Based on discussion with industry, we understand there is interest in building grain sorghum ethanol plants which incorporate such advanced technologies. Therefore, as was the case with corn ethanol in the RFS2 final rule, our intent is to provide different processing technology options that producers could use to meet the lifecycle threshold requirements required by EISA. This section describes the different GHG impacts associated with alternative processing technology and fuel options and outlines specific process pathways that would be needed to meet different GHG threshold requirements. If finalized, these pathways would allow producers to use the updated Table 1 in Section 80.1426 to determine whether their combination of technologies and process fuels would allow them to qualify as an advanced grain sorghum ethanol pathway.

Several technologies and fuel choices affect emissions from process energy use. Fuel choice has a significant impact on process energy emissions; switching from natural gas to biogas,[10] for example, will reduce lifecycle GHG emissions by approximately 20 percentage points. Another factor that influences GHG impacts from process energy use is the percentage of DG that is dried. If a plant is able to reduce the amount of DG it dries, process energy use, and therefore GHG emissions, decrease. The impact of going from 100% dry DG to 100% wet DG is larger for natural gas plants (approximately a 10% reduction in overall GHG emissions relative to the petroleum baseline) compared to biogas plants because biogas plants already have low emissions from process energy.

Production facilities that utilize combined heat and power (CHP) systems can also reduce GHG emissions relative to less efficient system configurations. CHP, also known as cogeneration, is a mechanism for improving overall plant efficiency by using a single fuel to generate both power and thermal energy. The most common configuration in ethanol plants involves using the boiler to power a turbine generator unit that produces electricity, and using waste heat to produce process steam. While the thermal energy demand for an ethanol plant using CHP technology is slightly higher than that of a conventional plant, the additional energy used is far less than what would be required to produce the same amount of electricity in an offsite (central) power plant. The increased efficiency is due to the ability of the ethanol plant to effectively utilize the waste heat from the electricity generation process.

In addition to CHP (or sometimes in combination), a growing number of ethanol producers are turning to alternative fuel sources to replace traditional boiler fuels (i.e., natural gas and coal), to improve their carbon footprint and/or become more self-sustainable. Alternative boiler fuels currently used or being pursued by the ethanol industry include biomass, co-products from the ethanol production process (bran, thin stillage or syrup), manure biogas (methane from nearby animal feedlots), and landfill gas (generated from the digestion of municipal solid waste). The CO_2 emissions from biomass combustion as a process fuel source are not specifically shown in the lifecycle GHG inventory of the biofuel production plant; rather, CO_2 emissions from biomass use are accounted for as part of the land use change calculations for each feedstock.

[10] Biogas in the context of use as a fuel source at ethanol plants refers to biogas from landfills, waste treatment plants, and waste digesters.

Since CHP technologies on natural gas plants reduce purchased electricity but increase process energy use emissions (because of increased natural gas use on-site), the net result is a small reduction in overall emissions. CHP at biogas facilities result in greater reductions since the increased biogas use for electricity production does not result in significant increases in on-site emissions.

Although not exhaustive, Table II–10 shows the amount of process fuel and purchased electricity used at a grain sorghum ethanol facility for the different technology and fuel options in terms of Btu/gal of ethanol produced.

TABLE II–10—PROCESS FUEL AND ELECTRICITY OPTIONS AT GRAIN SORGHUM ETHANOL FACILITIES

[Btu/gallon of ethanol produced]

Fuel type and technology	Natural gas use	Biogas use	Purchased electricity
Sorghum Ethanol—Dry Mill Natural Gas			
No CHP, 100% Wet DG	16,449	.....	2,235
Yes CHP, 100% Wet DG	18,605	.....	508
No CHP, 0% Wet DG	27,599	.....	2,235
Yes CHP, 0% Wet DG	29,755	.....	508
Sorghum Ethanol—Dry Mill Biogas:			
No CHP, 100% Wet DG	.....	16,449	2,235
Yes CHP, 100% Wet DG	.....	18,605	508
No CHP, 0% Wet DG	.....	27,599	2,235
Yes CHP, 0% Wet DG	.....	29,755	508

As discussed previously in Section II.B.3, there are a number of different process technologies available for grain sorghum ethanol production. The following Table II–11 shows the mean lifecycle GHG reductions compared to the baseline petroleum fuel for a number of different technology pathways including natural gas and biogas fired plants.

TABLE II–11—LIFECYCLE GHG EMISSION REDUCTIONS FOR DRY MILL GRAIN SORGHUM ETHANOL FACILITIES

[% change compared to petroleum gasoline]

Fuel type and technology	% Change
Sorghum Ethanol—Dry Mill Natural Gas:	
No CHP, 92% Wet DG	− 32
No CHP, 100% Wet DG	− 33
Yes CHP, 100% Wet DG	− 36
No CHP, 0% Wet DG	− 22
Yes CHP, 0% Wet DG	− 25
Sorghum Ethanol—Dry Mill Biogas:	
No CHP, 100% Wet DG	− 48
Yes CHP, 100% Wet DG	− 53
No CHP, 0% Wet DG	− 47
Yes CHP, 0% Wet DG	− 52

The docket for this NODA provides more details on our key model inputs and assumptions (e.g., crop yields, biofuel conversion yields, and agricultural energy use). These inputs and assumptions are based on our analysis of peer-reviewed literature and consideration of recommendations of experts from within the grain sorghum and ethanol industries, USDA, and academic institutions. EPA invites comment on all aspects of its modeling of grain sorghum ethanol, including all assumptions and modeling inputs.

4. Results of Lifecycle Analysis for Ethanol from Grain Sorghum (Using Dry Mill Natural Gas)

Consistent with our approach for analyzing other pathways, our analysis for grain sorghum ethanol includes a mid-point estimate as well as a range of possible lifecycle GHG emission results based on uncertainty analysis conducted by the Agency. The graph below (Figure II–1) depicts the results of our analysis (including the uncertainty in our land use change modeling) for grain sorghum ethanol produced in a plant that uses natural gas.[11]

Figure II–1 shows the results of our grain sorghum ethanol modeling. It shows the percent difference between lifecycle GHG emissions for 2022 grain sorghum ethanol, produced in a plant that uses the ''basic'' technology stated above, and those for the petroleum gasoline fuel 2005 baseline. Lifecycle GHG emissions equivalent to the statutory gasoline fuel baseline are represented on the graph by the zero on the X-axis. The midpoint of the range of results is a 32% reduction in GHG emissions compared to the 2005 gasoline baseline.[12] As in the case of other biofuel pathways analyzed as part of the RFS2 rule, the range of results shown in Figure II–1 is based on our assessment of uncertainty regarding the location and types of land that may be impacted as well as the GHG impacts associated with these land use changes (See Section II.B.1. for further information). These results and those in Table II–11, if finalized, would justify a determination that grain sorghum ethanol produced in plants that use natural gas would meet the 20% reduction threshold required for the generation of conventional renewable fuel RINs.

[11] This analysis assumed 92% wet DG and 8% dry DG.

[12] The 95% confidence interval around that midpoint results in range of a 19% reduction to a 44% reduction compared to the 2005 gasoline fuel baseline.

Figure II-1. Distribution of Results for Grain Sorghum Ethanol Produced in Plants that Use Natural Gas and Produce an Industry Average of 92% Wet Distillers Grains

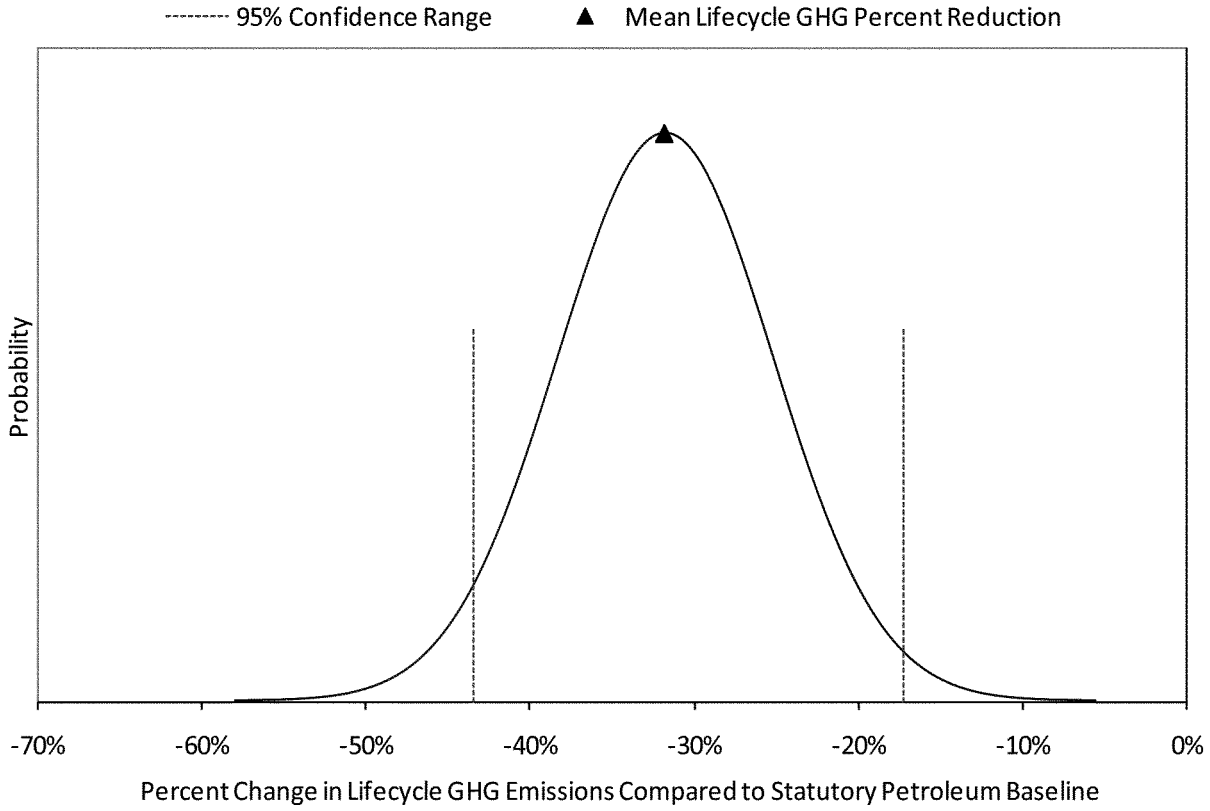


Table II–12 breaks down by stage the lifecycle GHG emissions for grain sorghum ethanol in 2022 and the statutory 2005 gasoline baseline.[13] Results are included using our mid-point estimate of land use change emissions, as well as with the low and high end of the 95% confidence interval. Net agricultural emissions include impacts related to changes in crop inputs, such as fertilizer, energy used in agriculture, livestock production and other agricultural changes in the scenarios modeled. The fuel production stage includes emissions from ethanol production plants. Fuel and feedstock transport includes emissions from transporting bushels of harvested grain sorghum from the farm to ethanol production facility.

TABLE II–12—LIFECYCLE GHG EMISSIONS FOR GRAIN SORGHUM ETHANOL PRODUCED IN PLANTS THAT USE NATURAL GAS AND PRODUCE AN INDUSTRY AVERAGE OF 92% WET DISTILLERS GRAINS

[gCO_2e/mmBtu]

Fuel type	Grain sorghum ethanol	2005 gasoline baseline
Net Agriculture (w/o land use change), Domestic and International	12,698	
Land Use Change, Mean (*Low/High*), Domestic and International	27,620 (*16,196/41,903*)	
Fuel Production	22,111	19,200
Fuel and Feedstock Transport	3,661	*
Tailpipe Emissions	880	79,004
Total Emissions, Mean (Low/High)	66,971 (*55,547/81,254*)	98,204
Midpoint Lifecycle GHG Percent Reduction Compared to Petroleum Baseline	32%	

* Emissions included in fuel production stage.

[13] Totals in the table may not sum due to rounding.

5. Results of Lifecycle Analysis for Ethanol From Grain Sorghum (Using Biogas and CHP)

To illustrate an example where a combination of various advanced processing technologies can result in an overall reduction of greater than 50% compared to the 2005 petroleum baseline, the graph included below (Figure II–2) depicts the results of our analysis (including the uncertainty in our land use change modeling) for grain sorghum ethanol produced in a dry mill plant that uses biogas, 0% wet DG, and CHP technology.

Figure II–2 shows the results of our grain sorghum ethanol modeling. It shows the percent difference between lifecycle GHG emissions for 2022 grain sorghum ethanol, produced in a plant that uses biogas as well as combined heat and power, and those for the petroleum gasoline fuel 2005 baseline. Lifecycle GHG emissions equivalent to the statutory gasoline fuel baseline are represented on the graph by the zero on the X-axis. The midpoint of the range of results for this sorghum ethanol plant configuration is a 52% reduction in GHG emissions compared to the 2005 gasoline baseline.[14] As in the case of other biofuel pathways analyzed as part of the RFS2 rule, the range of results shown in Figure II–2 is based on our assessment of uncertainty regarding the location and types of land that may be impacted as well as the GHG impacts associated with these land use changes (See Section II.B.1 for further information). These results, if finalized, would justify our determination that sorghum ethanol produced in dry mill plants that use biogas and combined heat and power meets the 50% reduction threshold required for the generation of advanced renewable fuel RINs.

Figure II-2. Distribution of Results for Grain Sorghum Ethanol Produced in Plants that Use Biogas, 0% Wet DG and Combined Heat and Power

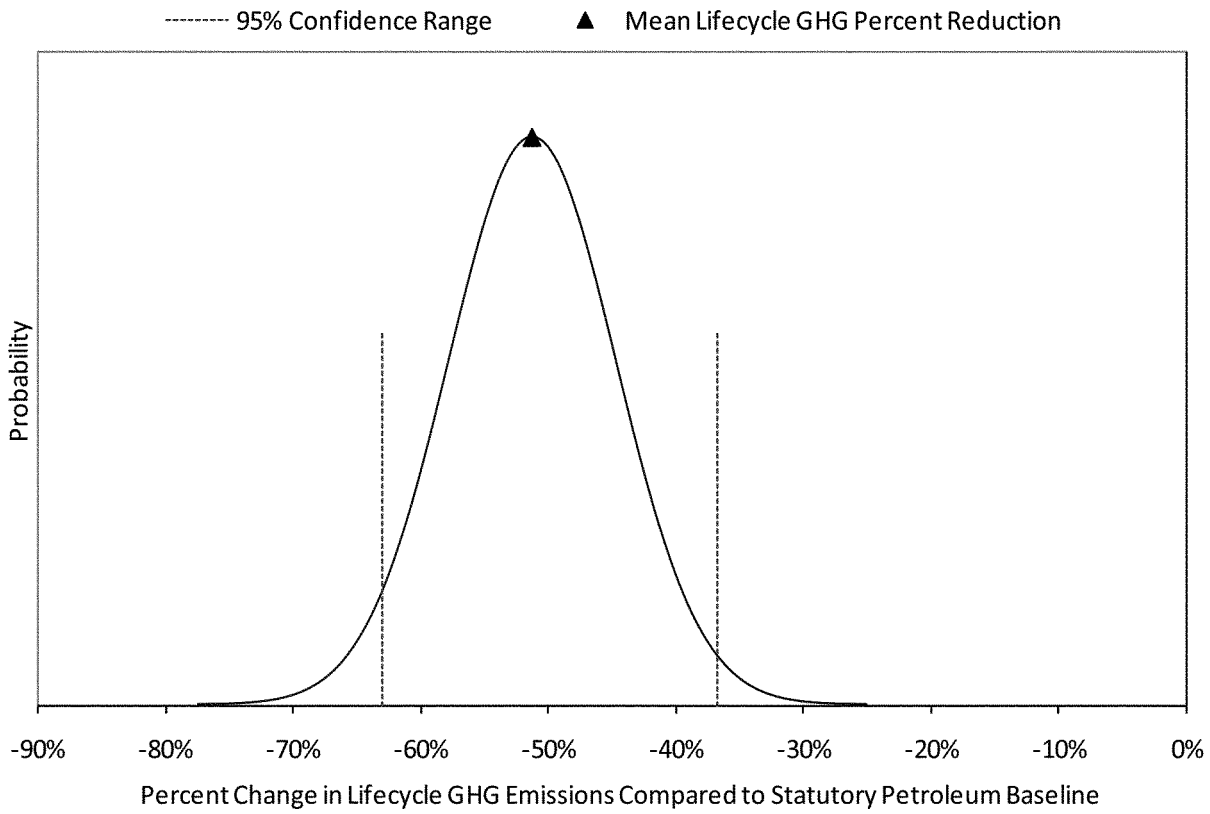


Table II–13 breaks down by stage the lifecycle GHG emissions for grain sorghum ethanol in 2022 and the statutory 2005 gasoline baseline.[15] Results are included using our mid-point estimate of land use change emissions, as well as with the low and high end of the 95% confidence interval. Net agricultural emissions include impacts related to changes in crop inputs, such as fertilizer, energy used in agriculture, livestock production and other agricultural changes in the scenarios modeled. Emissions from fuel production include emissions from ethanol production plants. Fuel and feedstock transport includes emissions from transporting bushels of harvested grain sorghum from the farm to ethanol production facility.

[14] The 95% confidence interval around that midpoint results in range of a 38% reduction to a 64% reduction compared to the 2005 gasoline fuel baseline.

[15] Totals in the table may not sum due to rounding.

TABLE II–13—LIFECYCLE GHG EMISSIONS FOR GRAIN SORGHUM ETHANOL PRODUCED IN PLANTS THAT USE BIOGAS AS WELL AS COMBINED HEAT AND POWER

[gCO_2e/mmBtu]

Fuel type	Grain sorghum ethanol	2005 gasoline baseline
Net Agriculture (w/o land use change), Domestic and International	12,698	
Land Use Change, Mean (*Low/High*), Domestic and International	27,620 (*16,196/41,903*)	
Fuel Production	1,612	19,200
Fuel and Feedstock Transport	4,276	*
Tailpipe Emissions	880	79,004
Total Emissions, Mean (*Low/High*)	47,086 (*35,662/61,369*)	98,204
Midpoint Lifecycle GHG Percent Reduction Compared to Petroleum Baseline	52%	

* Emissions included in fuel production stage.

6. Other Ethanol Processing Technologies

Since the promulgation of the RFS2 final rule, we have learned that in an effort to reduce the overall use of fossil fuels at their facilities, a number of renewable fuel producers are using or are intend to use electricity that is derived from renewable and non-carbon sources, such as wind power, solar power, hydropower, biogas or biomass, as power for process units and equipment. EPA, through a separate rulemaking process, is evaluating and seeking comment on the possibility of adding a new definition for renewable process electricity, and the related distribution tracking, registration, recordkeeping, and reporting requirements. Depending on the outcome of that process EPA could also evaluate the use of renewable process electricity as an option for reducing grain sorghum ethanol process GHG emissions.

Capturing and sequestering CO_2 emissions from an ethanol plant represents another potential technology pathway that could reduce lifecycle GHG emissions associated with ethanol. Carbon capture and sequestration (CCS) is defined by IPCC as, ''a process consisting of the separation of CO_2 from industrial and energy-related sources, transport to a storage location and long-term isolation from the atmosphere.'' [16] Although the analysis presented in this NODA for sorghum ethanol does not include a pathway for reducing GHG emissions reductions through CCS, EPA is interested in developing methodologies that would allow us to properly evaluate CCS as an emissions reduction technology as a part of the lifecycle analysis of fuel production for a variety of feedstocks under the RFS2 program. We are taking initial steps to that end in this NODA: We seek comment on the broad concept of how to properly account for CO_2 emissions associated with CCS, including CCS in conjunction with CO_2 enhanced oil and gas recovery (ER), in the context of our RFS lifecycle GHG calculations.

While some systems and technologies associated with CCS have been in use for many years, for purposes of evaluating lifecycle emissions under the RFS program CCS can still be considered an emerging field. Data on CCS is limited, particularly data relating to geologic sequestration (GS) and GS in conjunction with ER. While EPA recently established monitoring and reporting requirements for geologic sequestration under the Greenhouse Gas Reporting Program, no U.S. facilities have submitted data as of publication of this NODA. We therefore invite comment and the submission of data regarding the concept and practice of using CCS technologies to lower the lifecycle emissions of biofuels. Specifically, we seek data on the amount of CO_2 capture that is economically and technically feasible at the ethanol facility and the amount of additional energy and fuel such capture would require. We also seek comment on emissions leakage throughout the process of capturing, compressing, transporting, and sequestering the CO_2. In addition, we invite comment on the effectiveness and energy use of the ER CO_2 recycling system, any fugitive emissions associated with such recycling, and energy use and leakage rates with respect to injecting CO_2 for GS with and without ER. We also invite comment on the amount of CO_2 that remains sequestered and the length of time of sequestration, and how EPA should account for this as part of a lifecycle analysis for purposes of the RFS program, including how to account now for emissions sequestration that is planned to last for a long period of time into the future.

We believe it is important for facilities that receive credit for GHG emissions reductions using CCS verify that these emissions reductions actually take place. However, we recognize that the ethanol facility that generates RINs is most likely not the same party that will be operating the GS or EOR site, therefore we invite comment on whether it is feasible and enforceable for the ethanol facility to verify that the CO_2 has actually been captured and stored at the GS or EOR site, and how to account for a period of sequestration that stretches many years into the future. Furthermore, we invite comment on the most appropriate way for ethanol producers to validate and credit the GHG emissions reductions from CCS. We recognize that the actual GHG emission reductions from CCS can be very site specific, therefore we request comments on whether it would be more appropriate for EPA to make individual facility determinations using the 40 CFR 80.1416 petition process rather than provide a general pathway in Table 1 of 40 CFR 80.1426.

C. Consideration of Lifecycle Analysis Results

1. Implications for Threshold Determinations

As discussed above, EPA's analysis shows that, based on the mid-point of the range of results, ethanol produced from grain sorghum using biogas and combined heat and power at a dry mill plant would meet the 50 percent GHG emissions reduction threshold needed to qualify as an advanced biofuel (D–5 RINs). Grain sorghum ethanol meets the 20% lifecycle GHG emissions reduction threshold for conventional biofuels (D–6 RINs) when natural gas or biogas is used. If finalized, Table 1 to Section 80.1426 would be modified to add these three new pathways. Table II–14 illustrates how these new pathways would be included in the existing table. Data, analysis and assumptions for each

[16] Intergovernmental Panel on Climate Change. 2005. A Special Report of Working Group III: Summary for Policymakers. *http://www.ipcc.ch/pdf/special-reports/srccs_summaryforpolicymakers.pdf.*

of these processing technologies are provided in the docket for this NODA. We invite comment on all aspects of this analysis.

TABLE II–14—APPLICABLE D CODES FOR GRAIN SORGHUM ETHANOL PRODUCED WITH DIFFERENT PROCESSING TECHNOLOGIES FOR USE IN GENERATING RINS

Fuel type	Feedstock	Production process requirements	D-code
Ethanol	Grain Sorghum	Dry mill process, using Natural Gas for Process Energy	6
Ethanol	Grain Sorghum	Dry mill process, using Biogas for Process Energy, without Combined Heat and Power.	6
Ethanol	Grain Sorghum	Dry mill process, using Biogas for Process Energy, with Combined Heat and Power.	5

2. Consideration of Uncertainty

Because of the inherent uncertainty and the state of evolving science regarding lifecycle analysis of biofuels, any threshold determinations that EPA makes for grain sorghum ethanol will be based on an approach that considers the weight of evidence currently available. For this pathway, the evidence considered includes the mid-point estimate as well as the range of results based on statistical uncertainty and sensitivity analyses conducted by the Agency. EPA will weigh all of the evidence available to it, while placing the greatest weight on the best-estimate value for the scenarios analyzed.

As part of our assessment of the grain sorghum ethanol pathway, we have identified key areas of uncertainty in our analysis. Although there is uncertainty in all portions of the lifecycle modeling, we focused our analysis on the factors that are the most uncertain and have the biggest impact on the results. The indirect, international emissions are the component of our analysis with the highest level of uncertainty. The type of land that is converted internationally and the emissions associated with this land conversion are critical issues that have a large impact on the GHG emissions estimates.

Our analysis of land use change GHG emissions includes an assessment of uncertainty that focuses on two aspects of indirect land use change—the types of land converted and the GHG emissions associates with different types of land converted. These areas of uncertainty were estimated statistically using the Monte Carlo analysis methodology developed for the RFS2 final rule.[17] Figure II–1 and Figure II–2 show the results of our statistical uncertainty assessment.

Based on the weight of evidence considered, and putting the most weight on our mid-point estimate results, the results of our analysis indicate that grain sorghum ethanol would meet the minimum 20% GHG performance threshold for qualifying renewable fuel under the RFS program when using natural gas and average 2022 dry mill plant efficiencies, and would meet the minimum 50% GHG performance threshold for advanced biofuels under the RFS program when using biogas for process energy at a dry mill plant, with combined heat and power. These conclusions are supported by our midpoint estimates, our statistical assessment of land use change uncertainty, as well as our consideration of other areas of uncertainty.

The docket for this NODA provides more details on all aspects of our analysis of grain sorghum ethanol. EPA invites comment on all aspects of its modeling of grain sorghum ethanol. We also invite comment on the consideration of uncertainty as it relates to making GHG threshold determinations.

Dated: May 24, 2012.

Margo T. Oge,

Director, Office of Transportation & Air Quality.

[FR Doc. 2012–13651 Filed 6–11–12; 8:45 am]

BILLING CODE 6560–50–P

[17] The Monte Carlo analysis is described in EPA (2010a), Section 2.4.4.2.8.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 125

[EPA–HQ–OW–2008–0667, FRL–9681–5]

RIN 2040–AE95

National Pollutant Discharge Elimination System—Proposed Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to EPA's Stated Preference Survey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability.

SUMMARY: On April 20, 2011, EPA published proposed standards for cooling water intake structures at all existing power generating, manufacturing, and industrial facilities as part of implementing section 316(b) of the Clean Water Act (CWA). This notice presents a summary of new information EPA has developed since the rule proposal. The information results from a stated preference survey that EPA conducted after the proposed rule was published. Stated preference surveys are an attempt to determine the economic value of goods or services by means other than by assessing the effects of changes in the market for the goods and services. In this notice EPA solicits comment on the information presented in this notice and on what role, if any, it should play in EPA's assessment of the benefits of regulatory options for the final rule, pending completion of the survey and external peer review.

DATES: Comments must be received on or before July 12, 2012.

ADDRESSES: Submit your comments, identified by Docket No. EPA–HQ–OW–2008–0667 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: OW-Docket@epa.gov*, Attention Docket ID No. EPA–HQ–OW–2008–0667.
- *Mail:* Water Docket, U.S. Environmental Protection Agency, Mail Code: 4203M, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–OW–2008–0667. Please include a total of 3 copies. In addition, please mail a copy of your comments on information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.
- *Hand Delivery:* Water Docket, EPA Docket Center, EPA West Building Room 3334, 1301 Constitution Ave. NW., Washington, DC, Attention Docket ID No. EPA–HQ–OW–2008–0667. Such deliveries are only accepted during the

Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information by calling 202–566–2426.

Instructions: Direct your comments to Docket No. EPA–HQ–OW–2008–0667. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider to be CBI or otherwise protected should not be submitted through *www.regulations.gov* or email. The www.regulations.gov web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Water Docket in the EPA Docket Center, 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 Water Docket is 202–566–2426.

FOR FURTHER INFORMATION CONTACT: For additional technical information, contact Paul Shriner at 202–566–1076; email: *shriner.paul@epa.gov.* For additional economic information, contact Erik Helm at 202–566–1049; email: *helm.erik@epa.gov* or Wendy Hoffman at 202–564–8794; email: *hoffman.wendy@epa.gov.* For additional biological information, contact Tom Born at 202–566–1001; email: *born.tom@epa.gov.*

SUPPLEMENTARY INFORMATION:

Supporting Documentation

A. Docket

EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2008–0667. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include information claimed as Confidential Business Information (CBI) or other information for which the disclosure is restricted by statute. For information on how to access materials in the docket, refer to the preceding **ADDRESSES** section. To view docket materials, please call ahead to schedule an appointment. Every user is entitled to copy 266 pages per day before incurring a charge. The Docket may charge 15 cents for each page over the 266-page limit plus an administrative fee of $25.00.

B. Electronic Access

You may access this **Federal Register** document and the docket electronically, as well as submit public comments, through the Web site *http://www.regulations.gov* by searching for Docket ID No. EPA–HQ–OW–2008–0667. For additional information about the public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Table of Contents

I. Purpose of This Notice
II. Willingness To Pay Survey
III. General Solicitation of Comment

I. Purpose of This Notice

On April 20, 2011, EPA published proposed standards for cooling water intake structures at all existing power generating facilities and existing manufacturing and industrial facilities as part of EPA's implementation of its responsibilities under section 316(b) of the Clean Water Act (CWA), at 76 FR 22174. EPA received voluminous comments and data submissions during the 90-day public comment period. After many commenters requested additional time to review the proposal, on July 20, 2011, EPA extended the comment period by an additional 30 days (76 FR 43230).

In today's NODA, EPA is providing additional preliminary data that may be relevant to the benefits of the rule, based on the results of a stated preference survey. Stated preference surveys are an attempt to determine the economic value of goods or services outside of the context of the marketplace. Simply described, a stated preference survey attempts to gauge the value of an item through questions designed to mimic consumer decision-making in actual markets. A stated preference survey, in this case, was used to measure values associated with ecosystem improvements. Such values were only partially monetized at proposal. The stated preference survey estimates the value held by the public for ecosystem improvements based on the choices the surveyed members of the public make between hypothetical policy options and current conditions. EPA solicits public comment on all aspects of the study, including the methodology used, the strengths and weaknesses of stated preferences methods generally, and the appropriate role, if any, the study should play in the analysis of the final rule.

EPA notes that the preliminary results presented in this NODA are dependent on the background information that was presented to respondents to the stated preference survey, including information about regional and national impacts on aquatic resources both in the baseline and under various policy scenarios. Thus, these preliminary national and regional results are not directly transferable to site specific assessments.

Section II provides a brief description of the stated preference survey to date, and refers to technical support documents available on EPA's Web site and in the docket for the proposal, which includes the data and a set of preliminary statistical results in which each respondent's answers are given similar weight, even as some groups may be over- or underrepresented. Such unweighted results are presented for the Northeast, Southeast, Inland, Pacific regions, and a national survey. EPA is making the preliminary results of this study available for public comment and peer review in order to inform its determination of whether to include these results in the benefits analysis for the final rule.

This information is presented in more detail in a document referred to

hereinafter as the Survey Support Document (SSD) (DCN 11–4524). In addition to the unweighted models presented, EPA is also presenting preliminary weighted model results for the Northeast region. At the time this NODA was prepared, EPA had only developed weights for the Northeast region as it is the only region whose non-response study has been completed. The weights control for statistical differences between individuals who responded to the main survey and those individuals who did not respond. Weighted models for the remaining regions and the national surveys are not presented in the technical support documents, but will be made available to the public on EPA's Web site at a later date.

EPA invites comment on the study's preliminary results, including the extent to which those results are consistent with previous studies of stated or revealed public preferences; ways of assessing the external validity of the underlying per household estimates and implied aggregate WTP, for example by comparison with estimates in the published literature of WTP for increased species abundance or other ecosystem attributes; and whether further analyses are needed, and if so what analyses might be most useful. EPA also invites comment on how the certainty associated with the environmental attributes in this survey accord with certainty levels in other stated preference surveys, and whether that could affect responses.

EPA's rationale for the preferred regulatory option is detailed in the BTA Consideration section of EPA's proposal (76 FR 22174, Section VI). This notice is intended only to offer additional information collected as a result of conducting a stated preference survey. Several key elements of that proposal are worth restating. ''EPA concluded that closed cycle cooling is not the best technology available for minimizing adverse environmental impact on a national basis'' (76 FR 22174, Section VI.E). ''Four factors, in particular, led EPA, for this proposal, to reject a uniform standard based on closed cycle cooling'' (76 FR 22174, Section VI.E). The four factors have not changed on the basis of data collected through the stated preference survey, nor does EPA anticipate that these factors would be changed by any revisions to the national or regional benefits analysis based on these data, if such revisions are made in the final rule. The four factors are energy reliability, air emissions, land availability, and remaining useful plant life, each of which should be evaluated on a localized basis.

EPA's estimated benefits for this regulation in the original proposal were partial estimates only—EPA was not able to monetize all benefits, especially non-use benefits. As part of the proposal, EPA indicated it was in the process of developing a stated preference survey to estimate total willingness to pay (WTP) for improvements to fishery resources affected by impingement and entrainment (I&E) mortality from in-scope 316(b) facilities (75 FR 42438, July 21, 2010). EPA acknowledged it did not have sufficient time to fully develop and implement this survey for the proposed regulation (76 FR 22174). EPA indicated its intent to issue a Notice of Data Availability (NODA) pending survey implementation and data analysis. Section II provides an overview of this new data and preliminary analysis for the Northeast, Southeast, Inland, and Pacific regions as well as the national survey, and refers to the technical support documents on EPA's Web site. EPA presents a set of unweighted models that do not account for possible systematic variations between the populations of individuals that responded and did not respond to the surveys. The survey non-response assessment work has been completed for the Northeast region; therefore EPA presents a weighted model which statistically adjusts for the differences among those populations for that region. EPA has not yet completed the non-response assessments for the Pacific, Southeast, and Inland regions and the national survey. EPA does not plan to publish another NODA presenting the full set of adjusted results. Instead, EPA will post these results on its Web site at *http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/.* EPA encourages the interested public to monitor this web site periodically for additional information about the survey. EPA will also add the technical support documents to the docket for this rule, and interested parties may wish to sign up for the notification feature for this docket at regulations.gov, to be notified automatically via email when these results are posted.

This notice is intended to apprise the public of the preliminary results of the stated preference survey, make this information available for public review, and provide an opportunity for the public to comment on this new information. EPA has not decided whether to use the results of the stated preference survey in the benefits analysis for the final rule. After completing the non-response studies, conducting scope and validity testing, and reviewing and responding to public comment, EPA will revise its results (including a summary of the public comments) and present these materials for external peer review. After making any additional revisions based on the peer review, EPA will determine whether the monetized benefits based on the stated preference survey should be included in the benefits analysis for the final rule, and if so, what role they should play. However, EPA notes that the Agency is not reopening the proposed rule for comment through this notice.

II. Willingness To Pay Survey

In today's NODA, EPA is documenting the availability of data collected from a stated preference survey designed to facilitate the estimation of households' willingness to pay to reduce the number of fish impinged or entrained in cooling water intake structures. Stated preference methods provide a non-market approach to quantifying values associated with ecosystem improvements, such as increased protection of aquatic species or the restoration of habitats with specific attributes. These methods rely on an analysis of responses to survey questions through which individuals state information about their values.

Estimation of monetized non-use benefits is challenging, since market proxies are generally not available, and in the absence of such proxies, they can only be estimated by using either stated preference methods or benefits transfer based on prior stated preference results. For this reason, non-use benefits are often discussed qualitatively instead of attaching monetized values to them. Today's notice presents data collected from a stated preference study (EPA ICR # 2402.01) that EPA conducted regarding total (use plus non-use) benefits from reductions in fish mortality at cooling water intake structures. EPA's peer-reviewed guidelines for benefits analysis (U.S. EPA 2010, pp. 7–41, DCN 11–4712) recognize ''advantages of [stated preference] methods includ[ing] their ability to estimate non-use values and to incorporate hypothetical scenarios that closely correspond to a policy case.''

The data described in this NODA were collected using a stated preference survey based on a ''choice experiment'' design. Choice experiments involve asking survey respondents to indicate their most preferred option from a set of two or more hypothetical options and a ''status quo'' or ''no policy'' option. The options differ in the levels of environmental improvements and

impose different costs on the respondent's household.

Stated preference methods have ''* * * been tested and validated through years of research and are widely accepted by * * * government agencies and the U.S. courts as reliable techniques for estimating non-market values'' (Bergstrom and Ready 2009, p. 26, DCN 11–4762). EPA's own peer reviewed Guidelines for Preparing Economic Analysis (US EPA 2010, DCN 11–4712) indicates that the use of stated preference study data, when the study is conducted properly in accord with best current practices, is the only potential method for monetizing non-use values. Nonetheless, EPA recognizes that several issues have been raised regarding the estimation of welfare values from stated preference surveys. For example, the stated preference study discussed in this NODA creates a hypothetical market where respondents are asked to state their values for increases in ''fish saved'' in conjunction with increases in fish populations (total and commercial) and aquatic conditions by voting for or against alternative hypothetical policies that would regulate cooling water intake structures and that would impose increases in annual household cost of living. The issue of whether respondents are capable of respecting hypothetical budget constraints, knowing that their responses to the survey would not compel them to incur any costs, is a concern that has been cited as a reason to question the results of stated preference studies. The hypothetical nature of the market has raised questions as to whether this type of elicitation accurately reveals and elicits WTP associated with the good being considered.

Substantial research has been conducted over the past two decades on hypothetical bias in stated preference surveys. While many studies have found evidence of hypothetical bias (List and Gallet 2001, DCN 11–4763), a recent meta-analysis indicates that ''hypothetical bias in SP studies may not be as important'' as some have argued previously (Murphy et al. 2005, DCN 11–4764). This mirrors similar findings in prior studies that compare hypothetical and actual referenda (see discussion in Johnston 2006, DCN 11–4765). EPA solicits comment on the degree to which the potential for hypothetical bias may still be present in the 316(b) survey, and whether EPA has taken appropriate steps to ameliorate issues of bias and to what degree potential biases may have been reduced.

Stated preference surveys also require the provision of information to enable respondents to comprehend the potential implications of their hypothetical choices. For example, in this case, respondents may not be aware that the ''fish saved'' by actions addressing cooling water intake structures include large numbers of eggs and larvae as well as fish, or that the vast majority of those organisms are species that provide no consumptive use (e.g., commercial or recreational fishing) to humans. Even if they are aware of this issue in a general way, it is unlikely that most respondents will have previously considered what preserving those species is worth to them. In order to elicit informed responses, it is necessary to provide information to respondents about the general context and scope of the issue. Following standard practice, EPA pretested the information provided to respondents in focus groups and cognitive interviews to determine what quantity and types of information were required by respondents in order to feel confident and well-informed in their responses (DCN 11–4710). For example, in the introductory materials accompanying the four regional and national stated preference surveys, EPA presents the number of ''young adult fish'' (also called ''age-one-equivalents'') that are ''lost'' in coastal and fresh waters due to cooling water use and notes that these losses include eggs and larvae. That educational material was designed to inform survey respondents that reported effects on ''fish saved per year'' in the valuation questions partially result from reduced mortality of eggs and larvae. The presentation of this type of background information, if not properly vetted in the survey instrument development process, can result in focusing respondent attention on particular environmental amenities to the exclusion of other market and non-market goods that may also be important to some respondents' decision making with regard to the choice questions.

Consistent with established best practices for stated preference surveys, EPA has sought to minimize possible biases by careful and thorough construction and testing of the survey instrument. The Agency recognizes that potential biases may still remain and may influence the results of the study. While in EPA's view, the study incorporates current best professional practice in the conduct of stated preference studies, EPA acknowledges that the results of any empirical study depend on the methodology applied. EPA has not yet completed its statistical analyses of these survey data and therefore has not determined whether the results of the stated preference survey will play a role in the benefits analysis for the final rule, and if so what role they will play. EPA requests comment on these issues.

At the time this NODA was prepared, EPA had finished fielding all five versions of the main mail survey (four regional and one national). EPA undertook the Northeast version in advance of the other versions as a pilot study to inform potential changes to other survey versions, as described in the ICR for the 316(b) stated preference survey (EPA ICR #2402.01) and as recommended in published guidance for stated preference survey design (Arrow et al. 1993, DCN 11–4701; Bateman et al. 2002, DCN 11–4702). As noted above, the preliminary results of the survey are available in the docket and at *http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/.*

EPA notes that the stated preference survey regions differ from the benefits regions used in the Environmental and Economic Benefits Assessment (EEBA) document for the proposed rule.[1] The Agency will perform additional analysis comparing the results of the regional survey versions to the results of the national survey version. This additional analysis will allow EPA to look at the impacts of program size (regional vs. national) on willingness to pay and consider the implications of any differences for the validity of results. Before considering any application of this information in the final rule, EPA will also provide the full results and public comments to the planned peer-review panel. EPA does not regard these data as ready for consideration for use in any benefit cost analysis at this time until the results of additional EPA internal review, public comment and independent peer review have been completed. For the final benefits analysis, EPA may present a range for the total national benefit estimates produced by the stated preference research. Alternatively, EPA may decide not to use the results from this study, and instead to consider non-use benefits qualitatively and/or by using benefits transfer, as was done for the proposed rule.

At the time this NODA was prepared, EPA had produced preliminary estimates of average willingness-to-pay per household per percentage point improvement in each of the attributes, based on unweighted models (see Section II.E of the Survey Support

[1] See Exhibit II–3 of the Survey Support Document for a list of the states included in each region.

Document for more details). For example, the average dollar value per household per percentage point of reduced fish mortality at cooling water intake structures ranges from $0.75 and $0.78 in the Southeast and Inland regions, respectively, to $1.12 and $1.13 in the Northeast and national versions, respectively, to $2.52 in the Pacific region.

EPA is also conducting a non-response study for each version of the survey, to account for the possibility that respondents are fundamentally different from non-respondents. EPA would use the non-response study results to develop weights that correct for any differences, reducing the weight placed on overrepresented respondent groups, while increasing the weight placed on any underrepresented respondent groups. See Section II.G of the Survey Support Document for details on the non-response study for the Northeast region of the survey (the only region for which the non-response study has been completed to date). EPA emphasizes that the relationship between unweighted and weighted models for the Northeast may not be the same for the other regional and national versions. EPA currently is still fielding the non-response studies for the other three regional and national versions of the survey. EPA intends to complete weighted models for the remaining regions and the national surveys. After completing the non-response studies for all regions, reviewing public comment, and conducting additional scope and validity testing, EPA will present a more complete set of stated preference survey materials for an external peer review.

EPA invites comment on the study's preliminary results, including the extent to which those results are consistent with previous studies of stated or revealed public preferences; ways of assessing the external validity of the underlying per household estimates and implied aggregate WTP, for example by comparison with estimates in the published literature of WTP for increased species abundance or other ecosystem attributes; whether further analyses are needed, and if so what analyses might be most useful; and the certainty levels of attributes in this survey. After reviewing and responding to public comment, the results from the planned external peer review, and additional validity testing informed by public comment, EPA will determine whether the results of the stated preference survey should be included in the benefits analysis for the final rule, and if so, what role they should play.

This notice is intended to apprise the public of the new information, make this information available for public review and provide an opportunity to comment on the new information that the Agency has collected. However, EPA notes that the Agency is not reopening the proposed rule for comment through this notice.

III. General Solicitation of Comment

EPA encourages public participation and requests comments on all aspects of the data and analyses presented in this notice of data availability and in the SSD that EPA is making available on its Web site.

EPA invites all parties to coordinate their data collection activities with the Agency to facilitate mutually beneficial and cost-effective data submissions. Please refer to the **FOR FURTHER INFORMATION CONTACT** section at the beginning of this preamble for technical contacts at EPA.

To ensure that EPA can properly respond to comments, the Agency prefers that commenters cite, where possible, the paragraph(s) or sections in the document or supporting documents to which each comment refers. Please submit copies of your comments and enclosures (including references) as specified in the **ADDRESSES** section at the beginning of this notice.

Dated: June 1, 2012.

Nancy K. Stoner,

Acting Assistant Administrator, Office of Water.

[FR Doc. 2012–14104 Filed 6–8–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[Docket No. FWS–R9–MB–2012–0005; FF09M21200–123–FXMB1231099BPP0L2]

RIN 1018–AX97

Migratory Bird Hunting; Meeting Regarding Regulations for the 2012–13 Hunting Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of meeting date change.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), proposed in an earlier document to establish annual hunting regulations for certain migratory game birds for the 2012–13 hunting season. This notice revises the previously announced dates of the June 2012 Service Migratory Bird Regulations Committee meetings.

DATES: The Service Migratory Bird Regulations Committee (SRC) will meet to consider and develop proposed regulations for early-season migratory bird hunting on June 19 and 20, 2012. The meetings are open to the public and will commence at approximately 8:30 a.m.

ADDRESSES: The SRC will meet in room 200 of the U.S. Fish and Wildlife Service's Arlington Square Building, 4401 N. Fairfax Dr., Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Ron W. Kokel, U.S. Fish and Wildlife Service, Department of the Interior, MS MBSP–4107–ARLSQ, 1849 C Street NW., Washington, DC 20240; (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Background

On April 17, 2012, we published in the **Federal Register** (77 FR 23094) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. On May 17, 2012, we published the second in a series of proposed, supplemental, and final rules for migratory game bird hunting regulations (77 FR 29516). In that document, we announced a meeting of the SRC to take place June 20 and 21, 2012. The dates of that meeting have now changed: The SRC will meet June 19 and 20, 2012, at the location indicated above in **ADDRESSES**.

Service Migratory Bird Regulations Committee Meetings

At the June 19–20, 2012, meeting, the SRC will review information on the current status of migratory shore and upland game birds and develop recommendations for the 2012–13 migratory game bird regulations for these species, plus regulations for migratory game birds in Alaska, Puerto Rico, and the Virgin Islands. The SRC will also develop regulations recommendations for September waterfowl seasons in designated States, special sea duck seasons in the Atlantic Flyway, and extended falconry seasons. In addition, the SRC will review and discuss preliminary information on the status of waterfowl. In accordance with Departmental policy, these meetings are open to public observation. You may submit written comments to the Service on the matters discussed. See the May 17, 2012, **Federal Register** document (77

FR 29516) for information regarding how to submit comments.

Authority

We publish this supplementary proposed rule document under the authority of 16 U.S.C. 703–711, 16 U.S.C. 712, and 16 U.S.C. 742 a–j.

Dated: June 6, 2012.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–14288 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 113

Tuesday, June 12, 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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0043]

Notice of Request for Extension of and Revision to an Approval of an Information Collection; Importation of Wooden Handicrafts From China

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of and revision to an approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request approval of an extension to and revision of an information collection associated with regulations for the importation of wooden handicrafts from China.

DATES: We will consider all comments that we receive on or before August 13, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0043-0001*.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0043, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1231.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0043* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of wooden handicrafts from China, contact Mr. John T. Jones, Trade Director, PIM, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737; (301) 851–2344. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Wooden Handicrafts from China.

OMB Number: 0579–0357.

Type of Request: Extension of and revision to an approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of wooden handicrafts from China are contained in ''Subpart–Logs, Lumber, and Other Unmanufactured Wood Articles'' (7 CFR 319.40–1 through 319.40–11).

On March 1, 2012, we published a final rule [1] that amended the regulations to provide for the importation of wooden handicrafts from China under certain conditions. This action allows for trade in Chinese wooden handicrafts to resume while protecting the United States against the introduction of certain plant pests.

In response to comments submitted, the final rule did not include a provision that we had proposed that would have required Chinese exporters to complete a phytosanitary certificate. Therefore, the only burden associated with the import of Chinese wooden handicrafts is the identification tagging of packages.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.002 hours per response.

Respondents: Chinese exporters.

Estimated annual number of respondents: 140.

Estimated annual number of responses per respondent: 2,250.

Estimated annual number of responses: 315,000.

Estimated total annual burden on respondents: 630 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of June 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–14300 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the final rule, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2007-0117*.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0048]

Notice of Request for Extension of Approval of an Information Collection; Animal Welfare

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with its Animal Welfare Act regulations for the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers, and intermediate handlers.

DATES: We will consider all comments that we receive on or before August 13, 2012.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0048-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0048, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0048* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the Animal Welfare Act regulations, contact Dr. Barbara Kohn, Senior Staff Veterinarian, Animal Care, APHIS, 4700 River Road, Unit 84, Riverdale, MD 20737; (301) 851–3751. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Animal Welfare.

OMB Number: 0579–0093.

Type of Request: Extension of approval of an information collection.

Abstract: The regulations in 9 CFR parts 1 through 3 were promulgated under the Animal Welfare Act (the Act) (7 U.S.C. 2131 *et seq.*) to ensure the humane handling, care, treatment, and transportation of animals covered under the Act. The Act and regulations are enforced by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service.

The regulations in 9 CFR part 3, subparts A, D, and E, cover dogs and cats, nonhuman primates, and marine mammals, respectively. Subparts B and C cover rabbits, guinea pigs, and hamsters. Subpart F of 9 CFR part 3 covers warmblooded animals other than dogs, cats, nonhuman primates, marine mammals, rabbits, guinea pigs, and hamsters. Regulated facilities are required to keep certain records and provide specific information regarding health and feeding, housing, space, transportation, exercise, perimeter fencing, marine mammal interactive programs, and programs of veterinary care. We review this information to evaluate program compliance.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.291821788 hour per response.

Respondents: Dealers, research facilities, exhibitors, carriers, and immediate handlers.

Estimated annual number of respondents: 11,687.

Estimated annual number of responses per respondent: 14.73235219.

Estimated annual number of responses: 172,177.

Estimated total annual burden on respondents: 50,245 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of June 2012.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2012–14302 Filed 6–11–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–43–2012]

Foreign-Trade Zone 139—Sierra Vista, AZ; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Sierra Vista Economic Development Foundation, Inc., grantee of FTZ 139, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on June 5, 2012.

FTZ 139 was approved by the Board on March 13, 1987 (Board Order 352, 52 FR 9320, 03/24/1987). The current zone project includes the following site: *Site 1* (4.7 acres)—Sierra Vista Commerce Center, Highway 90, Sierra Vista.

The grantee's proposed service area under the ASF would be Cochise County, Arizona, as described in the application. If approved, the grantee

would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Naco U.S. Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include the existing site as a ''magnet'' site. No subzones/usage-driven sites are being requested at this time.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is August 13, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 27, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz*. For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: June 5, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–14266 Filed 6–11–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket T–4–2012]

Foreign-Trade Zone 161; Temporary/Interim Manufacturing Authority; Siemens Energy, Inc., (Wind Turbine Nacelles and Hubs); Notice of Approval

On April 2, 2012, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board filed an application submitted by the Board of County Commissioners of Sedgwick County, grantee of FTZ 161, requesting temporary/interim manufacturing (T/IM) authority, on behalf of Siemens Energy, Inc., to manufacture wind turbine nacelles and hubs under FTZ procedures within FTZ 161—Sites 3 and 4, in Hutchinson, Kansas.

The application was processed in accordance with T/IM procedures, as authorized by FTZ Board Orders 1347 (69 FR 52857, 8/30/04) and 1480 (71 FR 55422, 9/22/06), including notice in the **Federal Register** inviting public comment (77 FR 20782, 4/6/2012). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval under T/IM procedures. Pursuant to the authority delegated to the FTZ Board Executive Secretary in the above-referenced Board Orders, the application is approved, effective this date, until June 7, 2014, subject to the FTZ Act and the Board's regulations, including Section 400.13.

Dated: June 7, 2012.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2012–14275 Filed 6–11–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 30, 2012, the United States Court of International Trade (''CIT'') sustained the Department of Commerce's (''the Department'') results of redetermination pursuant to the CIT's remand order in *Amanda Foods (Vietnam) Ltd., et al.* v. *United States,* 807 F. Supp. 2d 1332 (CIT 2011) (''*Amanda 2011*'').[1] Consistent with the decision of the United States Court of Appeals for the Federal Circuit (''CAFC'') in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (''*Timken*''), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (''*Diamond Sawblades*''), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results and is amending the final results of the administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam covering the period of review (''POR'') of February 1, 2007 through January 31, 2008, with respect to the margins assigned to the following litigants: Amanda Foods (Vietnam) Ltd.; Bac Lieu Fisheries Joint Stock Company; Cadovimex Seafood Import-Export and Processing Joint Stock Company; Cafatex Fishery Joint Stock Corporation; Cam Ranh Seafoods Processing Enterprise Company; Cuulong Seaproducts Company; Danang Seaproducts Import Export Corporation; Minh Hai Export Frozen Seafood Processing Joint Stock Company (''Minh Hai Jostoco''); Minh Hai Joint-Stock Seafoods Processing Company (''Seaprodex Minh Hai''); Minh Hai Sea Products Import Export Company (''Seaprimex Co''); Ngoc Sinh Private Enterprise; Nha Trang Seaproduct Company; Phu Cuong Seafood Processing and Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Company; Soc Trang Aquatic Products and General Import Export Company; and UTXI Aquatic Products Processing Company.[2, 3]

DATES: Effective June 11, 2012.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

Background

In the third administrative review of the antidumping duty order on frozen warmwater shrimp from the Socialist Republic of Vietnam, the Department

[1] *See* Final Results Of Redetermination Pursuant To Court Remand, Court No. 09–00431, dated March 29, 2012, available at: *http://ia.ita.doc.gov/remands/index.html* (''*Amanda 2011 Final Remand*''); *see also Amanda Foods (Vietnam) Ltd., et al.* v. *United States,* Slip Op. 12–68 (CIT May 30, 2012) (judgment).

[2] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 74 FR 47191 (September 15, 2009) (''*Vietnam Shrimp AR3 Final*'').

[3] On March 8, 2012, the Court signed a stipulation of dismissal with respect to Coastal Fishery Development a.k.a. Coastal Fisheries Development Corporation; Thuan Phuoc Seafoods and Trading Corporation a.k.a. frozen seafoods factory 32 a.k.a. seafoods and foodstuff factory a.k.a. Frozen Seafoods Factory No. 32 a.k.a. Frozen Seafoods Fty; Investment Commerce Fisheries Corporation; Nha Trang Fisheries Joint Stock Company; Viet Foods Co., Ltd.; and Vinh Loi Import Export Co. Ltd. As a result, these companies are no longer parties in this litigation, are not subject to this remand, and we have not changed the rate originally assigned to them in *Vietnam Shrimp AR3 Final.*

reviewed 110 companies.[4] Of those 110 companies, four companies certified they had no shipments, three companies were selected for individual examination, 25 cooperative, non-individually examined respondents demonstrated eligibility for, and received, a separate rate, and 78 companies were considered part of the Vietnam-Wide entity because they did not demonstrate eligibility for a separate rate.

The Department explained in the *Vietnam Shrimp AR3 Final* that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department has limited its examination in an administrative review pursuant to section 777(A)(c)(2) of the Tariff Act of 1930, as amended (''Act'').[5] The Department further explained that its practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and *de minimis* rates and rates based entirely on facts available.[6] However, in this case, with respect to the cooperative non-individually examined respondents, the Department determined that the circumstances regarding the separate rate calculation methodology were comparable to those of the preceding administrative review, in which the Department also calculated *de minimis* margins for each mandatory respondent. As a result, consistent with the methodology applied in the preceding administrative review, the Department assigned a separate rate of 4.57 percent, which is the margin calculated for cooperative separate rate respondents in the underlying investigation, to those non-individually examined respondents in this administrative review that did not have their own prior or concurrently calculated margin.[7] Additionally, for those non-individually examined respondents for whom we calculated a rate in a more recent or contemporaneous segment, we assigned that calculated rate as the company's separate rate in this review.[8] Specifically, for Viet Hai Seafoods Company Ltd. and Grobest & I-Mei Industrial (Vietnam) Co., Ltd., we assigned the rates most recently calculated for both companies (zero) as their separate rate in the third administrative review because these rates were more recent than the separate rate calculated in the underlying investigation and were based on the companies' own data. Additionally, for Minh Hai Joint-Stock Seafoods Processing Company, we assigned as a separate rate the most recent rate of 4.30 percent, which we calculated for it in the underlying investigation based on the company's own data.[9]

This same separate rate assignment methodology was applied in the final results of the second administrative review of frozen warmwater shrimp from the Socialist Republic of Vietnam. In the litigation involving that proceeding, in *Amanda Foods (Vietnam) Ltd., et al.* v. *United States,* 647 F. Supp. 2d 1368 (CIT 2009) (''*Amanda I*''), the CIT remanded the separate rate assignment methodology to either assign to the plaintiffs the weighted-average rate of the mandatory respondents, or else provide justification, based on substantial evidence on the record, for using another rate. Consequently, in the Department's remand redetermination for *Amanda I,* we stated that ''the Department employed the correct analytical framework in its draft remand redetermination, in determining a reasonable method with which to assign a rate to non-individually examined respondents'' in the second administrative review.[10]

However, in *Amanda Foods (Vietnam) Ltd., et al.* v. *United States,* 714 F. Supp. 2d 1282 (CIT 2010) (''*Amanda II*''), the CIT disagreed with the Department's justification for applying the selected separate rate assignment methodology in the *Amanda I* remand redetermination and remanded the issue back to the Department, ordering that the Department employ a reasonable method {to assign a separate rate}, which may '' 'include{e} averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated,' 19 U.S.C. 1673d(c)(5)(B) and * * * assign to Plaintiffs dumping margins for the second {period of review (''POR'')} which are reasonable considering the evidence on the record as a whole; to do so, Commerce may reopen the evidentiary record if need be.''[11]

In the Department's remand redetermination for *Amanda II,* the Department reopened the record to gather the quantity and value (''Q&V'') of the plaintiffs' sales to the United States during the POR on a count-size specific basis to conduct an abbreviated comparative exercise using this Q&V data and the mandatory respondents' weighted-average normal values to determine whether the record contained evidence of dumping. Based on our analysis, we determined that there was no evidence of dumping on the record, and assigned, under protest, a separate rate to the 23 plaintiffs equal to the simple average of the dumping margins calculated for the two individually-examined companies.[12] The CIT affirmed the *Amanda II Remand Redetermination* in *Amanda Foods (Vietnam) Ltd., et al.* v. *United States,* 774 F. Supp. 2d 1286 (CIT 2011) (''*Amanda III*'').

As noted above, in light of *Amanda III,* the Department requested a voluntary remand with respect to the separate rate calculation methodology applied in *Vietnam Shrimp AR3 Final.*[13] Consequently, based on the exercise similarly conducted in *Amanda II Remand Redetermination* and affirmed in *Amanda III,* in the *Amanda 2011 Final Remand,* we analyzed the data collected from the 16 remaining plaintiffs and determined that the record does not contain substantial evidence to support the continued assignment of the separate rate applied in *Vietnam Shrimp AR3 Final* to these 16 plaintiffs.

Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the CAFC has held that, pursuant to section 516A(e) of the Act, the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's May 30, 2012, judgment sustaining the *Amanda 2011 Final Remand* constitutes a final decision of that court that is not in harmony with the *Vietnam Shrimp AR3 Final.* This notice is published in fulfillment of the publication requirements of *Timken.* Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if

[4] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results; Preliminary Partial Rescission and Request for Revocation, In Part, of the Third Administrative Review,* 74 FR 10009 (*March 9, 2009*), unchanged in *VN Shrimp AR3 Final,* 74 FR at 47196–7.

[5] *See VN Shrimp AR3 Final,* 74 FR at 47195.

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See Final Results of Redetermination Pursuant To Court Remand,* dated March 3, 2010, at 21.

[11] *See Amanda II,* 714 F. Supp. 2d at 1296.

[12] *See Amanda II Remand Redetermination* at 6.

[13] *See Amanda 2011,* 807 F. Supp. 2d at 1338.

appealed, pending a final and conclusive court decision. The cash deposit rate will remain the company-specific rate established for the subsequent and most recent period during which the respondents were reviewed.

Amended Final Results

Because there is now a final court decision with respect to the 16 Plaintiffs, revised dumping margins are as follows[14]:

Manufacturer/exporter	Weighted-average margin (percent) *(de mini-mis)*
Amanda Foods (Vietnam) Ltd	0.26
Bac Lieu Fisheries Joint Stock Company	0.26
Cadovimex-Vietnam, aka Cadovimex Seafood Import-Export and Processing Joint Stock Company (''Cadovimex-Vietnam'')	0.26
Cafatex Fishery Joint Stock Corporation (''Cafatex Corp.'') aka Cantho Animal Fisheries Product Processing Export Enterprise (Cafatex), aka Cafatex, aka Cafatex Vietnam, aka Xi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho, aka Cas, aka Cas Branch, aka Cafatex Saigon, aka Cafatex Fishery Joint Stock Corporation, aka Cafatex Corporation, aka Taydo Seafood Enterprise.	0.26
Cam Ranh Seafoods Processing Enterprise Company (''Camranh Seafoods'') aka Camranh Seafoods	0.26
Cuulong Seaproducts Company (''Cuu Long Seapro'') aka Cuu Long Seaproducts Limited (Cuulong Seapro) aka Cuulong Seapro, aka Cuulong Seaproducts Company (''Cuulong Seapro'') (''Cuu Long Seapro'').	0.26
Danang Seaproducts Import Export Corporation (''Seaprodex Danang'') aka Tho Quang Seafood Processing & Export Company, aka Seaprodex Danang, aka Tho Quang Seafood Processing And Export Company, aka Tho Quang, aka Tho Quang Co.	0.26
Minh Hai Export Frozen Seafood Processing Joint Stock Company, aka Minh Hai Jostoco, aka Minh Hai Export Frozen Seafood Processing Joint-Stock Company (''Minh Hai Jostoco''), aka Minh Hai Export Frozen Seafood Processing Joint-Stock Company, aka Minh Hai Joint Stock Seafood Processing Joint-Stock Company, aka Minh Hai Export Frozen Seafood Processing Joint-Stock Co., aka Minh Hai Export Frozen Seafood Processing Joint-Stock Company Minh Hai Jostoco.	0.26
Minh Hai Joint-Stock Seafoods Processing Company (''Seaprodex Minh Hai'') aka Sea Minh Hai, aka Minh Hai Joint-Stock Seafoods Processing Company.	0.26
Minh Hai Sea Products Import Export Company (Seaprimex Co) , aka Ca Mau Seafood Joint Stock Company (''SEAPRIMEXCO'') aka Seaprimexco Vietnam, aka Seaprimexco, aka Ca Mau Seafood Joint Stock Company (Seaprimexco).	0.26
Ngoc Sinh Private Enterprise, aka Ngoc Sinh Seafoods, aka Ngoc Sinh Seafoods Processing and Trading Enterprise	0.26
Nha Trang Seaproduct Company ('Nha Trang Seafoods'')	0.26
Phu Cuong Seafood Processing and Import-Export Co., Ltd	0.26
Sao Ta Foods Joint Stock Company (''Fimex VN''), aka Sao Ta Seafood Factory	0.26
Soc Trang Seafood Joint Stock Company	0.26
UTXI Aquatic Products Processing Corporation	0.26

In the event the CIT's ruling is not appealed or, if appealed, upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries of the subject merchandise during the POR from the 16 Plaintiffs based on the revised assessment rates calculated by the Department.

This notice is issued and published in accordance with sections 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

Dated: June 7, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–14438 Filed 6–8–12; 4:15 pm]

BILLING CODE 3510–DS–P

[14] All other rates determined in *Vietnam Shrimp AR3 Final* remain unchanged.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–602]

Brass Sheet and Strip From France: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from GBC Metals, LLC, of Global Brass and Copper, Inc., dba Olin Brass, Heyco Metals, Inc., Aurubis Buffalo, Inc., PMX Industries, Inc., and Revere Copper Products, Inc. (the Petitioners), the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on brass sheet and strip from France. The period of review is March 1, 2011, through February 29, 2012. Based on the withdrawal of request for review submitted by the Petitioners, we are now rescinding this administrative review.

DATES: *Effective Date:* June 12, 2012.

FOR FURTHER INFORMATION CONTACT: Steve Bezirganian or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–1131 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 30, 2012, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on brass sheet and strip from France covering the period March 1, 2011, through February 29, 2012.[1] The review covers two companies: Griset SA and KME France (the Respondents). The Petitioners requested the review of the

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 77 FR 25401 (April 30, 2012).

Respondents; no other party requested a review.

On May 14, 2012, the Petitioners withdrew their request for an administrative review of the Respondents.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1) of the Department's regulations, the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the publication of the notice of initiation of the requested review, or withdraws at a later date if the Department exercises its discretion to extend the time limit for withdrawing the request. The Petitioners withdrew their request within the 90-day deadline. Therefore, we are rescinding the review with respect to all companies.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed 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 directly to CBP 15 days after publication of this notice.

Notifications

This notice serves as a final reminder to importers for whom this review is being rescinded 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 the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (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: June 5, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–14273 Filed 6–11–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–854]

Certain Tin Mill Products From Japan: Continuation of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the U.S. International Trade Commission (USITC) that revocation of the antidumping duty order on certain tin mill products from Japan would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of this antidumping duty order.

DATES: *Effective Date:* June 12, 2012.

FOR FURTHER INFORMATION CONTACT: David Cordell or Angelica Mendoza, AD/CVD Operations Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0408 and (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 28, 2000, the Department published the antidumping duty order on certain tin mill products from Japan.[1] On June 1, 2011, the Department initiated the second sunset review of the antidumping duty order on certain tin mill products from Japan pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2]

As a result of this sunset review, the Department determined that revocation of the antidumping duty order on certain tin mill products from Japan would likely lead to continuation or recurrence of dumping and, therefore, notified the USITC of the magnitude of the margins of dumping likely to prevail should the order be revoked.[3]

On June 4, 2012, the USITC published its determination, pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on certain tin mill products from Japan would be likely to lead to continuation or recurrence of material injury to an industry in the United Sates within a reasonably foreseeable time.[4]

Scope of the Order

The products covered by the antidumping duty order are tin mill flat-rolled products that are coated or plated with tin, chromium or chromium oxides. Flat-rolled steel products coated with tin are known as tin plate. Flat-rolled steel products coated with chromium or chromium oxides are known as tin-free steel or electrolytic chromium-coated steel. The scope includes all the noted tin mill products regardless of thickness, width, form (in coils or cut sheets), coating type (electrolytic or otherwise), edge (trimmed, untrimmed or further processed, such and scroll cut), coating thickness, surface finish, temper, coating metal (tin, chromium, chromium oxide), reduction (single- or double-reduced), and whether or not coated with a plastic material. All products that meet the written physical description are within the scope of the order unless specifically excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of the order:

■ Single reduced electrolytically chromium coated steel with a thickness 0.238 mm (85 pound base box) (± 10%) or 0.251 mm (90 pound base box) (± 10%) or 0.255 mm (± 10%) with 770 mm (minimum width) (± 1.588 mm) by 900 mm (maximum length if sheared) sheet size or 30.6875 inches (minimum width) (± 1/16 inch) and 35.4 inches (maximum length if sheared) sheet size; with type MR or higher (per ASTM) A623 steel chemistry; batch annealed at T2 ½ anneal temper, with a yield strength of 31 to 42 kpsi (214 to 290

[1] *See Certain Tin Mill Products from Japan: Notice of Antidumping Duty Order,* 65 FR 52067 (August 28, 2000).

[2] *See Initiation of Five-Year ''Sunset'' Review,* 76 FR 31588, 31589 (June 1, 2011).

[3] *See Certain Tin Mill Products from Japan; Final Results of the Second Expedited Sunset Review of the Antidumping Duty Order,* 76 FR 60001 (September 28, 2011) and accompanying Issues and Decision Memorandum.

[4] *See Tin- and Chromium-Coated Steel Sheet from Japan Investigation No. 731–TA–860 (Second Review),* 77 FR 32998 (June 4, 2012), and USITC Publication 4325 (May 2012), titled *Tin- and Chromium-Coated Steel Sheet from Japan Investigation No. 731–TA–860 (Second Review).*

Mpa); with a tensile strength of 43 to 58 kpsi (296 to 400 Mpa); with a chrome coating restricted to 32 to 150 mg/m^2; with a chrome oxide coating restricted to 6 to 25 mg/m^2 with a modified 7B ground roll finish or blasted roll finish; with roughness average (Ra) 0.10 to 0.35 micrometers, measured with a stylus instrument with a stylus radius of 2 to 5 microns, a trace length of 5.6 mm, and a cut-off of 0.8 mm, and the measurement traces shall be made perpendicular to the rolling direction; with an oil level of 0.17 to 0.37 grams/base box as type BSO, or 2.5 to 5.5 mg/m^2 as type DOS, or 3.5 to 6.5 mg/m^2 as type ATBC; with electrical conductivity of static probe voltage drop of 0.46 volts drop maximum, and with electrical conductivity degradation to 0.70 volts drop maximum after stoving (heating to 400 degrees F for 100 minutes followed by a cool to room temperature).

■ Single reduced electrolytically chromium-or tin-coated steel in the gauges of 0.0040 inch nominal, 0.0045 inch nominal, 0.0050 inch nominal, 0.0061 inch nominal (55 pound base box weight), 0.0066 inch nominal (60 pound base box weight), and 0.0072 inch nominal (65 pound base box weight), regardless of width, temper, finish, coating or other properties.

■ Single reduced electrolytically chromium coated steel in the gauge of 0.024 inch, with widths of 27.0 inches or 31.5 inches, and with T–1 temper properties.

■ Single reduced electrolytically chromium coated steel, with a chemical composition of 0.005% max carbon, 0.030% max silicon, 0.25% max manganese, 0.025% max phosphorous, 0.025% max sulfur, 0.070% max aluminum, and the balance iron, with a metallic chromium layer of 70–130 mg/m^2, with a chromium oxide layer of 5–30 mg/m^2, with a tensile strength of 260–440 N/mm^2, with an elongation of 28–48%, with a hardness (HR–30T) of 40–58, with a surface roughness of 0.5–1.5 microns Ra, with magnetic properties of Bm (KG) 10.0 minimum, Br (KG) 8.0 minimum, Hc (Oe) 2.5–3.8, and MU 1400 minimum, as measured with a Riken Denshi DC magnetic characteristic measuring machine, Model BHU–60.

■ Bright finish tin-coated sheet with a thickness equal to or exceeding 0.0299 inch, coated to thickness of ¾ pound (0.000045 inch) and 1 pound (0.00006 inch).

■ Electrolytically chromium coated steel having ultra flat shape defined as oil can maximum depth of 5/64 inch (2.0 mm) and edge wave maximum of 5/64 inch (2.0 mm) and no wave to penetrate more than 2.0 inches (51.0 mm) from the strip edge and coilset or curling requirements of average maximum of 5/64 inch (2.0 mm) (based on six readings, three across each cut edge of a 24 inches (61 cm) long sample with no single reading exceeding 4/32 inch (3.2 mm) and no more than two readings at 4/32 inch (3.2 mm)) and (for 85 pound base box item only: crossbuckle maximums of 0.001 inch (0.0025 mm) average having no reading above 0.005 inch (0.127 mm)), with a camber maximum of ¼ inch (6.3 mm) per 20 feet (6.1 meters), capable of being bent 120 degrees on a 0.002 inch radius without cracking, with a chromium coating weight of metallic chromium at 100 mg/m^2 and chromium oxide of 10 mg/m^2, with a chemistry of 0.13% maximum carbon, 0.60% maximum manganese, 0.15% maximum silicon, 0.20% maximum copper, 0.04% maximum phosphorous, 0.05% maximum sulfur, and 0.20% maximum aluminum, with a surface finish of Stone Finish 7C, with a DOS–A oil at an aim level of 2 mg/square meter, with not more than 15 inclusions/foreign matter in 15 feet (4.6 meters) (with inclusions not to exceed 1/32 inch (0.8 mm) in width and 3/64 inch (1.2 mm) in length), with thickness/temper combinations of either 60 pound base box (0.0066 inch) double reduced CADR8 temper in widths of 25.00 inches, 27.00 inches, 27.50 inches, 28.00 inches, 28.25 inches, 28.50 inches, 29.50 inches, 29.75 inches, 30.25 inches, 31.00 inches, 32.75 inches, 33.75 inches, 35.75 inches, 36.25 inches, 39.00 inches, or 43.00 inches, or 85 pound base box (0.0094 inch) single reduced CAT4 temper in widths of 25.00 inches, 27.00 inches, 28.00 inches, 30.00 inches, 33.00 inches, 33.75 inches, 35.75 inches, 36.25 inches, or 43.00 inches, with width tolerance of #⅛ inch, with a thickness tolerance of #0.0005 inch, with a maximum coil weight of 20,000 pounds (9071.0 kg), with a minimum coil weight of 18,000 pounds (8164.8 kg) with a coil inside diameter of 16 inches (40.64 cm) with a steel core, with a coil maximum outside diameter of 59.5 inches (151.13 cm), with a maximum of one weld (identified with a paper flag) per coil, with a surface free of scratches, holes, and rust.

■ Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents in the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.7 mg/square foot of chromium applied as a cathodic dichromate treatment, with coil form having restricted oil film weights of 0.3–0.4 grams/base box of type DOS–A oil, coil inside diameter ranging from 15.5 to 17 inches, coil outside diameter of a maximum 64 inches, with a maximum coil weight of 25,000 pounds, and with temper/coating/dimension combinations of: (1) CAT 4 temper, 1.00/.050 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 33.1875 inch ordered width; or (2) CAT5 temper, 1.00/0.50 pound/base box coating, 75 pound/base box (0.0082 inch) thickness, and 34.9375 inch or 34.1875 inch ordered width; or (3) CAT5 temper, 1.00/0.50 pound/base box coating, 107 pound/base box (0.0118 inch) thickness, and 30.5625 inch or 35.5625 inch ordered width; or (4) CADR8 temper, 1.00/0.50 pound/base box coating, 85 pound/base box (0.0093 inch) thickness, and 35.5625 inch ordered width; or (5) CADR8 temper, 1.00/0.25 pound/base box coating, 60 pound/base box (0.0066 inch) thickness, and 35.9375 inch ordered width; or (6) CADR8 temper, 1.00/0.25 pound/base box coating, 70 pound/base box (0.0077 inch) thickness, and 32.9375 inch, 33.125 inch, or 35.1875 inch ordered width.

■ Electrolytically tin coated steel having differential coating with 1.00 pound/base box equivalent on the heavy side, with varied coating equivalents on the lighter side (detailed below), with a continuous cast steel chemistry of type MR, with a surface finish of type 7B or 7C, with a surface passivation of 0.5 mg/square foot of chromium applied as a cathodic dichromate treatment, with ultra flat scroll cut sheet form, with CAT 5 temper with 1.00/0.10 pound/base box coating, with alithograph logo printed in a uniform pattern on the 0.10 pound coating side with a clear protective coat, with both sides waxed to a level of 15–20 mg/216 sq. in., with ordered dimension combinations of (1) 75 pound/base box (0.0082 inch) thickness and 34.9375 inch x 31.748 inch scroll cut dimensions; or (2) 75 pound/base box (0.0082 inch) thickness and 34.1875 inch x 29.076 inch scroll cut dimensions; or (3) 107 pound/base box (0.0118 inch) thickness and 30.5625 inch x 34.125 inch scroll cut dimension.

■ Tin-free steel coated with a metallic chromium layer between 100–200 mg/m^2 and a chromium oxide layer between 5–30 mg/m^2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon, 0.60% maximum manganese, 0.02% maximum phosphorous, and 0.02% maximum sulfur; magnetic flux density (''Br'') of 10 kg minimum and a coercive force (''Hc'') of 3.8 Oe minimum.

■ Tin-free steel laminated on one or both sides of the surface with a polyester film, consisting of two layers (an amorphous layer and an outer crystal layer), that contains no more than the indicated amounts of the following environmental hormones: 1 mg/kg BADGE (BisPhenol—A Di-glycidyl Ether), 1 mg/kg BFDGE (BisPhenol—F Di-glycidyl Ether), and 3 mg/kg BPA (BisPhenol—A).

The merchandise subject to the order is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), under HTSUS subheadings 7210.11.0000, 7210.12.0000, 7210.50.0000, 7212.10.0000, and 7212.50.0000 if of non-alloy steel and under HTSUS subheadings 7225.99.0090, and 7226.99.0180 if of alloy steel. Although the subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Continuation of the Order

As a result of the determinations by the Department and the USITC that revocation of the antidumping duty order on certain tin mill products from Japan would be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty order on certain tin mill products from Japan.

U.S. Customs and Border Protection will continue to collect cash deposits of estimated antidumping duties at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of this order will be the effective date listed above. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next sunset review of this order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year (sunset) review and this notice are in accordance with sections 751(c) and 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: June 6, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–14278 Filed 6–11–12; 8:45 am]

BILLING CODE 3510–DS–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

The following notice of a scheduled meeting is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIMES AND DATES: The Commission has scheduled a meeting for the following date: June 20, 2012 at 10:00 a.m.

PLACE: Three Lafayette Center, 1155 21st St. NW., Washington, DC, Lobby Level Hearing Room (Room 1300).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission's Technology Advisory Committee is meeting at the above time and place, and it is expected that a quorum of the Commission will be present at the meeting.

CONTACT PERSON FOR MORE INFORMATION: David A. Stawick, Secretary of the Commission, 202–418–5071.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2012–14479 Filed 6–8–12; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Audit Advisory Committee (DAAC); Notice of Meeting

AGENCY: Under Secretary of Defense (Comptroller), DoD.

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 the following Federal advisory committee meeting of the Defense Audit Advisory Committee (DAAC) will be held.

DATES: Thursday, July 12, 2012, beginning at 1:00 p.m. and ending at 3:00 p.m.

ADDRESSES: Pentagon, Room 3E754, Washington DC (escort required; see ''Accessibility to the meeting'' paragraph in **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: The Committee's Designated Federal Officer (DFO) is Sandra Gregory, Office of the Under Secretary of Defense (Comptroller) (OUSD(C)), 1100 Defense Pentagon, Room 3D150, Washington, DC 20301–1100, *sandra.gregory@osd.mil,* (703) 614–3310. For meeting information please contact Yevette Brown, OUSD(C), 1100 Defense Pentagon, Room 3D150, Washington, DC 20301–1100, *Yevette.brown@osd.mil,* (703) 614–4819.

SUPPLEMENTARY INFORMATION:

(a) Purpose

The mission of the DAAC is to provide the Secretary of Defense, through the Under Secretary of Defense (Comptroller)/Chief Financial Officer, independent advice and recommendations on DoD financial management to include financial reporting processes, systems of internal controls, audit processes, and processes for monitoring compliance with relevant laws and regulations.

(b) Agenda

Below is the agenda for the July 12, 2012 meeting:

1:00 p.m. Welcome and Opening Remarks

1:20 p.m. Review of last Meeting Minutes

1:30 p.m. Financial Improvement Audit Readiness (FIAR) Status and Progress

2:15 p.m. Statement of Budgetary Resources (SBR) Way Forward

2:45 p.m. Closing Remarks

(c) 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. Members of the public who wish to attend the meeting must contact Ms. Brown at the number listed in **FOR FURTHER INFORMATION CONTACT** no later than 12:00 p.m. on Tuesday, July 10, 2012 to arrange a Pentagon escort. Public attendees are required to arrive at the Pentagon Metro Entrance on July 12, 2012, by 12:00 p.m. and complete security screening by 12:15 p.m. Security screening requires two forms of identification: (1) a government-issued photo I.D., and (2) any type of secondary I.D. which verifies the individual's name (i.e. debit card, credit card, work badge, social security card). Special Accommodations: Individuals requiring special accommodation to access the public meeting should contact Ms. Brown at least five business days prior to the meeting to ensure appropriate arrangements can be made.

(d) Procedures for Providing Written Comments

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the

Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Committee about its mission and topics pertaining to this public session.

Written comments are accepted until the date of the meeting, however, written comments should be received by the Designated Federal Officer at least five business days prior to the meeting date so that the comments may be made available to the Committee members for their consideration prior to the meeting. Written comments should be submitted to the Designated Federal Officer listed in **FOR FURTHER INFORMATION CONTACT**. Email submissions should be in one of the following formats (Adobe Acrobat, WordPerfect, or Word format).

Please note: Since the committee operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection, up to and including being posted on the OUSD(C) Web site.

Dated: June 7, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–14257 Filed 6–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2012–OS–0064]

Privacy Act of 1974; Notice of a Computer Matching Program

AGENCY: Defense Manpower Data Center, DoD.

ACTION: Notice of a computer matching program.

SUMMARY: Subsection (e)(12) of the Privacy Act of 1974, as amended (5 U.S.C. 552a), requires agencies to publish advance notice of any proposed or revised computer matching program by the matching agency for public comment. The DoD, as the matching agency under the Privacy Act is hereby giving notice to the record subjects of a computer matching program between the Department of Veterans Affairs (VA) and DoD that their records are being matched by computer. The purpose of this match concerns Reserve pay reconciliation.

DATES: This proposed action will become effective July 12, 2012 and matching may commence unless changes to the matching program are required due to public comments or by Congressional or by Office of Management and Budget objections. Any public comment must be received before the effective date.

ADDRESSES: Any interested party may submit written comments to the Director, Defense Privacy and Civil Liberties Office, 1901 South Bell Street Suite 920, Arlington, VA 22202–4512.

FOR FURTHER INFORMATION CONTACT: Mr. Samuel P. Jenkins at telephone (703) 607–2943.

SUPPLEMENTARY INFORMATION: Pursuant to subsection (o) of the Privacy Act of 1974, as amended (5 U.S.C. 552a), the DMDC and VA have concluded an agreement to conduct a computer matching program between the agencies. The purpose of this agreement is to verify eligibility for DoD/USCG members of the Reserve forces who receive VA disability compensation or pension to also receive military pay and allowances when performing reserve duty. The parties to this agreement have determined that a computer matching program is the most efficient, expeditious, and effective means of obtaining the information needed by the VA to identify ineligible VA disability compensation recipients who have returned to active duty. This matching agreement will verify eligibility for DoD/USCG members of the Reserve forces who receive VA disability compensation or pension to also receive military pay and allowances when performing reserve duty. If this identification is not accomplished by computer matching, but is done manually, the cost would be prohibitive and it is possible that not all individuals would be identified. A copy of the computer matching agreement between VA and DMDC is available upon request to the public. Requests should be submitted to the address in **FOR FURTHER INFORMATION CONTACT** or to the Department of Veterans Affairs, Veterans Benefit Administration, 810 Vermont Avenue NW., Washington, DC 20420.

Set forth below is the notice of the establishment of a computer matching program required by paragraph 6.c. of the Office of Management and Budget Guidelines on computer matching published in the **Federal Register** at 54 FR 25818 on June 19, 1989.

The matching agreement, as required by 5 U.S.C. 552a(r) of the Privacy Act, and an advance copy of this notice was submitted on May 31, 2012, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget pursuant to paragraph 4d of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records about Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: June 7, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Notice of a Computer Matching Program Between the Department of Veterans Affairs and the Department of Defense for Verification of Disability Compensation

A. PARTICIPATING AGENCIES:

Participants in this computer matching program are the Department of Veterans Affairs (VA) and the Defense Manpower Data Center (DMDC) of the Department of Defense (DoD). The VA is the source agency, i.e., the activity disclosing the records for the purpose of the match. The DMDC is the specific recipient activity or matching agency, i.e., the agency that actually performs the computer matching.

B. PURPOSE OF THE MATCH:

The purpose of this agreement is to verify eligibility for DoD/USCG members of the Reserve forces who receive VA disability compensation or pension to also receive military pay and allowances when performing reserve duty.

The VA will provide to DMDC identifying information on all VA recipients receiving a VA disability compensation or pension. DMDC will match the information with its reserve military pay data and provide for each match (hit) the number of training days, by fiscal year, for which the veteran was paid. The VA will use this information to make, where appropriate, necessary VA payment adjustments.

C. AUTHORITY FOR CONDUCTING THE MATCH:

The legal authority for conducting the matching program for use in the administration of VA's Compensation and Pension Benefits Program is contained in 38 U.S.C. 5304(c), Prohibition Against Duplication of Benefits provides that VA disability compensation or pension based upon his or her previous military service shall not be paid to a person for any period for which such person receives active service pay. 10 U.S.C. 12316, Payment of certain Reserves while on duty further provides that a reservist who is entitled to disability payments due to his or her earlier military service and

who performs duty for which he or she is entitled to DoD/USCG compensation may elect to receive for that duty either the disability payments or, if he or she waives such payments, the DoD/USCG compensation for the duty performed.

D. RECORDS TO BE MATCHED:

The systems of records maintained by the respective agencies under the Privacy Act of 1974, as amended, 5 U.S.C. 552a, from which records will be disclosed for the purpose of this computer match are as follows:

The DMDC will use the system of records identified as DMDC 01, entitled ''Defense Manpower Data Center Data Base,'' last published in the **Federal Register** at November 23, 2011, 76 FR 72391. A copy of the published system notice is at Attachment 2.

The VA will use the system of records identified as ''Compensation, Pension, Education and Vocational Rehabilitation and Employment Records–VA'' (58VA21/22/28), republished in its entirety at 74 FR 29275 (June 19, 2009), last amended at 75 FR 22187, April 27, 2010. Attachment 3 is a copy of the system notice with the appropriate routine use, i.e., RU 39.

E. DESCRIPTION OF COMPUTER MATCHING PROGRAM:

The VA will submit to DMDC an electronic data of all VA pension and disability compensation beneficiaries as of the end of September. Upon receipt of the data, DMDC will match by SSN with reserve pay data as submitted to DMDC by the military services and the USCG. Upon a SSN match, or a ''hit,'' of both data sets, DMDC will provide VA the individual's name and other identifying data, to include the number of training days, by Fiscal Year, for each matched record. Training days are the total of inactive duty drills paid plus active duty days paid.

The hits will be furnished to VA, which will be responsible for verifying and determining that the data in the DMDC electronic files is consistent with the VA files and for resolving any discrepancies or inconsistencies on an individual basis. VA will initiate actions to obtain an election by the individual of which pay he or she wishes to receive and will be responsible for making final determinations as to positive identification, eligibility for, or amounts of pension or disability compensation benefits, adjustments thereto, or any recovery of overpayments, or such other action as authorized by law.

The electronic data provided by the VA will contain information on approximately 4.2 million pension and disability compensation recipients.

The DMDC reserve pay data contains information on approximately 890,000 DoD and 10,000 USCG reservists who received pay and allowances for performing authorized duty.

VA will furnish DMDC the name and SSN of all VA pension and disability compensation recipients and DMDC will supply VA the name, SSN, date of birth, and the number of training days by fiscal year of each reservist who is identified as a result of the match.

F. INCLUSIVE DATES OF THE MATCHING PROGRAM:

This computer matching program is subject to public comment and review by Congress and the Office of Management and Budget. If the mandatory 30 day period for comment has expired and no comments are received and if no objections are raised by either Congress or the Office of Management and Budget within 40 days of being notified of the proposed match, the computer matching program becomes effective and the respective agencies may begin the exchange at a mutually agreeable time and thereafter on a quarterly basis. By agreement between VA and DMDC, the matching program will be in effect for 18 months with an option to renew for 12 additional months unless one of the parties to the agreement advises the other by written request to terminate or modify the agreement.

G. ADDRESS FOR RECEIPT OF PUBLIC COMMENTS OR INQUIRIES:

Director, Defense Privacy and Civil Liberties Office, 1901 South Bell Street, Suite 920, Arlington, VA 22202–4512. Telephone (703) 607–2943.

[FR Doc. 2012–14205 Filed 6–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review; Office of Special Education and Rehabilitative Services; Annual State Application Under Part B of the Individuals With Disabilities Education Act

SUMMARY: In accordance with Part B of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1412(a)) a State is eligible for assistance under Part B for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the conditions found in 20 U.S.C. 1412.

DATES: Interested persons are invited to submit comments on or before July 12, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04816. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual State Application Under Part B of the Individuals with Disabilities Education Act.

OMB Control Number: 1820–0030.

Type of Review: Revision.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 840.

Abstract: States will provide assurances that they either do or do not have in effect policies and procedures to meet the eligibility requirements of Part B of IDEA. OMB Control No. 1820–0030 corresponds with 34 CFR 300.100–176; 300.199; 300.640–645; and 300.705. These sections include the requirement that the Secretary and local educational agencies located in the State be notified of any State-imposed rule, regulation, or policy that is not required by this title and Federal regulations.

Dated: June 6, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–14271 Filed 6–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records

AGENCY: Office of Planning, Evaluation and Policy Development, Department of Education.

ACTION: Notice of deletions of existing systems of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a), the Department of Education (Department) deletes two systems of records from its existing inventory of systems of records subject to the Privacy Act.

DATES: These deletions are effective June 12, 2012.

FOR FURTHER INFORMATION CONTACT: Carmel Martin, Assistant Secretary for Planning, Evaluation and Policy Development, U.S. Department of Education, 400 Maryland Avenue SW., Room 5E313, Washington, DC 20202–4500. Telephone: (202) 401–3676.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed in this section.

SUPPLEMENTARY INFORMATION: The Department deletes two systems of records from its inventory of record systems subject to the Privacy Act. The deletions are not within the purview of subsection (r) of the Privacy Act, which requires submission of a report on a new or altered system of records.

These systems of records are no longer needed because the studies have been completed. In addition, the records are no longer collected or maintained by the Department, and each system of records has been deleted by the contractor. Therefore, the following systems of records are deleted:

1. (18–17–01) The Graduate Fellowship Programs Participants Study, 70 FR 51348–51351 (August 30, 2005).

2. (18–17–02) Follow Up Evaluation of the GEAR UP Program, 70 FR 74792–74794 (December 16, 2005).

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.

Dated: June 6, 2012.

Carmel Martin,

Assistant Secretary, Office of Planning, Evaluation and Policy Development.

For the reasons discussed in the preamble, the Assistant Secretary of the Office of Planning, Evaluation and Planning Development deletes the following systems of records:

System No.	System name
18–17–01	The Graduate Fellowship Programs Participants Study, 70 FR 51348–51351 (August 30, 2005).
18–17–02	Follow Up Evaluation of the GEAR UP Program, 70 FR 74792–74794 (December 16, 2005).

[FR Doc. 2012–14181 Filed 6–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–108–000.

Applicants: Michigan Electric Transmission Company, LLC.

Description: Application pursuant to Section 203 of Michigan Electric Transmission Company, LLC.

Filed Date: 6/5/12.

Accession Number: 20120605–5071.

Comments Due: 5 p.m. ET 6/26/12.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG12–74–000.

Applicants: High Majestic Interconnection Services, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of High Majestic Interconnection Services, LLC.

Filed Date: 6/5/12.

Accession Number: 20120605–5090.

Comments Due: 5 p.m. ET 6/26/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3859–004; ER11–3863–003; ER11–3861–003; ER11–3864–004; ER11–3866–004; ER12–192–002; ER11–3867–004; ER11–3857–004.

Applicants: Milford Power Company, LLC, MASSPOWER, Liberty Electric Power, LLC, Lake Road Generating Company, L.P., Empire Generating Co, LLC, ECP Energy I, LLC, EquiPower Resources Management, LLC, Dighton Power, LLC.

Description: Notice of Change in Status of the ECP MBR Sellers.

Filed Date: 6/5/12.

Accession Number: 20120605–5068.

Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1823–000.

Applicants: Southern California Edison Company.

Description: 2009–2010 CWIP ROE Refund Report to be effective N/A.

Filed Date: 6/5/12.

Accession Number: 20120605–5005.

Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1942–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: J122 Filing to be effective 6/6/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5033.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1943–000.
Applicants: DeWind Novus, LLC.
Description: Notice of Succession Filing to be effective 5/4/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5054.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1944–000.
Applicants: Duke Energy Ohio, Inc.
Description: Duke Energy Ohio, Inc. submits tariff filing per 35.15: Cancel Reactive to be effective 12/31/9998.
Filed Date: 6/5/12.
Accession Number: 20120605–5082.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1945–000.
Applicants: AEP Texas North Company.
Description: AEP Texas North Company submits tariff filing per 35.13(a)(2)(iii: TNC–Texas New Mexico Power Amd. #3 to IA to be effective 5/7/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5083.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1946–000.
Applicants: Duke Energy Beckjord, LLC.
Description: Duke Energy Beckjord, LLC submits tariff filing per 35.1: MBR Filing to be effective 10/1/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5096.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1947–000.
Applicants: Duke Energy Beckjord, LLC.
Description: Duke Energy Beckjord, LLC submits tariff filing per 35.13(a)(2)(iii: Reactive Filing to be effective 12/31/9998.
Filed Date: 6/5/12.
Accession Number: 20120605–5098.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1948–000.
Applicants: Duke Energy Conesville, LLC.
Description: Duke Energy Conesville, submits tariff filing per 35.1: MBR Filing to be effective 10/1/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5099.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1949–000.
Applicants: Duke Energy Conesville, LLC.
Description: Duke Energy Conesville, submits tariff filing per 35.13(a)(2)(iii: Reactive Filing to be effective 12/31/9998.
Filed Date: 6/5/12.
Accession Number: 20120605–5100.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1950–000.
Applicants: Entergy Texas, Inc.
Description: Entergy Texas, Inc. submits tariff filing per 35.13(a)(2)(iii: ETEC Partial Req Agrmt #199 to be effective 8/1/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5104.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1951–000.
Applicants: Duke Energy Dicks Creek, LLC.
Description: Duke Energy Dicks Creek, LLC submits tariff filing per 35.1: MBR Filing to be effective 10/1/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5106.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1952–000.
Applicants: Entergy Texas, Inc.
Description: Entergy Texas, Inc. submits tariff filing per 35.13(a)(2)(iii: ETEC Coordination Agrmt #200 to be effective 8/1/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5107.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1953–000.
Applicants: Duke Energy Dicks Creek, LLC.
Description: Duke Energy Dicks Creek, LLC submits tariff filing per 35.13(a)(2)(iii: Reactive Filing to be effective 12/31/9998.
Filed Date: 6/5/12.
Accession Number: 20120605–5108.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1954–000.
Applicants: Duke Energy Killen, LLC.
Description: Duke Energy Killen, LLC submits tariff filing per 35.1: MBR Filing to be effective 10/2/2012.
Filed Date: 6/5/12.
Accession Number: 20120605–5111.
Comments Due: 5 p.m. ET 6/26/12.

Docket Numbers: ER12–1955–000.
Applicants: Duke Energy Killen, LLC.
Description: Duke Energy Killen, LLC submits tariff filing per 35.13(a)(2)(iii: Reactive Filing to be effective 12/31/9998.
Filed Date: 6/5/12.
Accession Number: 20120605–5112.
Comments Due: 5 p.m. ET 6/26/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–14201 Filed 6–11–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–107–000.
Applicants: International Transmission Company.
Description: Section 203 Application of International Transmission Company.
Filed Date: 6/4/12.
Accession Number: 20120604–5205.
Comments Due: 5 p.m. ET 6/25/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER04–835–007; ER04–835–009; EL04–103–004, EL04–103–002.
Applicants: California Independent System Operator Corporation.
Description: Informational Filing of the California Independent System Operator Corporation for market participants to calculate incremental cost of local component of minimum load compensation costs.
Filed Date: 5/15/12.
Accession Number: 20120515–5248.
Comments Due: 5 p.m. ET 6/19/12.

Docket Numbers: ER04–835–007; ER04–835–009; EL04–103–002; EL04–103–004.
Applicants: California Independent System Operator Corporation.
Description: Errata to May 15, 2012 Informational Filing of the California Independent System Operator Corporation.
Filed Date: 5/16/12.
Accession Number: 20120516–5164.
Comments Due: 5 p.m. ET 6/19/12.

Docket Numbers: ER12–653–001.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits its deficiency response and additional information.
Filed Date: 6/4/12.
Accession Number: 20120604–5198.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–818–001.
Applicants: El Paso Electric Company.
Description: El Paso Electric Company submits deficiency response and additional information.
Filed Date: 6/4/12.
Accession Number: 20120604–5116.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1773–001.
Applicants: Inupiat Energy Marketing, LLC.
Description: Amendment to be effective 5/21/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5080.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1937–000.
Applicants: Carolina Power & Light Company.
Description: Revised Service Agreement No. 268 under Carolina Power and Light Company OATT to be effective 6/1/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5014.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1938–000.
Applicants: Viridian Energy MD LLC.
Description: Market-Based Rate Tariff to be effective 5/21/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5021.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1939–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3324 to be effective 5/2/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5142.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1940–000.
Applicants: Avista Corporation.
Description: Avista Corp Tariff (OATT) Revisions to be effective 8/4/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5158.
Comments Due: 5 p.m. ET 6/25/12.

Docket Numbers: ER12–1941–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3325 to be effective 5/3/2012.
Filed Date: 6/4/12.
Accession Number: 20120604–5159.
Comments Due: 5 p.m. ET 6/25/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 5, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–14202 Filed 6–11–12; 8:45 am]

BILLING CODE 6717–01–P

EXPORT-IMPORT BANK OF THE UNITED STATES

[Public Notice 2012–0145]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 92–41 Application for Financial Institution Short-Term, Single-Buyer Insurance.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The ''Application for Financial Institution Short Term Single Buyer Insurance'' form will be used by entities involved in the export of U.S. goods and services, to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements.

The application can be reviewed at: *www.exim.gov/pub/pending/eib92-41.pdf* Application for Financial Institution Short Term Single Buyer Insurance.

DATES: Comments should be received on or before (insert 60 days after publication) to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Arnold Chow, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION: *Titles and Form Number:* EIB 92–41 Application for Financial Institution Short-Term, Single-Buyer Insurance.
OMB Number: 3048–0019.
Type of Review: Regular.
Need and Use: The information requested enables the applicant to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements.
Annual Number of Respondents: 300.
Estimated Time per Respondent: 1.5 hours.
Government Annual Burden Hours: 450.
Frequency of Reporting or Use: Annually.
Government Review Time: 6 hours.
Total Hours: 1,800.
Cost to the Government: $69,696.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–14260 Filed 6–11–12; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK OF THE UNITED STATES

[Public Notice 2012–0101]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 05–01 Marketing Fax Back Response Form.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Marketing Fax Back Response Form is used to collect basic information on United States companies. This information will be provided to the Export-Import Bank's

financial consultants nationwide and will be used to provide assistance to exporters.

The form may be viewed at *www.exim.gov/pub/pending/eib05-01.pdf* Marketing Fax Back Response Forms.

DATES: Comments should be received on or before August 13, 2012 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Stephen Maroon, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION: *Titles and Form Number:* EIB 05–01 Marketing Fax Back Response Form.

OMB Number: 3048–0029.

Type of Review: Regular.

Need and Use: The Marketing Fax Back Response Form is used to collect basic information on United States companies. This information will be provided to the Export-Import Bank's financial consultants nationwide to assist in providing counsel to exporters.

Annual Number of Respondents: 500.

Estimated Time per Respondent: 3 minutes.

Frequency of Reporting or Use: Once per year.

Government Annual Burden Hours: 25 hours.

Estimated Government Costs: $900.00.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–14261 Filed 6–11–12; 8:45 am]

BILLING CODE 6690–01–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATES: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on June 14, 2012, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available) and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- May 10, 2012

B. Reports

- Quarterly Report on Farm Credit System Condition
- Annual Report on Young, Beginning and Small Farmer Mission Performance: 2011 Results
- Office of Examination Semi-Annual Report on Operations

Closed Session *

- Office of Examination Supervisory and Oversight Activities Report

* Session Closed—Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: June 7, 2012.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2012–14322 Filed 6–8–12; 11:15 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44.U.S.C. 3501–3520), the Federal Communications Commission (FCC) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before August 13, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov <mailto: PRA@fcc.gov>* and to *Cathy.Williams@fcc.gov <mailto: Cathy.Williams@fcc.gov>.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0320.

Title: Section 73.1350, Transmission System Operation.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 505 respondents; 505 responses.

Estimated Hours per Response: 0.5 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 253 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 73.1350(g) requires licensees to submit a ''letter of notification'' to the FCC in Washington, DC, Attention: Audio Division (radio) or Video Division (television), Media Bureau, whenever a transmission system control point is established at a location other than at the main studio or

transmitter within three days of the initial use of that point. The letter should include a list of all control points in use for clarity. This notification is not required if responsible station personnel can be contacted at the transmitter or studio site during hours of operation.

OMB Control Number: 3060–0634.

Title: Section 73.691, Visual Modulation Monitoring.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 20 respondents; 46 responses.

Estimated Hours per Response: One hour.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 46 hours.

Total Annual Cost: None.

Privacy Impact Assessment(s): No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 73.691(b) requires TV stations to enter into the station log the date and time of the initial technical problems that make it impossible to operate a TV station in accordance with the timing and carrier level tolerance requirements. If this operation at variance is expected to exceed 10 consecutive days, a notification must be sent to the FCC. The licensee must also notify the FCC upon restoration of normal operations. Furthermore, a licensee must send a written request to the FCC if causes beyond the control of the licensee prevent restoration of normal operations within 30 days. The FCC staff use the data to maintain accurate and complete technical information about a station's operation. In the event that a complaint is received from the public regarding a station's operation, this information is necessary to provide an accurate response.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–14176 Filed 6–11–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44.U.S.C. 3501–3520), the Federal Communications Commission (FCC) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before August 13, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* <*mailto:PRA@fcc.gov*> and to *Cathy.Williams@fcc.gov* <*mailto:Cathy.Williams@fcc.gov*>.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0854.

Title: Section 64.2401, Truth-in-Billing Format, CC Docket No. 98–170 and CG Docket No. 04–208.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 4,484 respondents; 49,542 responses.

Estimated Time per Response: 2 to 243 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is found at section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. 201(b), and section 258, 47 U.S.C. 258, Public Law 104–104, 110 Stat. 56. The Commission's implementing rules are codified at 47 CFR 64.2400–01.

Total Annual Burden: 4,047,134 hours.

Total Annual Cost: $15,918,200.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: In 1999, the Commission released the *Truth-in-Billing and Billing Format,* CC Docket No. 98–170, First Report and Order and Further Notice of Proposed Rulemaking, (1999 TIB Order); published at 64 FR 34488, June 25, 1999, which adopted principles and guidelines designed to reduce telecommunications fraud, such as slamming and cramming, by making bills easier for consumers to read and understand, and thereby, making such fraud easier to detect and report. In 2000, *Truth-in-Billing and Billing Format,* CC Docket No. 98–170, Order on Reconsideration, (2000 Reconsideration Order); published at 65 FR 43251, July 13, 2000, the Commission, granted in part petitions for reconsideration of the requirements that bills highlight new service providers and prominently display inquiry contact numbers. On March 18, 2005, the Commission released *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98–170, CG Docket No. 04–208, (2005

Second Report and Order and Second Further Notice); published at 70 FR 29979 and 70 FR 30044, May 25, 2005, which determined, inter alia, that Commercial Mobile Radio Service providers no longer should be exempted from 47 CFR 64.2401(b), which requires billing descriptions to be brief, clear, non-misleading and in plain language. The 2005 Second Further Notice proposed and sought comment on measures to enhance the ability of consumers to make informed choices among competitive telecommunications service providers.

On April 27, 2012, the Commission released the Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (''Cramming''), Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 11–116, CG Docket No. 09–158, CC Docket No. 98–170, FCC 12–42 (Cramming Report and Order and Further Notice of Proposed Rulemaking); published at 77 FR 30972, May 24, 2012, which determined that additional rules are needed to help consumers prevent and detect the placement of unauthorized charges on their telephone bills, an unlawful and fraudulent practice commonly referred to as ''cramming.''

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–14178 Filed 6–11–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 13, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0531.

Title: Sections 101.1011, 101.1325(b), 101.1327(a), 101.527, 101.529 and 101.103—Substantial Service Showing for LMDS, 24 GHz and MAS.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 1,114 respondents; 1,114 responses.

Estimated Time per Response: 2–15 hours.

Frequency of Response: On occasion and once every decade reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended.

Total Annual Burden: 3,541 hours.

Total Annual Cost: $462,000.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is seeking OMB approval for an extension of this information collection in order to obtain the full three year approval from them. There are no changes to the reporting and/or third party disclosure requirements. The Commission is reporting a change to their 2009 burden estimates. The Commission has reduced the total annual burden hours by 720 hours because there are fewer licenses subject to the substantial service requirement; in LMDS there are over 100 licenses that have met substantial service and will not be subject to that requirement again until 2018 and in MAS, the number of responses are reduced due to the cancellation of a large number of licenses. This resulted in an adjustment decrease of 360 responses based on a number of licensees having met their substantial service requirements, and revised burden estimates based on review of the data made over the last three years. The cost adjustment is an increase of $93,000 reflects the number of estimated responses and updated estimates of the costs involved.

Section 101.1011 requires that Local Multipoint Distribution Service (LMDS) must make a showing of substantial service in their license area within 10 years of being licensed. A licensee must demonstrate that it provided service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal.

Section 101.1325(b) requires that Multiple Address System (MAS) licensees must make a showing of substantial service in their license area within ten years of being licensed.

Section 101.1327(a) requires that in order to receive a renewal expectancy at renewal time, a MAS licensee must demonstrate that it provided service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. MAS licensees must also demonstrate that they have substantially complied with applicable Commission rules, policies, and the Communications Act; provide a record of the licensee's record of expansion, and provide a description of investments it has made in its system.

Section 101.527 requires that 24 GHz licensees must make a showing of

substantial service in their license area within 10 years of being licensed.

Section 101.529 requires that in order to receive a renewal expectancy at renewal time, a 24 GHz licensee must demonstrate that it provided substantial service. 24 GHz licensees must also provide copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy, and a list of any pending proceeding relating to any such possible violation.

Section 101.103 requires that LMDS licensees coordinate proposed operations with existing licensees, permittees, and applicants in the proposed area of operation. Coordination consists of notification by the licensee of its proposed operations, and a response by neighboring licensees, permittees, and applicants stating whether any interference is predicted. The coordination requirements set forth in the Commission's rules remains unchanged, and this submission does not seek to revise those requirements or the estimated burdens relating to that rule.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–14230 Filed 6–11–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44.U.S.C. 3501–3520), the Federal Communications Commission (FCC) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before August 13, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

OMB Control Number: 3060–0580.

Title: Section 76.1710, Operator Interests in Video Programming.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 1,500 respondents; 1,500 responses.

Estimated Time per Response: 15 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 22,500 hours.

Total Annual Costs: None.

Privacy Impact Assessment(s): No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality and respondents are not being asked to submit confidential information to the Commission.

Needs and Uses: 47 CFR 76.1710 requires cable operators to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services. The records must be made available to members of the public, local franchising authorities and the Commission on reasonable notice and during regular business hours. The records will be reviewed by local franchising authorities and the Commission to monitor compliance with channel occupancy limits in respective local franchise areas.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–14177 Filed 6–11–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Draft Guidance on Considerations in Transferring a Previously-Approved Research Project to a New IRB or Research Institution

AGENCY: Department of Health and Human Services (HHS), Office of the Secretary, Office of the Assistant Secretary for Health, Office for Human Research Protections.

ACTION: Notice.

SUMMARY: The Office for Human Research Protections (OHRP), Office of the Assistant Secretary for Health, is announcing the availability of a draft guidance document entitled ''Draft Guidance on Considerations in Transferring a Previously-Approved Research Project to a New IRB or Research Institution,'' and is seeking comment on the draft guidance. The draft guidance document, when finalized, would provide OHRP's first formal guidance on this topic. The draft document, which is available on the OHRP Web site at *http://www.hhs.gov/ohrp/newsroom/rfc/index.html,* is intended primarily for institutional review boards (IRB), institutions, and investigators that are responsible for the review, conduct, or oversight of human subjects research conducted or supported by HHS. OHRP will consider comments received before issuing the final guidance document.

DATES: Submit written comments by August 13, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Draft Guidance on Considerations in Transferring a Previously-Approved Research Project to a New IRB or Research Institution'' to the Division of Policy and Assurances, Office for Human Research Protections, 1101 Wootton Parkway, Suite 200,

Rockville, MD 20852. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–402–2071. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance document.

You may submit comments identified by docket ID number HHS–OS–OPHS–2012–0005, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Enter the above docket ID number in the ''Enter Keyword or ID field and click on ''Search.'' On the next page, click the ''Submit a Comment'' action and follow the instructions.
- *Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]:* Irene Stith-Coleman, Ph.D., Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852.

Comments received, including any personal information, will be posted without change to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Irene Stith-Coleman, Ph.D., Office for Human Research Protections, 1101 Wootton Parkway, Suite 200, Rockville, MD 20852, 240–453–6900; email *Irene.Stith-Coleman@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

OHRP, Office of the Assistant Secretary for Health, is announcing the availability of a draft guidance document entitled ''Draft Guidance on Considerations in Transferring a Previously-Approved Research Project to a New IRB or Research Institution.'' The draft guidance document, when finalized, will represent OHRP's current thinking on this topic and will provide OHRP's first formal guidance on this topic. The draft document is intended primarily for IRBs, institutions, and investigators that may be responsible for the review, conduct, or oversight of human subjects research conducted or supported by HHS.

The guidance document would apply to non-exempt human subjects research conducted or supported by HHS. It presents common scenarios for transfer of a previously-approved research project to another institutional review board (IRB) or to a new engaged research institution, and outlines the administrative actions to be considered by IRBs, engaged institution(s), and investigators. In particular, the guidance addresses the following questions:

1. What is the regulatory background for research project transfer?

2. What actions may apply when the research project remains at the same institution, but responsibility for IRB review is transferred either from an *internal* to an *external* IRB, or from an *external* IRB to *another external* IRB?

3. What actions may apply when the research project remains at the same institution, but responsibility for IRB review is transferred from one *internal* to another *internal* IRB?

4. What actions may apply when the research project is transferred to a *new engaged institution*?

To enhance human subject protections and reduce regulatory burden, OHRP and the Food and Drug Administration (FDA) have been actively working to harmonize the agencies' regulatory requirements and guidance for human subjects research.

FDA has simultaneously published in this same issue of the **Federal Register** a draft guidance document entitled ''Guidance for IRBs, Clinical Investigators, and Sponsors, Considerations When Transferring Clinical Investigation Oversight to Another IRB'' that is similar to OHRP's draft document.

FDA and OHRP recognize that the two documents may appear somewhat different as there are minor variations in formatting and some necessary variations due to differences in the regulated entities under FDA's and OHRP's jurisdiction. The agencies wish to stress, however, that our intent was to provide harmonized guidance to IRBs, sponsors, institutions, investigators, and other entities involved in the study oversight transfer process. FDA and OHRP will continue to work closely in the development of final guidance and appreciate comments from interested parties.

II. Electronic Access

Persons with access to the Internet may obtain the draft guidance document on OHRP's Web site at *http://www.hhs.gov/ohrp/newsroom/rfc/index.html* or on the Federal eRulemaking Portal at *http://www.regulations.gov/.*

Dated: June 7, 2012.

Ivor Pritchard,

Senior Advisor to the Director, Office for Human Research Protections.

[FR Doc. 2012–14287 Filed 6–11–12; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Decision To Evaluate a Petition To Designate a Class of Employees From the Clarksville Facility in Clarksville, TN, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: NIOSH gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from the Clarksville Facility in Clarksville, Tennessee, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Clarksville Facility.

Location: Clarksville, Tennessee.

Job Titles and/or Job Duties: Workers potentially exposed to radioactive materials while working at the Clarksville facility.

Period of Employment: January 1, 1949 to December 31, 1967.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV*.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2012–14221 Filed 6–11–12; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Decision To Evaluate a Petition To Designate a Class of Employees From the Medina Facility in San Antonio, TX, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: NIOSH gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from the Medina Facility in San Antonio, Texas, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Medina Facility.

Location: San Antonio, Texas.

Job Titles and/or Job Duties: Workers potentially exposed to radioactive materials while working at the Medina facility.

Period of Employment: January 1, 1958 to December 31, 1966.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV*.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2012–14223 Filed 6–11–12; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day–12–12DO]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

National Healthy Worksite Program—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is establishing the National Healthy Worksite Program (NHWP), a comprehensive workplace health promotion program to address physical activity, nutrition, and tobacco use in the workplace. Participating worksites will create high quality workplace health programs by implementing programs, policies, and environmental supports that assist employees in adopting healthy behaviors. The NHWP will provide assistance to an estimated 100 small, mid-size, and large employers to create and expand sustainable workplace programs aimed at achieving three primary goals: (1) To reduce the risk of chronic disease among employees and their families through science-based workplace health interventions and promising practices; (2) to promote sustainable and replicable workplace health activities such as establishing a worksite committee, having senior leadership support, and forming community partnerships and health coalitions, and (3) to promote peer-to-peer business mentoring that encourages employers to be active leaders and role models in their communities around health.

Over a three-year period, the National Healthy Worksite Program will engage and recruit groups of up to 15 employers in seven selected communities, lead them through the process of building a comprehensive workplace health program, and collect evaluation information. The NHWP will also provide workplace health program training to worksites that are not participating in the NHWP. CDC may increase the number of NHWP sites that receive assistance, if funding becomes available.

CDC plans to collect information needed to select the initial group of participating NHWP worksites; to describe implementation and costs of workplace health promotion programs at these sites over the initial two-year period of support; to examine the effects of workplace health programs on employee access and opportunity to engage in activities that support a healthy lifestyle; and to quantify reductions in individual health risks and improvements in productivity. The NHWP will also assess the value of community-based training for community participants (employers not selected as participating employers). In addition, for up to one year after the two-year implementation period, CDC will collect information needed to assess program sustainability.

Participation in the NHWP is voluntary for both worksites and employees at those sites. During the development phase of the proposed information collection, CDC received comments from a variety of interested parties, and a number of instruments were revised to improve clarity. There are no costs to participants other than their time, with the exception of an in-kind contribution for large employers.

CDC will use the information collected to support the implementation efforts of employers participating in the NHWP; inform future program efforts at CDC and other Federal agencies; and develop tools, resources, and guidance to support broader workplace health efforts.

OMB approval is requested for three years. The total estimated annualized burden hours are 15,530.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Interested Employer	Employer Phone Interview Guide	69	1	20/60
Participating Employer	Organizational Assessment	66	2	30/60
	Employee Eligibility File	33	4	15/60
	Employer Information Form	33	1	30/60
	Health Screening Site Interview Form	33	2	30/60
	Discussion Guide for Steering Committee Members.	100	1	30/60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
	Discussion Guide for Wellness Committee Members.	166	1	30/60
	Employer Follow-Up Survey	33	1	15/60
Community Participant	Community Participant Engagement Feedback Survey.	35	1	10/60
	Worksite Health Training Survey Parts I–III.	100	1	10/60
	Worksite Health Training Survey Part IV	100	1	10/60
Employee	Health Screening Consent/Contact Form	5,000	1	10/60
	All Employee Survey	5,000	2	5/60
	Health Assessment	5,000	2	15/60
	Success Story Consent Form	67	1	10/60
	Satisfaction Survey	2,000	4	15/60
Employee: Wellness Challenge Log/Program Participant.	Lower Your Weight by Eight Challenge Log.	2,000	1	1
	Step into Health Challenge Log	2,000	1	30/60
	Mix it Up Challenge Log	2,000	1	30/60
	Quench Your Thirst Challenge Log	2,000	1	30/60
	Feel Fit with Fiber Challenge Log	2,000	1	30/60
	Maintain Don't Gain Challenge Log	2,000	1	1
	Nutrition and Physical Activity Tracking Log/Lifestyle Tracker.	2,000	1	30/60

Kimberly Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–14207 Filed 6–11–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day 12–12MW]

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 S. Lane, at 1600 Clifton Road, MS D74, 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

Hepatitis Testing and Linkage to Care Monitoring & Evaluation System—New—National Center for HIV/AIDS, Viral Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention is requesting a three-year OMB approval for establishing a Hepatitis Testing and Linkage to Care (HEPTLC) Monitoring and Evaluation System to collect standardized, non-identifying, client-level and test-level hepatitis testing information from funded testing sites at multiple settings. Grantees will be required to use this web-based HEPTLC software application to collect and report testing and linkage to care activities.

The HEPTLC data collection and reporting system will enable CDC to receive standardized, non-identifying information from funded grantees, including: (1) Information about test sites that provide HEPTLC services and laboratories that provide lab testing; (2) Information about testing participants, including demographics, risk characteristics, vaccination history, etc. (3) Information related to diagnostic test results; and (4) Information about post-test follow-ups, including notification of test result, post-test-counseling, linkage to care and preventive services, and case report to surveillance authorities. CDC will use HEPTLC data for the following purposes: (1) Monitor the implementation activities of the HEPTLC initiative, as well as evaluate the progress and performance made by the grantees. Findings will further inform strategic planning and program improvement; (2) Inform recommendations and strategies of increasing early identification of infected persons and linkage to care, based on participant characteristics and linkage to care among those persons who are infected; (3) Identify best practices and gaps in implementing HEPTLC in various testing settings, and guide CDC in providing technical assistance to the grantees; (4) Produce standardized and specialized reports that will inform grantees, CDC Project Officers, HHS, and other stakeholders of the process, outcome and accountability measures; (5)Assess public health prevention funds and resources allocations with respect to prioritized

risk populations; (6) Advocate the needs for priority setting and budget allocation for hepatitis prevention.

Funded sites will use HEPTLC data for the following purposes:
(1) Understand targeted populations (demographics, risk behaviors, vaccination histories, etc.) and assess the extent to which the targeted populations have been reached;
(2) Document how well the project is progressing in meeting goals/objectives set forth by CDC (e.g. who delivered what to whom, how many, where, when, and how well), as well as performance indicators related to testing, counseling and linkage to care;
(3) Highlight opportunities for local program collaboration and service integration (PCSI) to prevent hepatitis:
(4)Fulfill data collection and reporting requirements outlined in the cooperative agreements.

The total estimated annualized hourly burden anticipated for all data collections and training would be approximately 6,080 hours. Respondents will be testing sites at multiple settings, including health departments, community based organizations (CBOs), community health centers (CHCs), person who inject drugs (PWID) treatment centers, and other settings, e.g. human immunodeficiency virus (HIV) or sexually transmitted disease (STD) clinics, Federally Qualified Health Centers (FQHCs). They will routinely collect, enter, and report information about the test site, client demographics and behaviors, testing results and linkage to care follow up information within the web-based HEPTLC system.

CDC anticipates that routine information collection will begin immediately after OMB approval. CDC intends for grantees to bear minimum burdens with minimal standardized data variables, while fulfilling mandatory reporting requirements. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
HBV—CBOs/Health Jurisdictions ..... HCV—multiple sites (IDU, CHCs, Others, ECHO).	HEPTLC Data Variables & Values (test-level monthly reporting).	40	12	12	5,760
HBV—CBOs/Health Jurisdictions ..... HCV—multiple sites (IDU, CHCs, Others, ECHO).	HEPTLC Template (program-level reporting/quarterly).	40	4	1.5	240
Training	HEPTLC System	40	1	2	80
Total	.....	.....	.....	.....	6,080

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–14209 Filed 6–11–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Affordable Care Act Tribal Maternal, Infant and Early Childhood Home Visiting Program Annual Report.

OMB No.: 0970–NEW.

Description: Section 511(h)(2)(A) of Title V of the Social Security Act, as added by Section 2951 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, Affordable Care Act or ACA), authorizes the Secretary of HHS to award grants to Indian Tribes (or a consortium of Indian Tribes), Tribal Organizations, or Urban Indian Organizations to conduct an early childhood home visiting program.

The legislation sets aside 3 percent of the total ACA Maternal, Infant, and Early Childhood Home Visiting (MIECHV) Program appropriation (authorized in Section 511(j)) for grants to Tribal entities and requires that the Tribal grants, to the greatest extent practicable, be consistent with the requirements of the Maternal, Infant, and Early Childhood Home Visiting Program grants to States and territories (authorized in Section 511(c)), and include (1) Conducting a needs assessment similar to the assessment required for all States under the legislation and (2) establishing quantifiable, measurable 3- and 5-year benchmarks consistent with the legislation.

The Administration for Children and Families, Office of Child Care, in collaboration with the Health Resources and Services Administration, Maternal and Child Health Bureau, has awarded grants for the Tribal Maternal, Infant, and Early Childhood Home Visiting Program (Tribal MIECHV). The Tribal MIECHV grant awards support 5-year cooperative agreements to conduct community needs assessments, plan for and implement (in accordance with an Implementation Plan submitted at the end of Year 1) high-quality, culturally-relevant, evidence-based and promising home visiting programs in at-risk Tribal communities, and participate in research and evaluation activities to build the knowledge base on home visiting among Native populations.

Section 511(e)(8)(A) of the Social Security Act, as added by Section 2951 of the Affordable Care Act, requires that grantees under the MIECHV program for States and Jurisdictions submit an annual report to the Secretary of Health and Human Services regarding the program and activities carried out under the program, including such data and information as the Secretary shall require. As described above, Section 511(h)(2)(A) further states that the requirements for the MIECHV grants to Tribes, Tribal Organizations, and Urban Indian Organizations are to be consistent, to the greatest extent practicable, with the requirements for grantees under the MIECHV program for States and Jurisdictions. In the Tribal Maternal, Infant, and Early Childhood Home Visiting Program Guidance for Submitting a Needs Assessment and Plan for Responding to Identified Needs (Phase 2 Implementation Plan) (OMB Control No. 0970–0389, Expiration Date 6/30/14), Tribal MIECHV grantees were notified that in Years 2–5 of their grant

they must comply with the requirement for submission of an Annual Report to the Secretary regarding the program and activities carried out under the program. This report shall be submitted to HHS by Tribal MIECHV grantees 90 days following the end of Years 2–5 of the grant.

This report shall address the following:

Update on Home Visiting Program Goals and Objectives.

Update on the Implementation of Home Visiting Program in Targeted Community(ies).

Progress toward Meeting Legislatively Mandated Benchmark Requirements.

Update on Rigorous Evaluation Activities.

Home Visiting Program Continuous Quality Improvement (CQI) Efforts.

Administration of Home Visiting Program.

Technical Assistance Needs.

Respondents: Affordable Care Act Tribal Maternal, Infant, and Early Childhood Home Visiting Program Year 2–5 Grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Affordable Care Act Tribal Maternal, Infant, and Early Childhood Home Visiting Program Guidance for Submitting an Annual Report to the Secretary	25	1	50	1,250

Estimated Total Annual Burden Hours: 1,250.

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. 2012–14185 Filed 6–11–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0560]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance on Informed Consent for In Vitro Diagnostic Device Studies Using Leftover Human Specimens That Are Not Individually Identifiable

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 guidance on informed consent for in vitro diagnostic device studies using leftover human specimens that are not individually identifiable.

DATES: Submit either electronic or written comments on the collection of information by August 13, 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: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@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.

Guidance on Informed Consent for In Vitro Diagnostic Device Studies Using Leftover Human Specimens That Are Not Individually Identifiable—(OMB Control Number 0910–0582)—Extension

FDA's investigational device regulations are intended to encourage the development of new, useful devices in a manner that is consistent with public health, safety, and with ethical standards. Investigators should have freedom to pursue the least burdensome means of accomplishing this goal. However, to ensure that the balance is maintained between product development and the protection of public health, safety, and ethical standards, FDA has established human subject protection regulations addressing requirements for informed consent and institutional review board (IRB) review that apply to all FDA-regulated clinical investigations involving human subjects. In particular, informed consent requirements further both safety and ethical considerations by allowing potential subjects to consider both the physical and privacy risks they face if they agree to participate in a trial.

Under FDA regulations, clinical investigations using human specimens conducted in support of premarket submissions to FDA are considered human subject investigations (see 21 CFR 812.3(p)). Many investigational device studies are exempt from most provisions of 21 CFR part 812, Investigational Device Exemptions, under 21 CFR 812.2(c)(3), but FDA's regulations for the protection of human subjects (21 CFR parts 50 and 56) apply to all clinical investigations that are regulated by FDA (see 21 CFR 50.1; 21 CFR 56.101, 21 U.S.C. 360j(g)(3)(A), and 21 U.S.C. 360j(g)(3)(D)).

FDA regulations do not contain exceptions from the requirements of informed consent on the grounds that the specimens are not identifiable or that they are remnants of human specimens collected for routine clinical care or analysis that would otherwise have been discarded. Nor do FDA regulations allow IRBs to decide whether or not to waive informed consent for research involving leftover or unidentifiable specimens.

In a level 1 guidance document, entitled ''Guidance on Informed Consent for In Vitro Diagnostic Device Studies Using Leftover Human Specimens That Are Not Individually Identifiable,'' issued under the Good Guidances Practices regulation, 21 CFR 10.115, FDA outlines the circumstances in which it intends to exercise enforcement discretion as to the informed consent regulations for clinical investigators, sponsors, and IRBs.

The recommendations of the guidance impose a minimal burden on industry. FDA estimates that 700 studies will be affected annually. Each study will result in one annual record, estimated to take 4 hours to complete. This results in a total recordkeeping burden of 2,800 hours ($700 \times 4 = 2{,}800$).

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Federal Food, Drug, and Cosmetic Act section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
520(g) (21 U.S.C. 360j(g))	700	1	700	4	2,800

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: June 7, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–14228 Filed 6–11–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0294]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food Contact Substance Notification Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by July 12, 2012.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0495. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, II, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Food Contact Substance Notification Program—21 CFR 170.101, 170.106, and 171.1 (Control Number 0910–0495)—Extension

Section 409(h) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 348(h)) establishes a premarket notification process for food contact substances. Section 409(h)(6) of the FD&C Act defines a ''food contact substance'' as ''any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.'' Section 409(h)(3) of the FD&C Act requires that the notification process be used for authorizing the marketing of food contact substances except when: (1) FDA determines that the submission and premarket review of a food additive petition (FAP) under section 409(b) of the FD&C Act is necessary to provide adequate assurance of safety or (2) FDA and the manufacturer or supplier agree

that an FAP should be submitted. Section 409(h)(1) of the FD&C Act requires that a notification include: (1) Information on the identity and the intended use of the food contact substance and (2) the basis for the manufacturer's or supplier's determination that the food contact substance is safe under the intended conditions of use.

Sections 170.101 and 170.106 of FDA's regulations (21 CFR 170.101 and 170.106) specify the information that a notification must contain and require that: (1) A food contact substance notification (FCN) include a completed and signed Form FDA 3480 and (2) a notification for a food contact substance formulation include a completed and signed Form FDA 3479. These forms serve to summarize pertinent information in the notification. The forms facilitate both preparation and review of notifications because the forms serve to organize information necessary to support the safety of the use of the food contact substance. The burden of filling out the appropriate form has been included in the burden estimate for the notification.

Currently, interested persons transmit an FCN submission to the Office of Food Additive Safety in the Center for Food Safety and Applied Nutrition using Form FDA 3480 whether it is submitted in electronic or paper format. FDA recently made minor revisions to Form FDA 3480 to better enable its use for electronic submission and to prompt FCN submitters to include certain information in a standard format. FDA estimates that the revisions to Form FDA 3480 will not change the amount of time necessary to complete the form.

In addition to its required use with FCNs, revised Form FDA 3480 is recommended to be used to organize information within a Pre-notification Consultation or Master File submitted in support of an FCN according to the items listed on the form. Master Files can be used as repositories for information that can be referenced in multiple submissions to the Agency, thus minimizing paperwork burden for food contact substance authorizations. FDA estimates that the amount of time for respondents to complete the revised Form FDA 3480 for these types of submissions will be 0.5 hours.

FDA has recently developed a new form, which the Agency recommends be used with each submission of additional information (i.e. amendment) to an FCN submission currently under Agency review, as well as be used to submit an amendment to a Pre-notification Consultation, or for an amendment to Master File in support of an FCN, whether submitted in electronic format or paper format. New Form FDA 3480A is entitled ''Amendment to an Existing Food Contact Substance Notification, a Pre-Notification Consultation, or a Food Master File.'' The form, and elements that would be prepared as attachments to the form, can be submitted in electronic format. Form FDA 3480A helps the respondent organize their submission to focus on the information needed for FDA's safety review. FDA estimates that the amount of time for respondents to complete the new Form FDA 3480A will be 0.5 hours because the new form, used solely for transmitting an amendment, is much shorter than Form FDA 3480. Amendments include the following information on new Form FDA 3480A and in attachments to the form:

- Date of submission;
- Whether the notifier has determined that all files provided in an electronic transmission are free of computer viruses;
- Whether the submission is an amendment to an FCN submission, a Pre-Notification Consultation, or a Master File;
- The format of the submission (i.e., Electronic Submissions Gateway (ESG), transmission on electronic physical media such as CD–ROM or DVD, or paper);
- The name of and contact information for the submitter, including the identity of the contact person and the company name (if applicable);
- The name of and contact information for any agent or attorney who is authorized to act on behalf of the notifier; and
- A brief description of the information provided and the purpose(s) of the amendment.

Section 171.1 of FDA's regulations (21 CFR 171.1) specifies the information that a petitioner must submit in order to: (1) Establish that the proposed use of an indirect food additive is safe and (2) secure the publication of an indirect food additive regulation in parts 175 through 178 (21 CFR parts 175 through 178). Parts 175 through 178 describe the conditions under which the additive may be safely used.

In addition, FDA's guidance document entitled ''Use of Recycled Plastics in Food Packaging: Chemistry Considerations'' provides assistance to manufacturers of food packaging in evaluating processes for producing packaging from post-consumer recycled plastic. The recommendations in the guidance address the process by which manufacturers certify to FDA that their plastic products are safe for food contact.

Description of Respondents: The respondents to this information collection are manufacturers of food contact substances.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section or other category	FDA Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
170.106 [2] (Category A)	FDA 3479	5	1	5	2	10
170.101 [3, 7] (Category B)	FDA 3480	5	1	5	25	125
170.101 [4, 7] (Category C)	FDA 3480	5	2	10	120	1,200
170.101 [5, 7] (Category D)	FDA 3480	33	2	66	150	9,900
170.101 [6, 7] (Category E)	FDA 3480	30	1	30	150	4,500
Pre-notification Consultation or Master File (concerning a food contact substance).[8]	FDA 3480	60	1	60	0.5	30

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

21 CFR Section or other category	FDA Form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Amendment to an existing notification (170.101), amendment to a Pre-notification Consultation, or amendment to a Master File (concerning a food contact substance).[9]	FDA 3480A	50	1	50	0.5	25
171.1 Indirect Food Additive Petitions.	N/A	1	1	1	10,995	10,995
Use of Recycled Plastics in Food Packaging: Chemistry Considerations.	N/A	10	1	10	25	250
Total	.....	.....	.....	.....	.....	27,035

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Notifications for food contact substance formulations and food contact articles. These notifications require the submission of Form FDA 3479 (''Notification for a Food Contact Substance Formulation'') only.
[3] Duplicate notifications for uses of food contact substances.
[4] Notifications for uses that are the subject of exemptions under 21 CFR 170.39 and very simple food additive petitions.
[5] Notifications for uses that are the subject of moderately complex food additive petitions.
[6] Notifications for uses that are the subject of very complex food additive petitions.
[7] These notifications require the submission of Form FDA 3480.
[8] These notifications recommend the submission of Form FDA 3480.
[9] These notifications recommend the submission of Form FDA 3480A.

The forms in table 1 of this document, and elements that would be prepared as attachments to the forms, may be submitted in electronic format through the ESG; email, if appropriate; or may be submitted in paper format, or as electronic files on physical media with paper signature page. FDA expects that most if not all businesses filing these submissions in the next 3 years will choose to take advantage of the option of electronic submission. Thus, the burden estimates in Table 1 of this document are based on the expectation of 100 percent participation in the electronic submission process. The opportunity to provide the information in electronic format could reduce the Agency's previous estimates for the time to prepare each submission. However, as a conservative approach for the purpose of this analysis, FDA is assuming that the availability of the revised or new forms and the opportunity to submit the information in electronic format will have no effect on the average time to prepare a submission.

These estimates are based on FDA's experience with the food contact substance notification program. Based on input from industry sources, FDA estimates that approximately five respondents will submit one notification annually for food contact substance formulations (Form FDA 3479), for a total of five responses. FDA estimates the reporting burden to be 2 hours per response, for a total burden of 10 hours. FDA also has included five expected duplicate submissions in the second row of table 1 of this document. FDA expects that the burden for preparing these notifications primarily will consist of the manufacturer or supplier filling out Form FDA 3480, verifying that a previous notification is effective, and preparing necessary documentation. Thus, FDA estimates that five respondents will submit one such submission annually, for a total of five responses. FDA estimates the reporting burden to be 25 hours per response, for a total burden of 125 hours.

Based on the submissions received, FDA identified three other tiers of FCNs that represent escalating levels of burden required to collect information (denoted as Categories C, D, and E in the third, fourth, and fifth rows of table 1 of this document). FDA estimated the median number of hours necessary for collecting information for each type of notification within each of the three tiers based on input from industry sources. FDA estimates that 5 respondents will submit two Category C submissions annually, for a total of 10 responses. FDA estimates the reporting burden to be 120 hours per response, for a total burden of 1,200 hours. FDA estimates that 33 respondents will submit two Category D submissions annually, for a total of 66 responses. FDA estimates the reporting burden to be 150 hours per response, for a total burden of 9,900 hours. FDA estimates that 30 respondents will submit one Category E submission annually, for a total of 30 responses. FDA estimates the reporting burden to be 150 hours per response, for a total burden of 4,500 hours.

Based on the submissions received, FDA estimates that 60 respondents will submit information to a Pre-notification Consultation or a Master File in support of FCN submission using Form FDA 3480. FDA estimates the reporting burden to be 0.5 hours per response, for a total burden of 30 hours.

Based on the submissions received, FDA estimates that 50 respondents will submit an amendment (Form FDA 3480A) to a substantive or non-substantive request of additional information to an incomplete FCN submission, for an amendment to a Pre-notification Consultation, or for an amendment to a Master File in support of an FCN. FDA estimates the reporting burden to be 0.5 hours per response, for a total burden of 25 hours.

Based on the submissions received, FDA estimates that one respondent will submit one indirect food additive petition under § 171.1, for a total of one response. FDA estimates the reporting burden to be 10,995 hours per response, for a total burden of 10,995 hours.

FDA estimates that 10 respondents will utilize the recommendations in the guidance document entitled ''Use of Recycled Plastics in Food Packaging: Chemistry Considerations,'' to develop the additional information for one such submission annually, for a total of 10 responses. FDA estimates the reporting

burden to be 25 hours per response, for a total burden of 250 hours.

As noted, FDA estimates that all of the future Forms FDA 3479, 3480, and 3480A submissions will be made electronically through the ESG. While FDA does not charge for the use of the ESG, FDA requires respondents to obtain a public key infrastructure certificate in order to set up the account. This can be obtained in-house or outsourced by purchasing a public key certificate that is valid for 1 year to 3 years. The certificate typically costs from $20 to $30.

Dated: June 7, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–14227 Filed 6–11–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0835]

Draft Guidance for Institutional Review Boards, Clinical Investigators, and Sponsors: Considerations When Transferring Clinical Investigation Oversight to Another Institutional Review Board; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled ''Considerations When Transferring Clinical Investigation Oversight to Another IRB.'' The draft guidance discusses regulatory responsibilities of institutional review boards (IRBs), clinical investigators, and sponsors when oversight of a previously approved clinical investigation under FDA's jurisdiction is transferred from one IRB to another IRB. The draft guidance also addresses questions that have been previously raised concerning procedures and processes that are required and/or recommended by FDA when such oversight is transferred.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either written or electronic comments on the draft guidance by August 13, 2012.

ADDRESSES: Submit written requests for single copies of this draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002 (1–888–463–6332 or 301–796–3400); or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448 (1–800–835–4709 or 301–827–1800); or the Division of Small Manufacturers, International and Consumer Assistance, Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4622, Silver Spring, MD 20993 (1–800–638–2041 or 301–796–7100). Send one self-addressed adhesive label to assist that office in processing your requests.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Bridget Foltz, Office of Good Clinical Practice, Food and Drug Administration, 10903 New Hampshire Ave., Bldg, 32, Rm. 5174, Silver Spring, MD 20993–0002, 301–796–8340.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance entitled ''Considerations When Transferring Clinical Investigation Oversight to Another IRB.'' The draft guidance discusses the regulatory responsibilities of IRBs, clinical investigators, and sponsors when oversight of a previously approved clinical investigation under FDA's jurisdiction is transferred from one IRB to another IRB. In particular, the draft guidance discusses eight steps to be considered when transferring oversight of a previously approved clinical investigation between two IRBs. These include: Identifying those studies for which IRB oversight is being transferred; ensuring availability and retention of pertinent records; establishing an effective date for the transfer; conducting a review of research by the receiving IRB, where appropriate; confirming or establishing the date for the next continuing review; determining whether the consent form needs to be revised; notifying the key parties; and updating IRB registration information. This list is not meant to be exhaustive as the circumstances involved in the transfer may vary.

To enhance human subject protections and reduce regulatory burden, FDA and the Office for Human Research Protections (OHRP) have been actively working to harmonize the Agencies' regulatory requirements and guidance for human subjects research. This draft guidance document was developed as a part of these efforts. OHRP has simultaneously published in this same issue of the **Federal Register** a draft guidance document entitled ''Considerations in Transferring a Previously Approved Research Project to a New IRB or Research Institution'' that is similar to FDA's draft document.

FDA and OHRP recognize that the two documents may appear somewhat different as there are minor variations in formatting and some necessary variations due to differences in the regulated entities under FDA's and OHRP's jurisdiction. The Agencies wish to stress, however, that our intent was to provide harmonized guidance to IRBs, sponsors, institutions, investigators, and other entities involved in the study oversight transfer process. FDA and OHRP will continue to work closely in the development of final guidance and appreciate comments from interested parties.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

This draft guidance includes information collections provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information referenced in this draft guidance that are related to IRB recordkeeping requirements under 21 CFR 56.115, which include the requirements for records related to informed consent, have been approved under OMB control number 0910–0130; the collection of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; and the collections of information in 21 CFR part 812 have been approved under

OMB control number 0910–0078. In accordance with the PRA, prior to publication of any final guidance document, FDA intends to solicit public comment and obtain OMB approval for any information collections recommended in this draft guidance that are new or that would represent material modifications to these previously approved collections of information found in FDA regulations.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. 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.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/ProposedRegulationsandDraftGuidances/default.htm* or *http://www.regulations.gov.*

Dated: June 6, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–14295 Filed 6–11–12; 8:45 am]

BILLING CODE 4160–01–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.

Project: 2013 National Survey on Drug Use and Health—(OMB No. 0930–0110)—Revision

The National Survey on Drug Use and Health (NSDUH) is a survey of the civilian, non-institutionalized population of the United States 12 years old and older. The data are used to determine the prevalence of use of tobacco products, alcohol, illicit substances, and illicit use of prescription drugs. The results are used by SAMHSA, ONDCP, Federal government agencies, and other organizations and researchers to establish policy, direct program activities, and better allocate resources.

Data from clinical interviews completed in 2008 were combined with the main interview short scale data to develop a predictive model that was applied to the full main sample to estimate SMI. Follow-up clinical interviews continued to be conducted with NSDUH respondents from 2009 to 2012. Data from these interviews were analyzed annually to update the calibration of the screening measure. To maximize trend validity, this model has been applied to 2009–2011 data. With the completion of 1500 clinical interviews in 2012, SAMHSA will have accumulated a large enough sample (4,500) to update and improve the models. Therefore, the MHSS clinical interviewing will be discontinued in 2013.

For the 2013 NSDUH, a few questionnaire changes are proposed. The instrument has been updated to include new questions on military service, medical marijuana, physician substance use screening, and respondent characteristics.

As with all NSDUH/NHSDA surveys conducted since 1999, the sample size of the survey for 2013 will be sufficient to permit prevalence estimates for each of the fifty states and the District of Columbia. The total annual burden estimate is shown below:

ESTIMATED BURDEN FOR 2013 NSDUH

Instrument	Number of respondents	Responses per respondent	Hours per response	Total burden hours	Hourly wage rate	Annualized costs
Household Screening	145,474	1	0.083	12,074	$14.45	$174,469
Interview	67,500	1	1.000	67,500	14.45	975,375
Screening Verification	5,400	1	0.067	362	14.45	5,231
Interview Verification	10,125	1	0.067	678	14.45	9,797
Total	145,474			80,614		1,164,872

Written comments and recommendations concerning the proposed information collection should be sent by July 12, 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. 2012–14197 Filed 6–11–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health

Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are 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.

Proposed Project: Projects for Assistance in Transition From Homelessness (PATH) Program Annual Report (OMB No. 0930–0205)—Revision

The Center for Mental Health Services awards grants each fiscal year to each of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands from allotments authorized under the PATH program established by Public Law 101–645, 42 U.S.C. 290cc–21 et seq., the Stewart B. McKinney Homeless Assistance Amendments Act of 1990 (section 521 et seq. of the Public Health Service (PHS) Act). Section 522 of the PHS Act requires that the grantee States and Territories must expend their payments under the Act solely for making grants to political subdivisions of the State, and to non-profit private entities (including community-based veterans' organizations and other community organizations) for the purpose of providing services specified in the Act. Available funding is allotted in accordance with the formula provision of section 524 of the PHS Act.

This submission is for a revision of the current approval of the annual grantee reporting requirements. Section 528 of the PHS Act specifies that not later than January 31 of each fiscal year, a funded entity will prepare and submit a report in such form and containing such information as is determined necessary for securing a record and description of the purposes for which amounts received under section 521 were expended during the preceding fiscal year and of the recipients of such amounts and determining whether such amounts were expended in accordance with statutory provisions.

The proposed changes to the PATH Annual Report Survey are as follows:

1. Format

To create a PATH report that is easier to read, the formatting has been modified to be more table driven. In addition, the language has been made more concise. Although the online form and report is close in flow to the previous report, it is necessary to thoroughly read all reporting instructions to insure proper data entry.

2. Estimated Counts

The new PATH report does not include entry of estimated counts. Only actual counts should be entered.

3. Homelessness Management Information System (HMIS) Data Integration

The Data section of the report is expected to be propagated from the local HMIS when providers use HMIS. This includes client counts, services, referrals, and demographics. This data will be automatically aggregated from client-level data.

4. Demographic Responses

In order to facilitate integration of PATH data into HMIS, all data responses have been modified to fully align with valid HMIS responses. For example, the ''Hispanic'' response has been separated from ''Race'' and placed in ''Ethnicity.''

5. Additional Data Items

The PATH report now tracks demographic data for persons contacted, as well as those enrolled. For services and referrals, in addition to gathering the number of enrolled persons receiving the service or referral, there is a total count of the number of times that particular service was provided or referral made.

6. Voluntary Outcome Measures

The data previously entered as voluntary outcome measures has now been moved to the referral section of the report and are no longer considered ''voluntary.''

The estimated annual burden for these reporting requirements is summarized in the table below.

Respondents	Number of respondents	Responses/ respondent	Burden per response (hrs.)	Total burden
States	56	1	19	1,064
Local provider agencies	503	1	34	17,102
Total	559			18,166

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 8–1099. One Choke Cherry Road, Rockville, MD 20857 or email a copy to *summer.king@samhsa.hhs.gov.* Written comments must be received before 60 days after the date of the publication in the **Federal Register**.

Summer King,

Statistician.

[FR Doc. 2012–14198 Filed 6–11–12; 8:45 am]

BILLING CODE 4162–20–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.

Project: Minority AIDS Initiative (MAI) Rapid HIV Testing Clinical Information Form (OMB No. 0930–0295)—Revision

This request is for a three-year generic clearance to continue rapid HIV testing data collection among 63 TCE–HIV Grantees and their clients and the additional 11 MAI–HIV Grantees and their clients. The primary purpose of the

MAI Rapid HIV Testing Clinical Information Form is to use a standardized data collection instrument to fully capture essential clinical information to enhance preventive services for those who test HIV-negative and refer to quality treatment/medical care those who test HIV-positive.

The aim of the project is to implement and increase rapid HIV testing among racial and ethnic minorities and collect rapid HIV testing data using the MAI Rapid HIV Testing Clinical Information Form. To meet this requirement, all Grantees must offer their clients rapid HIV preliminary antibody testing during outreach, pretreatment, or program enrollment. In addition, rapid HIV testing may be made available to the sexual and/or injection partners of clients. Grantees must provide onsite rapid HIV testing in accordance with their respective State and local requirements. If a client requests an off-site rapid HIV test, the Grantee must provide a referral to a rapid HIV testing site certified by the local health department.

Grantees are currently using the MAI Rapid HIV Testing Clinical Information Form in the field to systematically collect information from clients on demographics, previous rapid HIV test results, substance use and sexual risk behaviors, current rapid HIV test results, types of services received, and confirmatory HIV test result. Once a client is offered a rapid HIV test, the Grantee staff completes the MAI Rapid HIV Testing Clinical Information Form with the client present and then enters the data into a secure Web site that allows for real-time data submission.

The estimated annualized burden is summarized below.

Respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total burden hours
MAI Rapid HIV Testing Clinical Information Form (FY 2008 and FY 2009–63 Grantees)	10,000	1	0.133	1,330
RHT form for 11 HIV program FY 2011 grantees (public health departments)	20,000	1	0.133	2,660
MAI Rapid HIV Testing Clinical Information Form (Re-test)	6,000	1	0.133	798
Total	30,000			4,788

Written comments and recommendations concerning the proposed information collection should be sent by July 12, 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. 2012–14199 Filed 6–11–12; 8:45 am]

BILLING CODE 4162–20–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.

Project: National Evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program: Phase VI (OMB No. 0930–0307)—REVISION

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center of Mental Health Services is responsible for the national evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program (Children's Mental Health Initiative—CMHI) that will collect data on child mental health outcomes, family life, and service system development. Data will be collected on 47 service systems, and approximately 6,561 children and families.

Principal changes from the previous Phase VI OMB approval include:

- Addition of nine (9) communities awarded cooperative agreements in FY2010 for data collection.
- Replacement of intake and follow-up questionnaires for the Child Welfare Sector and Comparison Study with an administrative record review form to lessen burden.
- Addition of a brief 8-item Education Sector Caregiver Questionnaire to the Education Sector and Comparison Study to capture family involvement in the development and use of Individualized Education Plans (IEPs).
- Removal of data collection activities for the Alumni Networking Study, the CQI Initiative Evaluation, and the Sustainability Study.

Data collection for this evaluation will be conducted over a five-year period. Child and family outcomes of interest will be collected at intake and during subsequent follow-up sessions at six-month intervals. The length of time that individual families will participate in the study is up to 24 months. The outcome measures include the following: Child symptomatology and functioning, family functioning, satisfaction, and caregiver strain. The core of service system data will be collected every 18–24 months throughout the 5-year evaluation period. Service utilization and cost data will be tracked and submitted to the national evaluation every six months using two tools: The Flex Fund Tool and the Services and Costs Data Tool to estimate

average cost of treatment per child, distribution of costs, and allocation of costs across service categories. Service delivery and system variables of interest include the following: Maturity of system of care development in funded system of care communities, adherence to the system of care program model, and client service experience.

In addition, the evaluation will include one special study: The Sector and Comparison Study will examine in more detail the outcomes and service experience of children from multiple child-serving sectors and, through child-level matching, compare these outcomes with those not receiving system of care services.

Internet-based technology such as data entry and management tools will be used in this evaluation. The measures of the national evaluation address annual Congressional reporting requirements of the program's authorizing legislation, and the national outcome measures for mental health programs as currently established by SAMHSA.

The average annual respondent burden is estimated below. The estimate reflects the average number of respondents in each respondent category, the average number of responses per respondent per year, the average length of time it will take to complete each response, and the total average annual burden for each category of respondent, and for all categories of respondents combined.

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
System of Care Assessment						
Interview Guides A–S	Key site informants.	1081	3	1.00	3,243	649
Child and Family Outcome Study						
Caregiver Information Questionnaire, Revised: Caregiver—Intake (CIQ–RC–I).	Caregiver	6,561	1	0.37	2,406	481
Caregiver Information Questionnaire, Revised: Staff as Caregiver—Intake (CIQ–RS–I).	Staff as Caregiver.					
Caregiver Information Questionnaire, Revised: Caregiver—Follow-Up (CIQ–RC–F).	Caregiver	6,561	4	0.28	7,436	1,487
Caregiver Information Questionnaire, Revised: Staff as Caregiver—Follow-Up (CIQ–RS–F).	Staff as Caregiver.					
Caregiver Strain Questionnaire (CGSQ).	Caregiver	6,561	5	0.17	5,478	1,096
Child Behavior Checklist 1½–5 (CBCL 1½–5).	Caregiver	6,561	5	0.33	10,924	2,185
Child Behavior Checklist 6–18 (CBCL 6–18).						
Education Questionnaire, Revision 2 (EQ–R2).	Caregiver	6,561	5	0.33	10,924	2,185
Living Situations Questionnaire (LSQ)	Caregiver	6,561	5	0.08	2,723	545
Behavioral and Emotional Rating Scale—Second Edition, Parent Rating Scale (BERS–2C).	Caregiver	5,389	5	0.17	4,500	900
Columbia Impairment Scale (CIS)	Caregiver	6,281	5	0.08	2,607	521
Parenting Stress Index (PSI)	Caregiver	2,151	5	0.08	896	179
Devereux Early Childhood Assessment for Infants (DECA 1–18M).	Caregiver	1,576	5	0.08	657	131
Devereux Early Childhood Assessment for Toddlers (DECA 18–36M).						
Devereux Early Childhood Assessment (DECA 2–5Y).						
Preschool Behavioral and Emotional Rating (PreBERS).	Caregiver	1,576	5	0.10	788	158
Delinquency Survey, Revised (DS–R)	Youth	3,986	5	0.13	2,657	531
Behavioral and Emotional Rating Scale—Second Edition, Youth Rating Scale (BERS–2Y).	Youth	3,986	5	0.17	3,328	666
Gain Quick–R: Substance Problem Scale (GAIN).	Youth	3,986	5	0.08	1,654	331
Substance Use Survey, Revised (SUS–R).	Youth	3,986	5	0.10	1,993	399
Revised Children's Manifest Anxiety Scale, Second Edition (RCMAS–2).	Youth	3,986	5	0.07	1,329	266
Reynolds Adolescent Depression Scale, Second Edition (RADS–2).	Youth	3,986	5	0.05	997	199
Youth Information Questionnaire, Revised—Intake (YIQ–R–I).	Youth	3,986	1	0.25	997	199

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5-Year average annual burden hours
Youth Information Questionnaire, Revised—Follow-Up (YIQ–R–F).	Youth	3,986	4	0.25	3,986	797
Service Experience Study						
Multi-Sector Service Contacts, Revised: Caregiver—Intake (MSSC–RC–I).	Caregiver	6,561	1	0.25	1,640	328
Multi-Sector Service Contacts, Revised: Staff as Caregiver—Intake (MSSC–RS–I).	Staff as Caregiver.					
Multi-Sector Service Contacts, Revised: Caregiver—Follow-Up (MSSC–RC–F).	Caregiver	6,561	4	0.25	6,561	1,312
Multi-Sector Service Contacts, Revised: Staff as Caregiver—Follow-Up (MSSC–RS–F).	Staff as Caregiver.					
Cultural Competence and Service Provision Questionnaire, Revised (CCSP–R).	Caregiver	6,561	4	0.13	3,499	700
Youth Services Survey for Families (YSS–F).	Caregiver	6,561	4	0.12	3,071	614
Youth Services Survey (YSS)	Youth	3,986	4	0.08	1,323	265
Comparison and Sector Study: Juvenile Justice						
Court Representative Questionnaire (CRQ).	Court representatives.	202	5	0.50	505	101
Electronic Data Transfer of Juvenile Justice Records.	Key site personnel	202	5	0.03	34	7
Comparison and Sector Study: Education						
Teacher Questionnaire (TQ)	Teacher	202	5	0.50	505	101
School Administrator Questionnaire (SAQ).	School administrators.	202	5	0.50	505	101
Electronic Data Transfer of Education Records.	Key site personnel	202	5	0.03	34	7
Education Sector Caregiver Questionnaire (ESCQ).	Caregiver	202	5	0.08	81	16
Comparison and Sector Study: Child Welfare						
Electronic Data Transfer of Child Welfare Records.	Key site personnel	202	5	0.03	34	7
Services and Costs Study						
Flex Funds Data Dictionary/Tool	Local programming staff compiling/entering administrative data on children/youth.	1,565	3	0.03	155	31
Services and Costs Data Dictionary/Data Entry Application.	Local evaluator, staff at partner agencies, and programming staff compiling/entering service and cost records on children/youth.	6,561	100	0.05	32,805	6,561

Respondent	Number of respondents	Number of responses/respondent	Average burden/response	Total average annual burden
Caregiver	6,561	0.9	2.2	12,838
Youth	3,986	0.9	1.1	3,653

Respondent	Number of respondents	Number of responses/ respondent	Average burden/ response	Total average annual burden
Provider/Administrator	1,081	12.9	0.5	7,564
Total	11,628			24,055

Written comments and recommendations concerning the proposed information collection should be sent by July 12, 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. 2012–14200 Filed 6–11–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Toshiba E-Studio Multi-Function Peripherals

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of certain Toshiba e-Studio Multi-function Peripherals (MFPs), which perform imaging, scanning, faxing, and printing functions. Based upon the facts presented, CBP has concluded that the country where the last substantial transformation takes place is Singapore. Therefore, the country of origin of the MFPs is Singapore for purposes of U.S. Government procurement.

DATES: The final determination was issued on June 5, 2012. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination on or before July 12, 2012.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Valuation and Special Programs Branch: (202) 325–0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 5, 2012, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain Toshiba e-Studio MFPs which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H198875, was issued under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the country where the last substantial transformation takes place is Singapore. Therefore, the country of origin of the MFPs is Singapore for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: June 5, 2012.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

Attachment

HQ H198875

June 5, 2012

MAR OT:RR:CTF:VS H198875 HkP

CATEGORY: Origin

David T. Ralston Jr., Esq.
Foley & Lardner LLP
3000 K Street, NW
Suite 600
Washington, DC 20007–5109

RE: U.S. Government Procurement; Country of Origin of Toshiba e-Studio Multi-function Peripherals; Substantial Transformation

Dear Mr. Ralston:

This is in response to your letter, dated December 30, 2011, clarified on January 30, 2012, requesting a final determination on behalf of Toshiba America Business Solutions (''TABS''), pursuant to subpart B of part 177 of the U.S. Customs and Border Protection (''CBP'') Regulations (19 C.F.R. Part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (''TAA''), as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of eight models of Toshiba e-Studio multi-function peripherals (''MFPs''). As a U.S. importer, TABS is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

FACTS:

Toshiba's MFPs perform imaging, scanning, faxing and printing functions. TABS imports eight models of MFPs from Singapore: (1) the e-Studio 3040CG; (2) the e-Studio 4540CG; (3) the e-Studio 5540CG; (4) the e-Studio 6540CG; (5) the e-Studio 306G; (6) the e-Studio 456G; (7) the e-Studio 656G; and, (8) the e-Studio 856G. The model numbers ending in ''CG'' offer full color printing while those ending in ''G'' offer monochrome printing only. Apart from this, the primary distinction between the model types is the speed at which they print documents. The model name incorporates the maximum page-per-minute (''ppm'') output of each model. For example, the e-Studio 3040CG model prints a maximum of 30 ppm, and the e-Studio 856G model prints a maximum of 85 ppm. Each MFP model is primarily composed of the same

major components and assemblies, and is manufactured using essentially the same processes performed in the same locations.

An MFP consists of the following components:

(1) **Logic Control (''LGC'') Board:** a printed circuit board (''PCB'') populated with hundreds of micro-miniaturized parts. It drives the laser and scaner, exposes the photosensitive drum to make a latent image, and otherwise regulates the electric photography process based on the print data received from the System (''SYS'') Board (below); controls the transfer of toner from the drum to the paper while regulating feeding of the paper, the fixing of toner to the paper to complete the print image, and the ejection of the paper from the MFP; and, for photocopying, directs the scanning of original documents and sends the image data to the SYS Board. The LGC Board is manufactured in Singapore.

(2) **SYS Board:** a PCB populated with hundreds of micro-miniaturized parts. It allows the MFP to receive print data from the intranet, a scanner, an incoming fax, or through its copier function, convert the data and send it to the LGC board. It also allows the user to interface with the MFP by detecting key or touchscreen input and by sending image data to the display screen and displaying it. The SYS Board is manufactured in Singapore.

(3) **Control Panel:** used to operate the MFPs, consists of button and touch-panel switches, light emitting diodes (''LEDs'') and a liquid crystal display (''LCD''). It is assembled in China.

(4) **Scanner:** irradiates the surface of the original document. The reflected light is directed to a charge-coupled device (''CCD'') board using mirrors and lenses, where the optical image data is converted into an electrical signal that is transmitted to the SYS Board for further processing. It consists of different types of glass, an exposure lamp, a reflector, drive pulley, sensor, lens, CCD board, Scanner Logic Board (''SLG''), and other components. It is assembled in China.

(5) **Laser Optical Unit:** radiates a laser beam onto the photoconductive drum in response to the digital image signals transmitted from the scanner, Universal Serial Bus (''USB'') port, or network to create a latent image. The image signal is converted into the light emission signal of the laser diode on the laser driving (''LDR'') PCB, then radiated on the drum through optical elements such as lenses and mirrors. It is assembled in China.

(6) **Paper Feeding System:** feeds paper into the section of the MFP where the image is printed onto paper. It consists of several types of rollers, several types of sensors, and a drive system consisting of several motors. It is assembled in China.

(7) **Electrophotograph Processing Unit (''EPU''):** allows the formation of a latent image on the surface of the photoconductive drum within the unit. The EPU consists of two subassemblies, the process unit (the drum cleaner and developer unit) and the drive section. There are four EPUs in each color printer, one for each color of toner used for color printing (yellow, magenta, cyan, and black). It is assembled in China.

(8) **Transfer and Second Transfer Unit.** The Transfer Unit transfers the toner image from the photoconductive drum onto the transfer belt and the Second Transfer Unit transfers the image from the transfer belt to paper. The units consist of several components: a transfer belt unit, a transfer belt cleaning unit, a second transfer unit, several types of sensors, and a motor. It is assembled in China.

(9) **Fuser Unit:** fuses the toner image to paper by applying heat and pressure. The paper is then transported to the bridge unit or the paper exit unit. The unit principally consists of several types of rollers, heating lamps, thermistors, thermostats, a heating coil, entrance guide, paper guider, separation plate and fingers, and a fuser belt. It is assembled in China.

(10) **Automatic Duplexing Unit (''ADU''):** reverses paper so that images can be automatically printed on both sides of the paper. It consists of various types of sensors, rollers, a PCB, switch and motor. It is assembled in China.

(11) **Paper Exit Unit:** transports paper from the fuser unit or the optional bridge unit to the exit tray or the finisher. It consists of various types of sensors, rollers, a switch, cooling fan and motor. It is assembled in China.

(12) **Hard-disk Drive (''HDD''):** allows the storage, encryption and protection of data. It is designed and developed in Japan and manufactured overseas. Application software is developed in Japan.

(13) **Firmware:** software that controls all the functions of an MFP. System firmware controls the SYS Board and engine firmware controls the LGC Board. The e-Bridge open software platform enables the installation of multiple devices, the performance of initial settings, and integration with core business applications to streamline workflows. All MFP firmware is developed in Japan.

(14) **Image Processing (''IMG'') Board:** converts image data captured from the original document into printer image data for output to the printer or to be stored as a data file. The conversion process is controlled by the SYS Board and implemented by the LGC Board. The IMG Board itself is not programmed with any software. The board is only installed in the four MFPs that print in color—the ''CG'' models; image processing in the monochrome MFPs is done by the SYS Board and the LGC Board. It is manufactured in China.

TABS describes the SYS Board and the LGC Board (components 1 and 2 above) as the critical core components of an MFP because they organize and control the mechanical functions of an MFP, and an MFP could not operate without them. According to TABS' submission, the SYS Board is a system controller that unifies the MFP into a single system and can be considered the ''brains'' of the machine. On the other hand, the LGC Board functions as the fine mechanical controller of the MFP, precisely regulating the mechanical and electrical actions of the MFP to effect printing, scanning and other functions. TABS analogizes the LGC Board to the human nervous system, in that it carries out the commands of the brain, *i.e.,* the SYS Board.

Manufacture of the MFPs begins in China where all the subassemblies listed above, except for the LGC and SYS Boards and the HDD, are assembled. The subassemblies are connected to each other by a variety of wiring harnesses and attached to the metal frame of the MFP, which is then encased by a plastic cover. The unit is tested to ensure that it operates correctly. The tests involve the temporary installation of SYS and LGC Boards and a HDD, which are not shipped to Singapore with the MFPs. After testing is complete, the MFPs are shipped to Singapore for additional manufacturing, programming, and testing. The manufacturing processes in China account for approximately 60 percent of the total time it takes to manufacture an MFP.

In Singapore, the SYS and LGC Boards are manufactured by populating PCBs with hundreds of circuits and components, after which each board is inspected and tested for functionality using specialized equipment. According to TABS, the manufacture of the boards requires more advanced production technology than typical electric boards. The boards are permanently installed into the MFPs and programmed with system firmware (SYS Board) and engine firmware (LGC Board) developed in Japan. The third country-origin HDD is also permanently installed into the MFPs. The HDD installation process

involves creating HDD partitions, installing Japanese-origin application software, and performing an aging test, and takes approximately two hours. The MFPs are then programmed with Japanese-origin Toshiba e-Bridge software, after which the MFPs' images are tested using specialized equipment and adjusted as necessary. TABS states that because the post-production testing in Singapore concerns the intricacies of image quality and output rather than the mechanical workings of MFP components, it is far more complicated and requires a higher degree of skill and technology that the testing performed in China. After successfully completing the image quality and adjustment testing in Singapore, the MFPs are packaged for shipment.

ISSUE:

What is the country of origin of the various models of TABS e-Studio Multi-Function Peripherals for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States,* 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. In HQ H098417, dated June 15, 2010, dimmer and fan speed control switches were made from subcomponents made in Hong Kong and shipped to Mexico for assembly. The processing in Mexico included the assembly of a bare printed circuit board into a final PCB and the assembly of the PCB with other components into the finished product. CBP found that the assembly in Mexico was sufficiently complex and the components were substantially transformed into a final product that had a new name, character and use, such that the country of origin was Mexico. Likewise, in HQ H155115, dated May 24, 2011, CBP found that assembly in the United States of an imported glider and imported and U.S.-origin parts substantially transformed the components into an article with a new name, character, and use. The assembly process in the U.S. was complex and time-consuming and involved a significant U.S. contribution in both parts and labor. Consequently, the country of origin for procurement purposes was the United States.

In *Texas Instruments v. United States,* 681 F.2d 778, 782 (CCPA 1982), the court observed that the substantial transformation issue is a ''mixed question of technology and customs law.''

In *Data General v. United States,* 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The court noted that the programs were designed by a U.S. project engineer with many years of experience in ''designing and building hardware.''

TABS believes that the country of origin for TAA purposes is Singapore because the components and elements that are most important to the MFPs—the SYS Board (the ''brain'' of the MFP), the LGC Board (the ''nervous system'' implementing the commands of the brain), the HDD, and Toshiba proprietary software—are incorporated into the machines in Singapore. In addition, the SYS Board and the LGC Board are manufactured in Singapore. In support of its position, TABS cites HQ H018467 (Jan. 4, 2008).

In HQ H018467, CBP was asked to consider two manufacturing scenarios for multi-function printers. In one scenario, manufacturing took place in two countries; in the other, it took place in three countries. In the two-country scenario, 18 units were manufactured in the Philippines from components produced in various countries: automatic document feeder unit; scanner unit; operation panel unit; feed unit; manual paper feed unit; lift up motor unit; subassembly units; automatic document transferring unit; induction heating fuser unit; induction heating power supply unit; transcription unit; developing unit; laser scanning unit; main drive unit; motor drive board; high voltage power supply board; low voltage power supply board; and automatic duplex unit board. The units were sent to Japan where the system control board, engine control board, OPC drum unit, and the toner reservoir were manufactured and incorporated into the units. The control boards were programmed in Japan with Japanese firmware that controlled the user interface, imaging, memories, and the mechanics of the machines. The machines were then inspected and adjusted as necessary. CBP found that the manufacturing operations in Japan substantially transformed the Philippine units such that Japan was the country of origin of the multifunctional machines. In making our determination we took into consideration the fact that the system control board, the engine control board, and the firmware, which were very important to the functionality of the machines, were manufactured in Japan. We also found that the operations performed in Japan were meaningful and complex and resulted in an article of commerce with a new name, character and use.

In this case, substantial manufacturing operations are performed in both China and Singapore. Chinese subassemblies are imported into Singapore where they are fitted with Singaporean-origin SYS Boards and LGC Boards and programmed with Japanese-origin system and engine firmware. The firmware controls the functions and mechanics of the MFPs. The HDD, which is manufactured in a third country, is also installed into the MFPs in Singapore and programmed with Japanese-origin application software. The boards assembled in Singapore are important to the function of the MFPs, as is the Japanese software. But the assembly in Singapore completes the MFPs. Therefore, we find that the last substantial transformation occurs in Singapore. *See* HQ 563012, dated May 4, 2004 (CBP found that Hong Kong was the country of origin of fabric switches assembled to completion in Hong Kong, where they were also configured and programmed with U.S.-origin software that transformed the switches from non-functional devices into fabric switches capable of performing various Storage Area Network related functions); HQ H170315, scenario III, dated July 28, 2011 (application and transceiver boards for satellite phones were assembled in Malaysia and programmed with U.K.-origin software in Singapore, where the phones were also assembled. CBP found that no one country's operations dominated the manufacturing operations of the phones and that the last substantial transformation occurred in Singapore.) Therefore, the country of origin of the e-Studio MFPs is Singapore.

HOLDING:

Based on the facts provided, the country where the last substantial transformation takes place is Singapore. As such, the Toshiba e-Studio MFPs described in this ruling are to be considered products of Singapore for purposes of U.S. Government procurement.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell, Executive Director,
Regulations and Rulings,
Office of International Trade.

[FR Doc. 2012–14214 Filed 6–11–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Digital Projectors

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of certain digital projectors. Based upon the facts presented, CBP has concluded in the final determination that the assembly and programming operations performed in the Taiwan substantially transform the non-TAA country components of the digital projectors. Therefore the country of origin of the digital projectors is Taiwan for purposes of U.S. Government procurement.

DATES: The final determination was issued on June 4, 2012. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within July 12, 2012.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–325–0132).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 4, 2012, pursuant to subpart B of part 177, Customs and Border Protection (CBP) Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of digital projectors which may be offered to the United States Government under an undesignated government procurement contracts. This final determination, in HQ H193929, was issued at the request of the manufacturer of the digital projectors under the procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that based upon the facts presented, the assembly and programming operations performed in Taiwan substantially transform the non-TAA country components. Therefore, the country of origin of the finished digital projectors is Taiwan for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register.**

Dated: June 6, 2012.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

Attachment

HQ H193929

MAR–2 OT:RR:CTF:VS H193929 RSD

CATEGORY: Marking

Munford Page Hall, Esq.
William C. Sjoberg, Esq.
Adduci, Mastriani & Schaumberg LLP
1200 Seventeenth Street, New
Washington, DC 20036

RE: Final Determination regarding the Country of Origin of Digital Projectors, Substantial Transformation

Dear Mr. Hall and Mr. Sjoberg:

This is in response to your three letters dated November 15, 2011, November 22, 2011, and January 18, 2012, requesting final determinations on behalf of a foreign manufacturer of five digital projector models, pursuant to subpart B of part 177 of the U.S. Customs Border Protection (CBP) Regulations (19 C.F.R. Part 177). Under these regulations which implement Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in the U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of five different models of digital projectors. We note that the manufacturer of the digital projectors, a foreign manufacturer, is a party-at-interest within the meaning the 19 C.F.R. § 177.22(d)(1), and, as such, is

entitled to request this final determination.

FACTS:

Five different models of digital projectors are at issue. One of the digital projectors uses light emitting diodes (LEDs) to project videos and images, while the other digital projectors are lamp based.

First Digital Projector Model

In your submission of November 15, 2011, you describe the subject merchandise as a digital LED portable projector referred to as ''Model C''. The dimensions of the LED projector are 22 cm × 4.25 cm × 17 cm, (W × H × D), and it weighs 1.1 kg. The digital light processing (''DLP'') projector is designed to use LEDs as the light source for projecting images and videos from a computer or other video sources. The LED projector can produce an image size of up to 120 inches measured diagonally. According to your submission, the LED projector was designed and developed in Taiwan. The LED Projector uses four firmware files: (1) the system firmware, (2) the power control microcontroller firmware, (3) the Extended Display Identification Data (''EDID'') firmware, and (4) multimedia firmware. These four firmware files are developed and coded in Taiwan and are programmed into the corresponding integrated circuits (''ICs'') in Taiwan.

The LED projector contains components from several different countries. Two major functional parts including the digital micro-mirror device (DMD) and the DPP6401 data processor will originate from Taiwan. Other non-Taiwanese components are shipped to China where they are pre-assembled with the Taiwanese components to create modules or sub-assemblies. You list 16 modules that are assembled together to make the LED projectors. The modules are as follows:

1) Bottom casing module containing parts from China, Japan, Korea and Taiwan;

2) Top cover module with mechanical parts from China;

3 4) Two fan modules with mechanical parts from China;

5) Low voltage power supply (LVPS) containing parts from China, Japan, Korea, Malaysia, Philippines, and Taiwan;

6) Semi-finished optical engine module with parts and components from China, Taiwan, Philippines, and Japan;

7) Photo sensor module containing parts from China, Korea, and Taiwan;

8 9 10) Three LED modules with LED chips and circuit boards from the USA;

11) Heat sink for blue LED with mechanical parts from China;

12) Heat pipe module for green LED with mechanical parts from China;

13) Heat pipe module for red LED with mechanical parts from China;

14) Projection lens module with optical lens and mechanical parts from China

15) Main board module with parts and electronic components from China, Hong Kong, Japan, Korea, Malaysia, Philippines, Taiwan, and a processor from Taiwan; and

16) LED driver board module with components and parts from China, Taiwan, Japan, and Malaysia.

After the components are assembled together in China to form the 16 different modules, they are shipped from China to Taiwan for assembly into the LED projectors. Other parts used in the assembly of the projector in Taiwan include screws, brackets which are mounted onto the LVPS sensor board, mylar cable ties, and an EMI gasket.

The assembly, firmware programming, testing and packing processes in Taiwan consist of at least 225 steps taking no less than 4 hours and 54 minutes to complete of which the Taiwanese assembly process consists of at least 71 steps taking approximately 15.6 minutes. The assembly process in producing the projectors in Taiwan includes the following steps:

1) The fan modules are screwed to the bottom casing modules.

2) The LVPS is screwed to the bottom casing module.

3) The semi-finished optical engine module is assembled with other components into the completed optical engine module by screwing, inserting and sticking the pieces together.

4) The completed optical engine module is screwed to the bottom casing module.

5) The main board module is assembled onto the completed optical engine module. The slot of the main board module must be aligned with the DMD board edge connector so as to plug the main board onto the DMD board incorporated into the optical engine module.

6) The wires from the different component and modules are connected to the main board module, by plugging the wires from different components and modules into the corresponding connectors, respectively, on the main board module.

7) The light source with the main board module is assembled by inserting the edge connector of the LED driver board module to the corresponding slot of the main board module.

8) The light source driver is connected with the LVPS and the wire from the LVPS is plugged into the corresponding connector on the light source driver; or the wire is plugged from the light source driver to the corresponding connector on the LVPS;

9) The top cover is screwed to the bottom casing module.

The light source driver in the Model C projectors is the LED driver module. The light source (LEDs) in the Model C projector is assembled with the semi-finished optical engine module to become the completed optical engine module.

The system firmware programming, power control firmware programming, and EDID programming consists of at least 42 steps taking approximately 11.6 minutes to complete. All functions of the LED projectors undergo testing prior to the LED projector being exported to the United States. The normal testing process includes 12 kinds of functions tests and consists of at least 97 steps taking approximately 137.8 minutes. After the whole projector is assembled, the next step is to program the firmware files into the integrated circuits (ICs) before function testing. The firmware programming process involves power control firmware programming, multimedia firmware programming, and system firmware programming.

Second and Third Digital Projector Models

In your submission of November 22, 2011, you provide a description of two other versions of similar digital projectors. You refer to these versions of the projectors as Model A. The two versions of the digital projector are very similar to each other. The two projectors have the same physical dimensions of 32.4 cm × 9.7 cm × 23.4 cm (W × H × D) and weigh 2.9 kg. The two models are DLP projectors designed to use a high-intensity discharge (''HID'') arc lamp as the light source to project images and videos from computers or other video sources. The digital projectors can produce an image size of up to 362 inches in diagonal. The main difference between the two models of digital projectors are in the resolution of the projected image and the throw ratio, which is defined as the distance (D) measured from lens to screen that a projector is placed from the screen, divided by the width (W) of the image that it will project (D/W).

You state that the two digital projectors are designed and developed in Taiwan. They will also be ultimately assembled in Taiwan. Additionally, major functional parts, including the digital micro-mirror device (''DMD''),

and the DDP2431 data processor will originate from Taiwan. The digital projectors will also use five firmware files: (1) the system firmware, (2) the power control firmware (i.e. 8051 microcontroller firmware), (3) the extended display identification data (''EDID'') firmware, (4) the network firmware, and (5) the lamp driver firmware which are developed and coded in Taiwan. In addition, the system firmware, power control firmware and EDID firmware are programmed into the corresponding ICs in Taiwan.

The manufacturing of the digital projectors versions of Model A is very similar to the process used to manufacture the digital projector Model C described above. The components will be fabricated in China, Taiwan, USA, Korea, Japan, Indonesia, Malaysia, Thailand, Singapore, and the Czech Republic. In China the components are assembled into 13 different modules or sub-assemblies. The 13 modules are: 1) the bottom casing module, 2) top cover keypad module, 3,4) two fan modules (i.e. the blower module and system fan module), 5) lamp driver (ballast), 6) zoom ring module, 7) lamp module, 8) lamp cover module, 9) semi-finished optical engine module, 9) color wheel module, 10) main board module,11) color wheel module, 12) main board module, and 13) LVPS. The modules/subassemblies are shipped to Taiwan where they are assembled into the digital projectors.

According to your submission, the assembly, firmware programming, testing, and packing operations in Taiwan will consist of at least 220 steps and take no less than 11 hours and 48 minutes to complete. The Taiwanese assembly process itself consists of at least 55 steps, taking approximately 15.5 minutes. The assembly of the second and third digital projectors in Taiwan consists of the same basic processing steps as the first digital projector described previously.

The light source driver in Model A projectors is the ballast (lamp driver). The light source (lamp) in the Model A projectors is installed into the system (projector) after the top cover is assembled with bottom casing module.

The system firmware programming, power control firmware programming and EDID programming consists of at least 35 steps taking approximately 9.3 minutes to complete. All functions of the projectors also undergo extensive testing prior to being exported to the United States. The normal testing process includes 11 kinds of function tests and consists of at least 97 steps which will take approximately 11 hours and 13.6 minutes to perform.

Fourth and Fifth Digital Projector Models

In your submission of January 18, 2012, you provide a description of two other versions a digital projector, designated as Model B. The two versions of the digital projector Model B are substantially similar to Model C described above. The projectors have the same dimensions of 32.4 cm × 9.7 cm × 23.4 cm (W × H × D) and weigh 2.9 kg. The products are DLP projectors designed to use a HID arc lamp as the light source to project images and videos from computers or other video sources. One version of Model B can produce a diagonal image up to 303 inches, while the other version can produce a diagonal image up to 362 inches. Again, the main differences between the two digital projectors are the resolution of the projected image and the throw ratio which is defined as the distance (D) measured from lens to screen that a projector is placed from the screen, divided by the width (W) of the image that it will project (D/W).

There are five firmware files used in digital projectors: (1) the system firmware, (2) the power control firmware (i.e. 8051) microcontroller firmware (3) the EDID firmware, (4) the network firmware, and (5) the lamp driver firmware, which are developed and coded in Taiwan. The system firmware, power control firmware and EDID firmware are programmed into the corresponding ICs in Taiwan.

As in the scenario for the Model B projectors the same 13 modules will be assembled in China from components made in various countries and similarly, they will be shipped to Taiwan for final assembly into the digital projectors. Additionally, major functional parts, including the digital micro-mirror device (''DMD''), and DDP2431 data processor will originate in Taiwan.

The power control firmware and system firmware will be programmed into the ICs. The complete digital projector will be subject to five function tests in what is designated as the ''pre-test''. In addition, the digital projectors will be subject to a series of other tests. After finishing the six function tests in the ''post test'', the EDID firmware is programmed into the digital projectors to provide the identification of the digital projectors. When the digital projectors pass the ''post tests'', they will be sent to the packing department, where they will be packed together with the accessory kits.

The assembly, firmware programming, testing, and packing processes in Taiwan described consist of at least 211 steps taking no less than 2 hours and 59.6 minutes to complete, of which the assembly process consists of at least 68 steps taking approximately 10.6 minutes to complete. The assembly of the fourth and fifth digital projectors in Taiwan consists of the same basic processing steps as the other three digital projector described previously.

The light source driver in Model B projectors is the ballast (lamp driver). The light source (lamp) in the Models B projectors is installed into the system (projector) after the top cover is assembled with the bottom casing module.

The system firmware programming, power control firmware programming and EDID programming consist of at least 35 steps taking approximately 9.3 minutes to perform. All functions of the digital projectors undergo testing prior to exportation to the United States. The normal testing process includes 11 function tests and consists of at least 86 steps taking approximately 2 hours and 30.7 minutes.

ISSUE:

What is the country of origin of the digital projectors for purposes of U.S. government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States,* 573 F. Supp.

1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In *Data General v. United States,* 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The programming bestowed upon each circuit its electronic function, that is, its ''memory'' which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a U.S. project engineer with many years of experience in ''designing and building hardware.'' While replicating the program pattern from a ''master'' PROM may be a quick one-step process, the development of the pattern and the production of the ''master'' PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device, possessing a desired distinctive circuit pattern, was no less a ''substantial transformation'' than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In *Texas Instruments v. United States,* 681 F.2d 778, 782 (CCPA 1982), the court observed that the substantial transformation issue is a ''mixed question of technology and customs law.'' In Headquarters Ruling (HQ) 555578 dated June 11, 1990, overhead projectors were produced in Haiti from components of Belgian and U.S. origin, as well as from parts fabricated in Haiti. CBP concluded that the operations performed in Haiti constituted more than simple combining operations and resulted in a new and different article of commerce with a new name, character and use.

In HQ H114395, dated May 18, 2011, CBP considered the country of origin of a DLP projector that used LEDs as its light source for projecting photos and videos from mobile devices onto any surface. We were asked to consider two scenarios. In the first scenario, PCBA–ICs from Japan, Thailand, the U.S., Korea, and Malaysia; and fly eyes from Japan were shipped to China. Some Taiwanese origin components (DMDs, DPP 1505 chips, EPROM's, LEDs, and lenses) were also be shipped to China for assembly with Chinese-origin components (PCBs, projecting lenses, mirrors, and mechanical parts), the ICs, and fly eyes for making modules for the light engine and the PCBA main board. In China, two types of Taiwanese firmware for operating the projector were downloaded to memory chips located on the light engine and PCBA main board modules. The modules assembled in China were then shipped to Taiwan for quality inspections. In the second scenario, PCBA–ICs from Japan, Thailand, the U.S., Korea, and Malaysia; and fly eyes from Japan were shipped to Taiwan. The assembly and programming operations that took place in China, under the first scenario, were all performed in Taiwan. We determined that the light engine module and the PCBA main board were the essence of the projector, and it was at their production where the last substantial transformation occurred. Therefore, when the light engine module and PCBA main board module were assembled and programmed in China, the country of origin of the projectors was China for the purposes of U.S. government procurement. However, we also ruled that if the light engine module and PCBAs main board modules were assembled and programmed in Taiwan, then the country of origin of the projectors was Taiwan for purposes of U.S. government procurement

HQ H146735, (July 29, 2011), concerned a determination of the country of origin of two models of a digital projector, which were very similar to the products under consideration here. In that case, Chinese modules were assembled together into a projector in Taiwan. However, the projectors were designed and developed in Taiwan. Many of the main parts of the projectors, including the data processors were also fabricated in Taiwan. CBP determined that for purposes of government procurement the country of origin of the digital projectors assembled in Taiwan using the Chinese modules was Taiwan. In making this determination, CBP considered that the bottom cover module, elevator module, right cover module, I/O cover module, cosmetic module, two fan modules, lamp driver module programmed in China with Chinese firmware, zoom ring module, lamp module, lamp cover module, LAN module programmed in China with Taiwanese origin firmware, and the LVPS module from China were assembled together in Taiwan with other Chinese components to form a completed projector. After assembly was performed, the projector was programmed in Taiwan with three types of Taiwanese developed firmware (power control firmware, system firmware, and EDID). We found that the assembly and programming operations performed in Taiwan were sufficiently complex and meaningful so as to create a new article with a distinct name, character, and use. In support of this determination, we further noted that some of Chinese modules were made using Taiwanese parts. Thus, through the operations undertaken in Taiwan, we concluded that the individual parts from various countries lost their separate identities to become a new and different article, *i.e.,* the projector.

In our judgment, the five versions of the different models of digital projectors involved in this case closely resemble the digital projectors that we considered in HQ H147365. In addition, in this case the processing steps and programming operations performed in Taiwan are very similar to the actions undertaken in Taiwan in HQ H147365. Moreover, as in HQ H147365, we recognize that the most essential components of the LED projectors, the DMD and data processors, will be made in Taiwan.

Furthermore, the important firmware files, namely, the system firmware, power control firmware, lamp driver firmware, and EDID firmware are developed and coded in Taiwan. The programming of the ICs, to make the digital projectors functional through the interaction of modules and via the firmware files after the digital projectors have been assembled, is also done in Taiwan. We also note that as in HQ H147365, a number of the Chinese modules contain some significant Taiwanese parts. Thus, as in HQ H147365, we find that the assembly processed previously described and the programming operations performed in Taiwan are sufficiently complex and meaningful so as to create new articles with a distinct name, character, and use.

We note that there are some distinctions among the five different versions of the digital projectors under consideration. The projector Model A and projector Model B are the same type of digital projector with different resolutions and some different features. These four versions of the projectors are similar because they are lamp based projectors. Model C is a slightly different type of projector in that it is an LED based projector and does not require a color wheel module. However, we do not believe that these differences in the projectors are relevant in determining their country of origin. Consequently, in accordance with our holding in HQ H147365, we find that the country of origin of the specified five models of the finished digital projectors is Taiwan.

HOLDING:

Based on the facts presented in this case, we find that the assembly and programming operations performed in Taiwan substantially transform the non-Taiwanese components into Taiwanese digital projectors. Therefore, the country of origin of the five different versions of digital projectors described above for purposes of government procurement is Taiwan.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination.

Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication in the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell, Executive Director
Regulations and Rulings
Office of International Trade

[FR Doc. 2012–14182 Filed 6–11–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2012–0015]

Request for Applicants for Appointment to the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC)

AGENCY: U. S. Customs and Border Protection; Department of Homeland Security.

ACTION: Committee Management; Request for Applicants for Appointment to COAC.

SUMMARY: U.S. Customs and Border Protection (CBP) is requesting individuals who are interested in serving on the Advisory Committee on Commercial Operations of Customs and Border Protection to apply for appointment (COAC). COAC provides advice and makes recommendations to the Commissioner of CBP, the Secretary of the Department of Homeland Security, and the Secretary of the Treasury on all matters involving the commercial operations of CBP and related DHS and Treasury functions.

DATES: Applications for membership should reach CBP at the address below on or before July 27, 2012.

ADDRESSES: If you wish to apply for membership, your application should be submitted by one of the following means:

- *Email: Traderelations@dhs.gov.*
- *Fax:* 202–325–4290.
- *Mail:* Ms. Wanda Tate, Management & Program Analyst, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Room 5.2A, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Wanda Tate, Management & Program Analyst, 1300 Pennsylvania Avenue NW., Room 5.2A, *Wanda.Tate@dhs.gov,* 202–344–1661, 202–325–4290.

SUPPLEMENTARY INFORMATION: The Advisory Committee on Commercial Operations of Customs and Border Protection (COAC) is an advisory committee established in accordance with the provisions of the *Federal Advisory Committee Act* (FACA), 5 U.S.C. App. 2.

Balanced Membership Plans: The COAC consists of twenty members who are selected from representatives of the trade or transportation community served by U.S. Customs and Border Protection (CBP) or others who are directly affected by CBP commercial operations and related functions. The members shall represent the interests of either importers (and their agents) or those associated with the carriage of international freight. The members will be appointed by the Secretaries of the Department of Homeland Security and the Treasury from candidates recommended by the Commissioner of CBP. In addition, members will represent major regions of the country, and, by statute, not more than ten of the twenty Committee members may be affiliated with the same political party.

It is expected that, during its upcoming thirteenth two-year term, the Committee will consider issues relating to enhanced border and cargo supply chain security, CBP modernization and automation, informed compliance and compliance assessment, account-based processing, commercial enforcement and uniformity, international efforts to harmonize customs practices and procedures, strategic planning, northern border and southern border issues, and import safety.

Committee Meetings:

The Committee meets quarterly each year although additional meetings may be scheduled. Generally, every other meeting of the Committee is held outside of Washington, DC, usually at a CBP port of entry. The members are not reimbursed for travel and per diem.

Committee Membership:

Membership on the Committee is personal to the appointee and a member may not send an alternate to represent him or her at a Committee meeting. Appointees will serve a two-year term of office that will be concurrent with the duration of the charter.

No person who is required to register under the *Foreign Agents Registration Act* as an agent or representative of a foreign principal may serve on this advisory Committee. If you are Federal registered lobbyist you will not be eligible to apply for appointment.

Members who are currently serving on the Committee are eligible to re-apply for membership provided that they are not in their second consecutive term and that they have met attendance requirements. A new application letter (see **ADDRESSES** above) is required, but it may incorporate by reference materials previously filed (please attach courtesy copies). Members will not be paid compensation by the Federal

Government for their services with respect to the COAC.

Application for Advisory Committee Appointment

Any interested person wishing to serve on the (COAC) must provide the following:

- Statement of interest and reasons for application;
- Complete professional biography or resume;
- Home address and telephone number;
- Work address, telephone number, and email address;
- Political affiliation in order to ensure balanced representation. (Required by COAC's authorizing legislation; if no party registration or allegiance exists, indicate ''independent'' or ''unaffiliated.'');
- Statement of the industry you represent;
- Statement whether you are a Federally registered lobbyist;
- Statement agreeing to submit to pre-appointment background and tax checks (mandatory). However, a national security clearance is not required for the position.

The Department of Homeland Security (DHS) does not discriminate in employment on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions.

Dated: June 6, 2012.

David V. Aguilar,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2012–14183 Filed 6–11–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5374–N–41]

Buy American Exceptions Under the American Recovery and Reinvestment Act of 2009

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009 (Public Law 111–05, approved February 17, 2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that certain exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition (CFRFC) grant funds. Specifically, an exception was granted to the Hammond Housing Authority for the purchase and installation of Variable Refrigerant Flow (VRF) multi-split air conditioners and heat pumps for the Hubert H. Humphrey Hi-Rise project.

FOR FURTHER INFORMATION CONTACT: Donald J. LaVoy, Deputy Assistant Secretary for Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4112, Washington, DC 20410–4000, telephone number 202–402–8500 (this is not a toll-free number); or Dominique G. Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20410–4000, telephone number 202–402–8500 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: Section 1605(a) of the Recovery Act provides that none of the funds appropriated or made available by the Recovery Act may be used 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. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a Federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that, on May 14, 2012, upon request of the Hammond Housing Authority, HUD granted an exception to applicability of the Buy American requirements with respect to work, using CFRFC grant funds, in connection with the Hubert H. Humphrey Hi-Rise project. The exception was granted by HUD on the basis that the relevant manufactured goods (VRF multi-split air conditioners and heat pumps) are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality.

Dated: June 6, 2012.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2012–14298 Filed 6–11–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5600–FA–26]

Announcement of Funding Awards for the McKinney-Vento HMIS Technical Assistance (HMIS TA) Fiscal Year 2012

AGENCY: Office of the Assistant Secretary for Community Planning and Development, 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 in a competition for funding under the Notice of Funding Availability (NOFA) for the McKinney-Vento HMIS Technical Assistance program. This announcement contains the names of the awardees and amounts of the awards made available by HUD.

FOR FURTHER INFORMATION CONTACT: Julie Hovden, Director, Technical Assistance Division, Office of Community Planning and Development, 451 Seventh Street SW., Room 7218, Washington, DC 20410–7000; telephone 202–402–4496 (this is not a toll-free number). Persons with speech or hearing impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service during working hours at 800–877–8339. For general information on this and other HUD programs, visit HUD's Homelessness Resource Exchange at

www.hudhre.info, or HUD's Web site at *www.hud.gov*, or call Community

SUPPLEMENTARY INFORMATION: The Fiscal Year 2012 McKinney-Vento HMIS Technical Assistance program was designed to provide technical assistance to communities on the implementation and operation of homeless management information systems, including data collection and analysis and performance reporting through the selection of technical assistance (TA) providers for this program.

The competition was announced in the HMIS–TA NOFA published February 28, 2012 (FR–5600–N–26) and closed on March 29, 2012. The NOFA allowed for up to $7 million for Homeless Management Information System (HMIS) data collection, reporting and research, including the Annual Homeless Assessment Report (AHAR) TA activities. Applications were rated and selected for funding on the basis of selection criteria contained in the Notice. For the Fiscal Year 2012 competition, awards totaling $7,000,000 were awarded to five distinct technical assistance providers nationwide.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the grantees and the amounts of the awards in Appendix A to this document.

Dated: May 30, 2012.

Clifford D. Taffet,

General Deputy Assistant Secretary for Community Planning and Development.

Appendix A

Recipient	State	Amount
Abt Associates	MA	$2,007,100
ICF International	VA	1,782,000
Cloudburst Consulting Group	MD	1,482,800
National Center on Family Homelessness	VA	877,800
Training Development Associates	MA	850,300
Total		7,000,000

[FR Doc. 2012–14246 Filed 6–11–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5600–FA–32]

Announcement of Funding Awards for HUD's Fiscal Year 2011–2012 Technical Assistance and Capacity Building Under the Transformation Initiative (OneCPD TA and Core Curricula)

AGENCY: Office of the Assistant Secretary for Community Planning and Development, 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 in a competition for funding under the Notice of Funding Availability (NOFA) for the Technical Assistance and Capacity Building under the Transformation Initiative (OneCPD TA and Core Curricula) program. This announcement contains the names of the awardees and amounts of the awards made available by HUD.

FOR FURTHER INFORMATION CONTACT: Julie Hovden, Director, Technical Assistance Division, Office of Community Planning and Development, 451 Seventh Street SW., Room 7218, Washington, DC 20410–7000; telephone 202–402–4496 (this is not a toll-free number). Persons with speech or hearing impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service during working hours at 800–877–8339. For general information on this and other HUD programs, visit HUD's OneCPD Resource Exchange at *www.onecpd.info* or HUD's Web site at *www.hud.gov*.

SUPPLEMENTARY INFORMATION: The Fiscal Year 2011–2012 Technical Assistance and Capacity Building under the Transformation Initiative (OneCPD TA and Core Curricula) was designed to provide assessment tools, technical and capacity building assistance to state government, local government, and non-profit recipients of OneCPD TA and Core Curricula funding to achieve measureable outcomes through the selection of technical assistance (TA) providers for this program.

The competition was announced in the OneCPD TA and Core Curricula NOFA published February 14, 2012 (FR–5600–N–32) and closed on March 15, 2012. The NOFA allowed up to $61 million for OneCPD Technical Assistance, for technical assistance and capacity building activities for recipients, including state and local governments and non-profit organizations, receiving funds from the Office of Community Planning and Development (CPD), and up to $995,000 to develop, deliver and enhance Core Curricula in the areas of Development Finance, Environmental Review and Compliance, Asset Management and Preservation of HUD-Assisted Projects and Construction and Rehabilitation Management. Applications were rated and selected for funding on the basis of selection criteria contained in the Notice. For the Fiscal Year 2011–2012 competition, awards totaling $63,390,365 were awarded to 15 distinct technical assistance providers nationwide.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the grantees and the amounts of the awards in Appendix A to this document.

Dated: May 30, 2012.

Clifford D. Taffet,

General Deputy Assistant Secretary for Community Planning and Development.

Appendix A

Recipient	State	Award type	Amount
Abt Associates, Inc.	MA	OneCPD	$7,500,000
Capital Access, Inc.	PA	OneCPD	2,000,000
Cloudburst Consulting Group Inc.	MD	OneCPD	7,750,000
Cloudburst Consulting Group Inc.	MD	Core Curricula	125,000

Recipient	State	Award type	Amount
Dennison Associates, Inc.	DC	OneCPD	500,000
Econometrica, Inc.	MD	OneCPD	2,000,000
Enterprise Community Partners, Inc.	MD	OneCPD	8,500,000
Housing Assistance Council	DC	OneCPD	3,000,000
ICF International, Inc.	VA	OneCPD	9,405,950
Minnesota Housing Partnership	MN	OneCPD	2,000,000
National Association for Latino Community Asset Builders	TX	OneCPD	2,500,000
National Center on Family Homelessness	MA	OneCPD	4,550,000
National Center on Family Homelessness	MA	Core Curricula	650,000
National Council for Community Development, Inc	NY	OneCPD	500,000
Ohio Capital Corporation for Housing	OH	OneCPD	750,000
Technical Assistance Collaborative, Inc	MA	OneCPD	2,750,000
Training & Development Associates, Inc	NC	OneCPD	8,689,415
Training & Development Associates, Inc	NC	Core Curricula	220,000
Total—OneCPD			62,395,365
Total—Core Curricula			995,000
Total			63,390,365

[FR Doc. 2012–14250 Filed 6–11–12; 8:45 am]

BILLING CODE 4210–67–P

INTER-AMERICAN FOUNDATION BOARD MEETING

Sunshine Act Meetings

TIME AND DATE: June 25, 2012; 9:00 a.m.–1:15 p.m.

PLACE: 1331 Pennsylvania Ave. NW., 12th floor north, Suite 1200, Washington, DC 20004.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

- Approval of the Minutes of the March 26, 2012, Meeting of the Board of Directors
- Appointment of Board Secretary
- Appointment of Advisory Council Vice-Chair
- Management Report
- Strategic Planning Exercise
- Initial Fundraising Plan
- Web site Demo
- Next Meetings

PORTIONS TO BE OPEN TO THE PUBLIC:

- Approval of the Minutes of the March 26, 2012, Meeting of the Board of Directors
- Appointment of Board Secretary
- Appointment of Advisory Council Vice-Chair
- Management Report
- Strategic Planning Exercise
- Initial Fundraising Plan
- Web site Demo
- Next Meetings

CONTACT PERSON FOR MORE INFORMATION: Paul Zimmerman, General Counsel, (202) 683–7118.

Dated: June 8, 2012.

Paul Zimmerman,

General Counsel.

[FR Doc. 2012–14467 Filed 6–8–12; 4:15 pm]

BILLING CODE 7025–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Solicitation for Comments on the Proposed Realignment of the Division of Workforce Development From the Office of Indian Energy and Economic Development to the Office of the Deputy Director—Indian Services, Bureau of Indian Affairs

AGENCIES: Office of the Assistant Secretary—Indian Affairs and Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Office of the Assistant Secretary—Indian Affairs (AS–IA) is considering realigning the Division of Workforce Development (DWD), now located in the Office of Indian Energy and Economic Development (IEED) within AS–IA, to the Bureau of Indian Affairs, under the Office of the Deputy Director—Indian Services. This notice seeks comments on this proposed realignment from federally recognized American Indian Tribes and Alaska Native entities.

DATES: Interested persons are invited to submit comments on or before July 27, 2012.

ADDRESSES: You may submit comments on the information collection to Mr. Jack Stevens, Acting Director, Division of Workforce Development, Office of Indian Energy and Economic Development, U.S. Department of the Interior, Room 20—South Interior Building, 1951 Constitution Avenue NW., Washington, DC 20245, fax (202) 208–4564; email: *Jack.Stevens@bia.gov.*

FOR FURTHER INFORMATION CONTACT: You may request further information from Mr. Jack Stevens, Acting Director, Division of Workforce Development, Office of Indian Energy and Economic Development, U.S. Department of the Interior. Telephone: (202) 208–6764.

SUPPLEMENTARY INFORMATION:

I. Abstract

The AS–IA is considering realigning the DWD, now located in IEED, to the BIA, under the Office of the Deputy Director—Indian Services, to improve management efficiencies and strengthen the Public Law 102–477 demonstration project.

In 2005, DWD was realigned from the Office of Tribal Services (now the Office of the Deputy Director—Indian Services), BIA to the Office of Self-Governance. On August 29, 2006, it was realigned again, into IEED. The purpose of the action under consideration is to return DWD to the Office of the Deputy Director—Indian Services. This realignment will not result in any loss of funding or staff positions for DWD nor will it alter in any respect its responsibility to:

- Administer the Public Law 102–477 demonstration project under the Indian Employment, Training, and Related Services Demonstration Act of 1992, as amended, 25 U.S.C. 3401 *et seq.*
- Administer the Job Placement and Training Program under 25 CFR part 26
- Gather and publish population and employment data for the congressionally-mandated Labor Force Report pursuant to 25 U.S.C. 3416.

Rather, the realignment would reunite DWD with the Division of Human Services and the Division of Self-Determination, which perform complementary services and which are within the office of the Deputy Director—Indian Services.

DWD transmits welfare funding under the BIA's General Assistance Program and the Tribal Temporary Assistance to Needy Families Program (TANF); job placement and training aid under the Department of Health and Human Service's Native Employment Works Program (NEW) program, the Department of Labor's Workforce Investment Act (WIA), and the Department of Labor's Section 166 Comprehensive Services Program and its Section 166 Supplemental Youth Services Program; funding for child welfare and child protective services under the Child Care and Development Fund Program (CCDF); funding for school supplies under the BIE Johnson-O'Malley (JOM) programs; and funding for burial services under 25 CFR 20.324–20.326. These operations align with the Division of Human Services, which administers social service, welfare assistance, and American Indian child welfare matters.

DWD provides many of its funding awards through Public Law 93–638 contracts, which the Division of Self-Determination oversees. The Division of Self-Determination also provides Public Law 93–638 training and technical assistance to the BIA and tribes and certifies Awarding Officials who monitor the performance of Public Law 93–638 contracts.

For these operational reasons, AS–IA proposes to return DWD to its original home in the BIA.

Dated: May 31, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–14241 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–4M–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Seminole Nation of Oklahoma—Alcohol Control and Enforcement Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Seminole Nation of Oklahoma—Alcohol Control and Enforcement Ordinance. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Seminole Nation of Oklahoma's Indian country. This Ordinance allows for the possession and sale of alcoholic beverages within the jurisdiction of the Seminole Nation of Oklahoma, will increase the ability of the tribal government to control the distribution and possession of liquor within their Indian country, and at the same time, will provide an important source of revenue, the strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective 30 days after June 12, 2012.

FOR FURTHER INFORMATION CONTACT: Diane Buck, Acting Tribal Government Officer, Eastern Oklahoma Regional Office, Bureau of Indian Affairs, P.O. Box 8002, Muskogee, OK 74402, Phone: (918) 781–4685; Fax: (918) 781–4649: or De Springer, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street NW., MS–4513–MIB, Washington, DC 20240; Telephone (202) 513–7626.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The General Council of the Seminole Nation of Oklahoma adopted TO 2011–05, A Tribal Ordinance of the Seminole Nation of Oklahoma Amending Title 24 of the Seminole Nation Code of Laws and the Alcohol Control and Enforcement Ordinance Per the Request of the Bureau of Indian Affairs, on May 10, 2011.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the General Council of the Seminole Nation of Oklahoma passed and approved TO 20011–05 to amend Title 24 of the Seminole Nation Code of Laws and the Alcohol Control and Enforcement Ordinance on May 10, 2011.

Dated: May 31, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

The Seminole Nation of Oklahoma—Alcohol Control and Enforcement Ordinance, as amended, shall read as follows:

Section 701. Title

This Ordinance shall be known as the ''Seminole Nation of Oklahoma Alcohol Control and Enforcement Ordinance.''

Section 702. Authority

This Ordinance is enacted pursuant to Article V of the Constitution of the Seminole Nation of Oklahoma.

Section 703. Purpose

The purpose of this Ordinance is to regulate and control the manufacture, distribution, possession, and sale of Alcohol on Tribal lands of the Seminole Nation of Oklahoma. The enactment of this Ordinance will enhance the ability of the Seminole Nation of Oklahoma to control all such alcohol-related activities within the jurisdiction of the Tribe and will provide an important source of revenue for the continued operation and strengthening of the Seminole Nation of Oklahoma and the delivery of important governmental services.

Section 704. Application of Federal Law

Federal law forbids the introduction, possession and sale of liquor in Indian Country (18 U.S.C. § 1154 and other statutes), except when in conformity both with the laws of the State and the Tribe (18 U.S.C. § 1161). As such, compliance with this Ordinance shall be in addition to, and not a substitute for, compliance with the laws of the State of Oklahoma.

Section 705. Administration of Ordinance

The General Council, through its powers vested under Article V of the Constitution of the Seminole Nation of Oklahoma and this Ordinance, delegates to the Alcohol Regulatory Authority the authority to exercise all of the powers and accomplish all of the purposes as set forth in this Ordinance, which may include, but are not limited to, the following actions:

A. Adopt and enforce rules and regulations for the purpose of effectuating this Ordinance, which includes the setting of fees, fines and other penalties;

B. Execute all necessary documents; and

C. Perform all matters and actions incidental to and necessary to conduct its business and carry out its duties and functions under this Ordinance.

Section 706. Sovereign Immunity Preserved

A. The Tribe is immune from suit in any jurisdiction except to the extent that the General Council of the Seminole Nation of Oklahoma expressly and unequivocally waives such immunity by approval of such written resolution.

B. Nothing in this Ordinance shall be construed as waiving the sovereign

immunity of the Seminole Nation of Oklahoma or the Alcohol Regulatory Authority as an agency of the Seminole Nation of Oklahoma.

Section 707. Applicability

This Ordinance shall apply to all commercial enterprises located within Tribal lands consistent with applicable Federal Liquor Laws.

Section 708. Computation of Time

Unless otherwise provided in this Ordinance, in computing any period of time prescribed or allowed by this Ordinance, the day of the act, event, or default from which the designated period time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. For the purposes of this Ordinance, the term ''legal holiday'' shall mean all legal holidays under Tribal or Federal law. All documents mailed shall be deemed served at the time of mailing.

Section 709. Liberal Construction

Provisions of this Ordinance shall be liberally construed to achieve the purposes set forth, whether clearly stated or apparent from the context of the language used herein.

Section 710. Collection of Applicable Fees and Fines

The Alcohol Regulatory Authority shall have the authority to collect all applicable and lawful fees and fines from any person or Licensee as imposed by this Ordinance. The failure of any Licensee to pay all applicable fees or fines for the sale of Alcoholic Beverages shall subject the Licensee to penalties, including, but not limited to the revocation of said License.

Section 711. Matter of Special Interest

The manufacture, distribution, possession, sale, and consumption of Alcoholic Beverages within the jurisdiction of the Seminole Nation of Oklahoma are matters of significant concern and special interest to the Tribe. The General Council hereby declares that the policy of the Seminole Nation of Oklahoma is to eliminate the problems associated with unlicensed, unregulated, and unlawful importation, distribution, manufacture, possession and sale of Alcoholic Beverages for commercial purposes and to promote temperance in the use and consumption of Alcoholic Beverages by increasing the Tribe's control and enforcement of laws over such activities on Tribal lands.

Section 712. Federal Law

The introduction of Alcohol within the jurisdiction of the Tribe is currently prohibited by federal law (18 U.S.C. § 1154), except as provided for therein, and the Tribe is expressly delegated the right to determine when and under what conditions Alcohol, including Alcoholic Beverages, shall be permitted thereon (18 U.S.C. § 1161).

Section 713. Need for Regulation

The Tribe finds that the Federal Liquor Laws prohibiting the introduction, manufacture, distribution, possession, sale, and consumption of Alcoholic Beverages within the Tribal lands should be supplemented and that the problems associated with same should be addressed by the laws of the Tribe, with all such business activities related thereto subject to the regulatory authority of the Alcohol Regulatory Authority.

Section 714. Geographic Locations

The Tribe finds that the introduction, manufacture, distribution, possession, sale, and consumption of Alcohol, including Alcoholic Beverages, shall be regulated under this Ordinance only where such activity will be conducted within or upon Tribal lands.

Section 715. Definitions

As used in this Ordinance, the following words shall have the following meanings unless the context clearly requires otherwise:

A. ''Alcohol'' means the product of distillation of fermented liquid, whether or not rectified or diluted with water, including, but not limited to Alcoholic Beverages as defined herein, but does not mean ethyl or industrial alcohol, diluted or not, that has been denatured or otherwise rendered unfit for purposes of consumption by humans.

B. ''Alcohol Regulatory Authority'' means the three person subordinate committee established under this Chapter.

C. ''Alcoholic Beverage(s)'' when used in this Ordinance means, and shall include any liquor, beer, spirits, or wine, by whatever name they may be called, and from whatever source and by whatever process they may be produced, and which contain a sufficient percent of alcohol by volume which, by law, makes said beverage subject to regulation as an intoxicating beverage under the laws of the State of Oklahoma. Alcoholic Beverages include all forms of ''low-point beer'' as defined under the laws of the State of Oklahoma.

D. ''Applicant'' means any person who submits an application to the Alcohol Regulatory Authority for an Alcoholic Beverage License and who has not yet received such a License.

E. ''Constitution'' means the Constitution of the Seminole Nation of Oklahoma.

F. ''General Council'' means the duly elected legislative body of the Seminole Nation of Oklahoma authorized to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future.

G. ''Federal Liquor Laws'' means all laws of the United States of America that apply to or regulate in any way the introduction, manufacture, distribution, possession, or sale of any form of Alcohol, including, but not limited to 18 U.S.C. §§ 1154 & 1161.

H. ''Legal Age'' means twenty-one (21) years of age.

I. ''License'' or ''Alcoholic Beverage License'' means a license issued by the Alcohol Regulatory Authority authorizing the introduction, manufacture, distribution, or sale of Alcoholic Beverages for commercial purposes under the provisions of this Ordinance.

J. ''Licensee'' means a commercial enterprise that holds an Alcoholic Beverage License issued by the Alcohol Regulatory Authority and includes any employee or agent of the Licensee.

K. ''Liquor store'' means any business, store, or commercial establishment at which Alcohol is sold and shall include any and all businesses engaged in the sale of Alcoholic Beverages, whether sold as packaged or by the drink.

L. ''Manufacturer'' means any person engaged in the manufacture of Alcohol, including, but not limited to the manufacture of Alcoholic Beverages.

M. ''Oklahoma Liquor License'' means any license or permit issued by the State of Oklahoma, including any agency, subdivision, or county thereof, regulating any form of Alcohol, including, but not limited to any form of Alcoholic Beverage. Any license or permit issued for the sale or distribution of ''low-point beer'', as defined under Oklahoma law, shall be considered an ''Oklahoma Liquor License'' under this Ordinance.

N. ''Ordinance'' means this Seminole Nation of Oklahoma Alcohol Control Ordinance, as hereafter amended.

O. The words ''package'' or ''packaged'' means the sale of any Alcoholic Beverage by delivery of same by a seller to a purchaser in any container, bag, or receptacle for consumption beyond the premises or location designated on the seller's License.

P. ''Public place'' means and shall include any tribal, county, state, or

federal highways, roads, and rights-of-way; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; public restaurants, buildings, meeting halls, hotels, theaters, retail stores, and business establishments generally open to the public and to which the public is allowed to have unrestricted access; and all other places to which the general public has unrestricted right of access and that are generally used by the public. For the purpose of this Ordinance, ''public place'' shall also include any privately owned business property or establishment that is designed for or may be regularly used by more persons other than the owner of the same, but shall not include the private, family residence of any person.

Q. The words ''sale(s)'', ''sell'', or ''sold'' mean the exchange, barter, traffic, furnishing, or giving away for commercial purpose of any Alcoholic Beverage by any and all means, by whatever name commonly used to describe the same, by any commercial enterprise or person to another person.

R. ''Tribal Court'' means the Courts of the Seminole Nation of Oklahoma, as established under the Constitution of the Seminole Nation of Oklahoma and/or any other administrative Tribal Court established by a General Council Ordinance.

S. ''Tribal land(s)'' shall mean and reference the geographic area that includes all land included within the definition of ''Indian country'' as established and described by federal law and that is under the jurisdiction of the Seminole Nation of Oklahoma, including, but not limited to all lands held in trust by the federal government, located within the same, as are now in existence or may hereafter be added to.

T. ''Tribal law'' means the Constitution of the Seminole Nation of Oklahoma and all laws, ordinances, codes, resolutions, and regulations now and hereafter duly enacted by the Tribe.

U. ''Tribe'' shall mean the Seminole Nation of Oklahoma.

Section 716. Prohibition of the Unlicensed Sale of Alcoholic Beverages

This Ordinance prohibits the introduction, manufacture, distribution, or sale of Alcoholic Beverages for commercial purposes, other than where conducted by a Licensee in possession of a lawfully issued License in accordance with this Ordinance. The Federal Liquor Laws are intended to remain applicable to any act or transaction that is not authorized by this Ordinance, and violators shall be subject to all penalties and provisions of any and all Federal and or Tribal laws.

Section 717. License Required

A. Any and all sales of Alcoholic Beverages conducted upon Tribal lands shall be permitted only where the seller: (i) holds a current Alcoholic Beverage License, duly issued by the Alcohol Regulatory Authority; and (ii) prominently and conspicuously displays the License on the premises or location designated on the license.

B. A Licensee has the right to engage only in those activities involving Alcoholic Beverage expressly authorized by such License in accordance with this Ordinance.

Section 718. Sales for Cash

All sales of Alcoholic Beverages conducted by any person or commercial enterprise upon Tribal lands shall be conducted on a cash-only basis, and no credit for said purchase and consumption of same shall be extended to any person, organization, or entity, except that this provision does not prohibit the payment of same by use of credit cards acceptable to the seller (including but not limited to VISA, MasterCard, or American Express).

Section 719. Personal Consumption

All sales of Alcoholic Beverages shall be for the personal use and consumption of the purchaser and or his/her guest(s) of Legal Age. The re-sale of any Alcoholic Beverage purchased within or upon Tribal lands by any person or commercial enterprise not licensed as required by this Ordinance is prohibited.

Section 720. Tribal Enterprises

No employee or operator of a commercial enterprise owned by the Tribe shall sell or permit any person to open or consume any Alcoholic Beverage on any premises or location, or any premises adjacent thereto, under his or her control, unless such activity is properly licensed as provided in this Ordinance.

Section 721. Licensing Eligibility

Only Applicants operating upon Tribal lands shall be eligible to receive a License for the sale of any Alcoholic Beverage under this Ordinance.

Section 722. Licensing Application Process

A. The Alcohol Regulatory Authority may cause a License to be issued to any Applicant as is it may deem appropriate, but not contrary to the best interests of the Tribe and its Tribal members. Any Applicant that desires to receive any Alcoholic Beverage License, and that meets the eligibility requirements pursuant to this Ordinance, must apply to the Alcohol Regulatory Authority for the desired class of License. Any such person as may be empowered to make such application, shall: (i) fully and accurately complete the application provided by the Alcohol Regulatory Authority; (ii) pay the Alcohol Regulatory Authority such application fee as may be required; and (iii) submit such application to the Alcohol Regulatory Authority for consideration.

B. All application fees paid to the Alcohol Regulatory Authority are nonrefundable upon submission of any such application. Each application shall require the payment of a separate application fee.

Section 723. Term and Renewal of Licenses

A. The term of all Licenses issued under this Ordinance shall be for a period not to exceed one (1) year from the original date of issuance and may be renewed thereafter on a year-to-year basis, in compliance with this Ordinance and any rules and/or regulations hereafter adopted by the Alcohol Regulatory Authority.

B. Each License may be considered for renewal by the Alcohol Regulatory Authority annually upon the Licensee's submission of a new application and payment of all fees. Such renewal application shall be submitted to the Alcohol Regulatory Authority at least thirty (30) days and no more than ninety (90) days prior to the expiration of an existing License. If a License is not renewed prior to its expiration, the Licensee shall cease and desist all activity as permitted under the License, including the sale of any Alcoholic Beverages, until the renewal of such License is properly approved by the Alcohol Regulatory Authority. The Alcohol Regulatory Authority, in its sole discretion, may issue a Temporary License to an Applicant in lieu of a renewal License for such time period as is necessary for the Alcohol Regulatory Authority to compete its regulatory processes prior to the approval of a renewal License.

Section 724. Classes of Licenses

The Alcohol Regulatory Authority shall have the authority to issue the following classes of Alcoholic Beverage License:

A. ''Retail On-Site General License'' authorizing the Licensee to sell Alcoholic Beverages at retail to be consumed by the buyer only on the premises or location designated in the License. This class of License includes, but is not limited to, hotels where Alcoholic Beverages may be sold for

consumption on the premises and in the rooms of bona fide registered guests.

B. ''Retail On-Site Beer and Wine License'' authorizing the Licensee to sell only beer and wine at retail to be consumed by the buyer only on the premises or location designated in the License. This class of License includes, but is not limited to, hotels where beer and/or wine may be sold for consumption on the premises and in the rooms of bona fide registered guests.

C. ''Retail Off-Site General License'' authorizing the Licensee to sell Alcoholic Beverages at retail to be consumed by the buyer off of the premises or at a location other than the one designated in the License.

D. ''Retail Off-Site Beer and Wine License'' authorizing the Licensee to sell only beer and wine at retail to be consumed by the buyer off of the premises or at a location other than the one designated in the License.

E. ''Manufacturer's License'' authorizing the Applicant to manufacture Alcoholic Beverages for the purpose of wholesale to retailers on or off Tribal lands, but not authorizing the sale of Alcoholic Beverages at retail.

F. ''Temporary License'' authorizing the sale of Alcoholic Beverages on a temporary basis for premises or at a location temporarily occupied by the Licensee for a picnic, social gathering, or similar occasion. A Temporary Licenses may not be renewed upon expiration. A new application must be submitted for each such License.

Section 725. Application Form and Content

An application for any License shall be made to the Alcohol Regulatory Authority and shall contain at least the following information:

A. The name and address of the Applicant, including the names and addresses of all of the principal officers, directors, managers, and other employees with primary management responsibility related to the sale of Alcoholic Beverages;

B. The specific area, location, and/or premise(s) for which the License is applied;

C. The hours that the Applicant will sell the Alcoholic Beverages;

D. For Temporary Licenses, the dates for which the License is sought to be in effect;

E. The class of Alcoholic Beverage License applied for, as set forth in Section 724 herein;

F. Whether the Applicant has an Oklahoma Liquor License;

G. A sworn statement by the Applicant to the effect that none of the Applicant's officers, directors, managers, and or employees with primary management responsibility related to the sale of Alcoholic Beverages, have ever been convicted of a felony under the law of any jurisdiction, and have not violated and will not violate or cause or permit to be violated any of the provisions of this Ordinance; and

H. The application shall be signed and verified by the Applicant under oath and notarized by a duly authorized representative.

Section 726. Public Hearing

A. Upon receipt of an application for issuance or renewal of a License, and the payment of any fees required by the Alcohol Regulatory Authority, the Alcohol Regulatory Authority shall set the consideration of such application for a public hearing. Notice of the time and place of such hearing shall be mailed to the Applicant and provided to the public at least twenty (20) calendar days before the date of the hearing. Notice shall be mailed to the Applicant by prepaid U.S. mail at the address listed in the application. Notice shall be provided to the public by publication in a newspaper of general circulation within the jurisdiction of the Tribe. The notice published in the newspaper shall include: (i) The name of the Applicant; (ii) whether the hearing will consider a new License issuance or renewal of an existing License; (iii) the class of License applied for; and (iv) an address and general description of the area where the Alcoholic Beverages will be or have been sold.

B. At such hearings, the Alcohol Regulatory Authority shall hear from any person who wishes to speak for or against the application, subject to the limitation in paragraph (C) of this section, and any other limitations herein.

C. The Alcohol Regulatory Authority shall have the authority to place time limits on each speaker and limit or prohibit repetitive testimony.

Section 727. Action on the Application

The Alcohol Regulatory Authority shall act on the matter within thirty (30) days of the conclusion of the public hearing. The Alcohol Regulatory Authority shall have the authority to deny, approve, or approve with conditions the application, consistent with this Ordinance and the laws of the Tribe. Upon approval of an application, the Alcohol Regulatory Authority shall issue a License to the Applicant in a form to be approved from time to time by the Alcohol Regulatory Authority.

Section 728. Denial of License or Renewal

An application for a new License or License renewal may be denied for one or more of the following reasons.

A. The Applicant materially misrepresented facts contained in the application;

B. The Applicant is currently not in compliance with this Ordinance or any other Tribal or Federal laws;

C. Granting of the License, or renewal thereof, would create a threat to the peace, safety, morals, health, or welfare of the Tribe;

D. The Applicant has failed to complete the application properly or has failed to tender the appropriate fee;

E. A verdict or judgment has been entered against or a plea of nolo contendere has been entered by an Applicants' officer, director, manager, or any other employee with primary management responsibility related to the sale of Alcoholic Beverages, to any offense under Tribal, Federal, or State laws prohibiting or regulating the sale, use, possession or giving away of Alcoholic Beverages.

Section 729. Temporary Denial of License

If the application is denied solely on the basis of Section 728.D., the Alcohol Regulatory Authority shall, within fourteen (14) days of such action, deliver in person or by mail a written notice of temporary denial to the Applicant. Such notice of temporary denial shall: (i) Set forth the reason(s) for denial; and (ii) state that the temporary denial will become a permanent denial if the reason(s) for denial are not corrected within fifteen (15) days following the mailing or personal delivery of such notice.

In the case of denial of a renewal, the Alcohol Regulatory Authority, in its sole discretion, may issue a Temporary License to an Applicant in lieu of a renewal License for such time period as is necessary for the Applicant to cure such deficiency as has been identified under Section 728.D., and for such time period is necessary for the Alcohol Regulatory Authority to compete its regulatory processes prior to the approval of a renewal License.

Section 730. Cure

If an Applicant is denied a License, the Applicant may cure the deficiency and resubmit the application for consideration. Each re-submission will be treated as a new application for License or renewal of a License, and the appropriate fee shall be due upon re-submission.

Section 731. Investigation

Upon receipt of an application for the issuance, transfer, or renewal of a License, the Alcohol Regulatory Authority shall make a thorough investigation to determine whether the Applicant and the premises or location for which a License is applied for qualifies for a License, and whether the provisions of this Ordinance have been complied with. The Alcohol Regulatory Authority shall investigate all matters connected therewith which may affect Law Enforcement, public health, welfare, and morals.

Section 732. Procedures for Appealing a Denial or Condition of Application

Any Applicant for a License or Licensee who believes the denial of their License, request for renewal, or condition imposed on their License was wrongfully determined may appeal the decision of the Alcohol Regulatory Authority in accordance with the Alcohol Regulatory Authority Rules and Regulations.

Section 733. Revocation of License

The Alcohol Regulatory Authority may initiate action to revoke a License whenever it is brought to the attention of the Alcohol Regulatory Authority that a Licensee:

A. Has materially misrepresented facts contained in any License application;

B. Is not in compliance with this Ordinance or any other Tribal or Federal laws material to the issue of Alcohol licensing;

C. Failed to comply with any condition of a License, including failure to pay any fee required under this Ordinance;

D. Has had a verdict, or judgment entered against, or has had a plea of nolo contendere entered by any of its officers, directors, managers or any employees with primary responsibility over the sale of Alcoholic Beverages, as to any offense under Tribal, Federal or State laws prohibiting or regulating the sale, use, or possession, of Alcoholic Beverages;

E. Failed to take reasonable steps to correct objectionable conditions constituting a nuisance on the premises or location designated in the License, or any adjacent area under their control, within a reasonable time after receipt of a notice to make such corrections has been mailed or personally delivered by the Alcohol Regulatory Authority; or

F. Has had their Oklahoma Liquor License suspended or revoked.

Section 734. Initiation of Revocation Proceedings

Revocation proceedings may be initiated by either: (i) The Alcohol Regulatory Authority, on its own motion and through the adoption of an appropriate resolution meeting the requirements of this section; or (ii) by any person who files a complaint with the Alcohol Regulatory Authority. The complaint shall be in writing and signed by the maker. Both the complaint and resolution shall state facts showing that there are specific grounds under this Ordinance, which would authorize the Alcohol Regulatory Authority to revoke the License(s). The Alcohol Regulatory Authority shall cause the consideration of such revocation to be set for a public hearing before the Alcohol Regulatory Authority on a date no later than thirty (30) days from the Alcohol Regulatory Authority's receipt of a complaint or adoption of a resolution. Notice of the time, date, and place of such hearing shall be provided to the Licensee and the public in the same manner as set forth in section 726 herein. The notice of such hearing shall state that the Licensee has the right to file a written response to the complaint or resolution with the Alcohol Regulatory Authority, verified under oath and signed by the Licensee, no later than ten (10) days prior to the hearing date.

Section 735. Revocation Hearing

Any hearing held on any complaint shall be held under such rules and regulations as the Alcohol Regulatory Authority may prescribe. Both the Licensee and the person filing the complaint shall have the right to present witnesses to testify and to present written documents in support of their positions to the Alcohol Regulatory Authority. The Alcohol Regulatory Authority shall render its decision within sixty (60) days after the date of the hearing. The decision of the Alcohol Regulatory Authority shall be final.

Section 736. Delivery of License

Upon revocation of a License, the Licensee shall forthwith deliver their License to the Alcohol Regulatory Authority.

Section 737. Transferability of Licenses

Alcoholic Beverage Licenses shall be issued to a specific Licensee for use at a single premises or location (business enterprise) and shall not be transferable for use by any other premises or location. Separate Licenses shall be required for each of the premises of any Licensee having more than one premises or location where the sale, distribution, or manufacture of Alcoholic Beverages may occur.

Section 738. Posting of License

Every Licensee shall post and keep posted its License(s) in a prominent and conspicuous place(s) on the premises or location designated in the License. Any License posed on a premises or location not designated in such License shall not be considered valid and shall constitute a separate violation of this Ordinance.

Section 739. Appointment of Alcohol Regulatory Authority Subordinate Committee

Two members of the subordinate committee shall be appointed by the Principal Chief and approved by a majority of the General Council pursuant to Article 3, Section 4 of the Constitution. The Chief of Police shall serve as the 3rd member of the subordinate committee. The Principal Chief and Assistant Chief shall serve as an ex-officio member of the Alcohol Regulatory Authority subordinate committee. Terms of office shall be for four years. Other than the Chief of Police, no voting member of the Alcohol Regulatory Authority shall be an elected official of the Seminole Nation of Oklahoma or an employee of the Seminole Nation of Oklahoma during his or her term of office on the Alcohol Regulatory Authority.

Section 740. Alcohol Regulatory Authority

In furtherance of this Ordinance, the Alcohol Regulatory Authority shall have exclusive authority to administer and implement this Ordinance and shall have the following powers and duties hereunder:

A. To adopt and enforce rules and regulations governing the sale, manufacture, distribution, and possession of Alcoholic Beverages within the Tribal lands of the Seminole Nation of Oklahoma;

B. To request and provide payment for services of the Seminole Nation of Oklahoma Division of Commerce to perform all administrative and regulatory responsibilities of the Alcohol Regulatory Authority hereunder other than those responsibilities specifically delegated to the members of the subcommittee comprising the Alcohol Regulatory Authority;

C. To issue Licenses permitting the sale, manufacture, distribution, and possession of Alcoholic Beverages within the Tribal lands;

D. To give reasonable notice and to hold hearings on violations of this Ordinance, and for consideration of the

issuance or revocation of Licenses hereunder;

E. To deny applications and renewals for Licenses and revoke issued Licenses as provided in this Ordinance;

F. To bring such other actions as may be required to enforce this Ordinance;

G. To prepare and deliver such reports as may be required by law or regulation; and

H. To collect fees and penalties as may be required, imposed, or allowed by law or regulation, and to keep accurate books, records, and accounts of the same.

Section 741. Right of Inspection

Any premises or location of any commercial enterprise licensed to manufacture, distribute, or sell Alcoholic Beverages pursuant to this Ordinance shall be open for inspection by the Alcohol Regulatory Authority for the purpose of insuring the compliance or noncompliance of the Licensee with all provisions of this Ordinance and any applicable Tribal laws or regulations.

Section 742. Limitation on Powers

In the exercise of its powers and duties under this Ordinance, agents, employees, or any other affiliated persons of the Alcohol Regulatory Authority shall not, whether individually or as a whole:

A. Accept any gratuity, compensation, or other thing of value from any Alcoholic Beverage wholesale, retailer, or distributor, or from any Applicant or Licensee; or

B. Waive the sovereign immunity of the Seminole Nation of Oklahoma, or of any agency, commission, or entity thereof without the express written consent by resolution of the General Council of the Seminole Nation of Oklahoma.

Section 743. The Annual Fee Schedule for Each Class of Alcoholic Beverage License is as Follows

A. Retail On-Site General License: $2,000.00.

B. Retail On-Site Beer and Wine License: $1,500.00.

C. Retail Off-Site General License: $1,000.00.

D. Retail Off-Site Beer and Wine License: $500.00.

E. Manufacturer's License: $250.00.

F. Temporary License: $100.00 per event. No annual License available.

Section 744. Renewal Fees and Late Charge Fine

Payment of the Annual Fee for Renewal Licenses is due prior to the date of expiration of the License. Past due Renewal Fees shall be assessed a Late Charge Fine equal to 10% of the annual License Fee per month until paid. Failure to pay the Annual Fee, Renewal Fee or Late Charge Fine shall result in revocation of the License.

Section 745. Manufacture, Sale, or Distribution Without License

Any person who manufactures, distributes, sells, or offers for sale or distribution, any Alcoholic Beverage in violation of this Ordinance, or who operates any commercial enterprise on Tribal lands that has Alcoholic Beverages for sale or in their possession without a proper License properly posted, as required in section 738, shall be in violation of this Ordinance.

Section 746. Unlawful Purchase

Any person who purchases any Alcoholic Beverage on Tribal lands from a person or commercial enterprise that does not have a License to manufacture, distribute, or sell Alcoholic Beverages properly posted shall be in violation of this Ordinance.

Section 747. Intent To Sell

Any person who keeps, or possesses, or causes another to keep or possess, upon his person or any premises within his control, any Alcoholic Beverage, with the intent to sell or to distribute the same contrary to the provisions of this Ordinance, shall be in violation of this Ordinance.

Section 748. Sale to Intoxicated Person

Any person who knowingly sells or serves an Alcoholic Beverage to a person who is visibly intoxicated shall be in violation of this Ordinance.

Section 749. Public Conveyance

Any person engaged in the business of carrying passengers for hire, and every agent, servant, or employee of such person, who shall knowingly permit any person to consume any Alcoholic Beverage in any such public conveyance shall be in violation of this Ordinance.

Section 750. Age of Consumption

No person under the age of twenty-one (21) years may possess or consume any Alcoholic Beverage on Tribal lands, and any such possession or consumption shall be in violation of this Ordinance.

Section 751. Serving Underage Person

No person shall sell or serve any Alcoholic Beverage to a person under the age of twenty-one (21) or permit any such person to possess or consume any Alcoholic Beverages on the premises or on any premises under their control. Any Licensee violating this section shall be guilty of a separate violation of this Ordinance for each and every Alcoholic Beverage sold or served and or consumed by such an underage person.

Section 752. False Identification

Any person who purchases or who attempts to purchase any Alcoholic Beverage through the use of false, or altered identification that falsely purports to show such person to be over the age of twenty-one (21) years shall be in violation of this Ordinance.

Section 753. Documentation of Age

Any seller or server of any Alcoholic Beverage shall be required to request proper and satisfactory documentation of age of any person who appears to be thirty-five (35) years of age or younger. When requested by a seller or server of Alcoholic Beverages, every person shall be required to present proper and satisfactory documentation of the bearer's age, signature, and photograph prior to the purchase or delivery of any Alcoholic Beverage. For purposes of this Ordinance, proper and satisfactory documentation shall include one or more of the following:

A. Driver's License or personal identification card issued by any state department of motor vehicles or tribal or federal government agency;

B. United States active duty military credentials;

C. Passport.

Any seller, server, or person attempting to purchase an Alcoholic Beverage, who does not comply with the requirements of this section shall be in violation of this Ordinance and subject to civil penalties, as determined by the Alcohol Regulatory Authority.

Section 754. General Penalties

Any person or commercial enterprise determined by the Alcohol Regulatory Authority to be in violation of this Ordinance, including any lawful regulation promulgated pursuant thereto, shall be subject to a civil penalty of not more than Five Hundred Dollars ($500.00) for each such violation, except as provided herein. The Alcohol Regulatory Authority may adopt by resolution a separate written schedule for fines for each type of violation, taking into account the seriousness and threat the violation may pose to the general public health and welfare. Such schedule may also provide, in the case of repeated violations, for imposition of monetary penalties greater than the Five Hundred Dollars ($500.00) per violation limitation set forth above. The civil penalties provided for herein shall be in addition to any criminal penalties that

may be imposed under any other Tribal, Federal, or State laws.

Section 755. Initiation of Action

Any violation of this Ordinance shall constitute a public nuisance. The Alcohol Regulatory Authority may initiate and maintain an action in Tribal Court or any court of competent jurisdiction to abate and permanently enjoin any nuisance declared under this Ordinance. Any action taken under this section shall be in addition to any other civil penalties provided for in this Ordinance. The Alcohol Regulatory Authority shall not be required to post any form of bond in such action.

Section 756. Contraband; Seizure; Forfeiture

A. All Alcoholic Beverages held, owned, or possessed within Tribal lands by any person, commercial enterprise, or Licensee operating in violation of this Ordinance are hereby declared to be contraband and subject to seizure and forfeiture to the Tribe.

B. Seizure of contraband as defined in this Ordinance shall be done by the Alcohol Regulatory Authority, with the assistance of Law Enforcement, and all such contraband seized shall be inventoried and maintained by the Alcohol Regulatory Authority pending a final order of the Alcohol Regulatory Authority. The owner of the contraband seized may alternatively request that the contraband seized be sold and the proceeds received there from be maintained by Law Enforcement pending a final order of the Alcohol Regulatory Authority. The proceeds from such a sale are subject to forfeiture in lieu of the seized contraband.

C. Within ten (10) days following the seizure of such contraband, a hearing shall be held by the Alcohol Regulatory Authority, at which time the operator or owner of the contraband shall be given an opportunity to present evidence in defense of his or her activities.

D. Notice of the hearing of at least ten (10) days shall be given to the person from whom the property was seized and the owner, if known. If the owner is unknown, notice of the hearing shall be posted at the place where the contraband was seized and at other public places on Tribal lands. The notice shall describe the property seized, and the time, place, and cause of seizure, and list the name and place of residence, if known, of the person from whom the property was seized. If upon the hearing, the evidence warrants, or, if no person appears as a claimant, the Alcohol Regulatory Authority shall thereupon enter a judgment of forfeiture, and all such contraband shall become the property of the Seminole Nation of Oklahoma. If upon the hearing the evidence does not warrant forfeiture, the seized property shall be immediately returned to the owner.

Section 757. Nuisance

Any room, house, building, vehicle, structure, premises, or other location where Alcoholic Beverages are sold, manufactured, distributed, bartered, exchanged, given away, furnished, or otherwise possessed or disposed of in violation of this Ordinance, or of any other Tribal, Federal, or State laws related to the transportation, possession, distribution or sale of Alcoholic Beverages, and including all property kept therein, or thereon, and used in, or in connection with such violation is hereby declared to be a nuisance upon any second or subsequent violation of the same.

Section 758. Action to Abate Nuisance

Upon a determination by the Alcohol Regulatory Authority that any such place or activity is a nuisance under any provision of this Ordinance, the Tribe or the Alcohol Regulatory Authority may bring a civil action in the Tribal Court to abate and to perpetually enjoin any such activity declared to be a nuisance. Such injunctive relief may include a closure of any business or other use of the property for up to one (1) year from the date of the such injunctive relief, or until the owner, lessee or tenant shall: (i) give bond of no less than Twenty-Five Thousand dollars ($25,000) to be held by the Alcohol Regulatory Authority and be conditioned that any further violation of this Ordinance or other Tribal laws will result in the forfeiture of such bond; and (ii) pay of all fines, costs and assessments against him/her/it. If any condition of the bond is violated, the bond shall be forfeit and the proceeds recoverable by the Alcohol Regulatory Authority through an order of the Tribal Court. Any action taken under this section shall be in addition to any other civil penalties provided for in this Ordinance.

Section 759. Use and Appropriation of Revenue Received

All fees, payments, fines, costs, assessments, and any other revenues collected by the Alcohol Regulatory Authority under this Ordinance, from whatever sources, shall be expended first for the administrative costs incurred in the administration and enforcement of this Ordinance including costs of Law Enforcement. Any excess funds shall be subject to and available for appropriation by the Alcohol Regulatory Authority to the Tribe for essential governmental and social services related to drug and alcohol education, counseling and treatment.

Section 760. Audit

The Alcohol Regulatory Authority and its handling of all funds collected under this Ordinance is subject to review and audit by the Tribe as part of the annual financial audit of the Alcohol Regulatory Authority.

Section 761. Reports

The Alcohol Regulatory Authority shall submit to the General Council a quarterly report and accounting of all fees, payments, fines, costs, assessments, and all other revenues collected and expended pursuant to this Ordinance.

Section 762. Severability

If any provision or application of this Ordinance is found invalid and or unenforceable by a court of competent jurisdiction, such determination shall not be held to render ineffectual any of the remaining provisions or applications of this Ordinance not specifically identified thereby, or to render such provision to be inapplicable to other persons or circumstances.

Section 763. Construction

Nothing in this Ordinance shall be construed to diminish or impair in any way the rights or sovereign powers of the Seminole Nation of Oklahoma.

Section 764. Effective Date

This Ordinance shall be effective upon certification by the Secretary of the Interior, publication in the **Federal Register** and recorded in the office of the Clerk of the Tribal Court.

Section 765. Prior Law Repealed

Any and all prior enactments of the Seminole Nation of Oklahoma that are inconsistent with the provisions of this Ordinance are hereby rescinded.

Section 766. Amendment

This Ordinance may only be amended by written resolution approved by the General Council.

[FR Doc. 2012–14248 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Stillaguamish Tribe of Indians—Liquor Control Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Stillaguamish Tribe of Indians' Liquor Control Ordinance. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Stillaguamish Tribe of Indians' Indian country. This Ordinance allows for the possession and sale of alcoholic beverages within the jurisdiction of the Stillaguamish Tribe of Indians, will increase the ability of the tribal government to control the distribution and possession of liquor within their Indian country, and at the same time, will provide an important source of revenue, the strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective 30 days after June 12, 2012.

FOR FURTHER INFORMATION CONTACT: Betty Scissons, Tribal Government Specialist, Northwest Regional Office, Bureau of Indian Affairs, 911 NE. 11th Avenue, Portland, OR 97232, Phone: (503) 231–6723; Fax: (503) 231–6731; or De Springer, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street NW., MS–4513–MIB, Washington, DC 20240; Telephone (202) 513–7626.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Stillaguamish Tribe of Indians' Board of Directors adopted Resolution 2012/019, Re-affirming Resolution 2011–162 Approving and Adopting the Stillaguamish Tribe of Indians Liquor Control Ordinance, with Minor Typographical Changes Herein, on January 31, 2012.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the Stillaguamish Tribe of Indians' Board of Directors adopted Resolution 2012/019 to enact a new Liquor Control Ordinance on January 31, 2012.

Dated: May 31, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

The Stillaguamish Tribe of Indian Liquor Control Ordinance, as amended, shall read as follows:

General Provisions

3.06.600 General Purpose

The Stillaguamish Tribe of Indians (Tribe) has a significant interest in protecting the health, safety and general welfare of its members, the residents within the Tribe's Indian Country and those persons and businesses doing business on and/or visiting the Tribe's Indian Country. The purpose of the Ordinance is to exercise the Tribe's jurisdiction to regulate the sale, distribution and taxation of liquor within the Tribe's Indian Country in conformity with any compact between the Tribe and the State of Washington, Article 10 of the Treaty of Point Elliott of 1855, 12 Stat. 927, to which the Tribe is a party, and in conformity with 18 U.S.C. 1161, and to raise revenues to fund health, safety and general welfare programs and services provided to Tribal members and residents of and visitors to land within the Tribe's territorial jurisdiction.

The authority to protect the Tribe as a sovereign political entity and to adopt the Ordinance codified herein is vested in the Stillaguamish Tribe of Indians, Board of Directors under Article IV and Article VII, Sec. 1 of the Constitution, which Board has enumerated authority under Article VII, Sec. 1(a) to enact a comprehensive law and order code, which provides for Tribal civil and criminal jurisdiction; under Article VII, Sec. 1(b) to administer the affairs and assets of the Tribe, including Tribal lands and funds; under Article VII, Section 1(d) to provide for taxes, assessments, permits and license fees upon members and non-members within the Tribe's jurisdiction; and under Article VII, Sec. 1(h), to exercise other necessary powers to fulfill the Board's obligations, responsibilities and purposes as the governing body of the Tribe; and in the inherent sovereignty of the Stillaguamish Tribe of Indians to regulate its own territory and activities therein.

The need exists for strict Tribal regulation and control over liquor distribution, sales and taxation within the Tribe's Indian Country. Therefore, in the public interest and for the welfare of the people of the Stillaguamish Tribe of Indians, its employees, the residents of and visitors to Indian Country, the Stillaguamish Board of Directors, in the exercise of its authority under the Tribe's Constitution, declares its purpose by the provisions of this Subchapter to regulate the sale and distribution of liquor.

3.06.601 Scope

(1) This Subchapter shall apply to the full extent of the sovereign jurisdiction of the Tribe.

(2) Compliance with this Subchapter is hereby made a condition of the use of any land or premises within the Tribe's Indian Country.

(3) Any person who resides, conducts business, engages in a business transaction, receives benefits from the Tribe, acts under Tribal authority, or enters the Tribe's Indian Country shall be deemed to have consented to the following:

(a) To be bound by the terms of this Subchapter;

(b) To the exercise of the exclusive jurisdiction of the Stillaguamish Tribal Court for legal actions arising pursuant to this Subchapter; and

(c) To detainment, service of summons and process, and search and seizure, in conjunction with legal actions arising pursuant to this Subchapter.

(4) No portion of this Ordinance and Subchapter shall be construed as contrary to Federal law.

3.06.602 Repeal of Prior Liquor Control Laws

(1) All ordinances and resolutions of the Tribe regulating, authorizing, prohibiting or in any way dealing with the sale of liquor heretofore enacted or now in effect, including, but not limited to, Resolution 2007/145 adopting the Stillaguamish Tribe Liquor Ordinance of October 10, 2007, are hereby repealed and are declared to be of no further force and effect, with the exception of the provisions of the Stillaguamish Tribe of Indians Law and Order Code, including, but not limited to, the provisions of Chapter 8.40, Alcohol-Related Offenses.

(2) The provisions of this Subchapter shall be prospective only from the date of its enactment. Nothing contained herein shall be deemed to revoke any presently existing valid license or permit or renewal thereof previously issued by the Washington State Liquor Control Board or the exercise of privilege given thereunder to any retailer subject to the provisions of this Subchapter.

3.06.603 Definitions

All definitions of the Taxation Code Section 3.06.201 apply herein unless the terms are otherwise defined in this Subchapter. For purposes of this Subchapter, whenever any of the following words, terms or definitions is used herein, they shall have the meaning ascribed to them in this Subchapter:

(1) ''*Indian Country,*'' consistent with the meaning given in 18 U.S.C. 1151 means: (a) All land within the limits of the Stillaguamish Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; and (b) all Indian allotments or other lands held in trust for the Tribe or a member of the Tribe, including rights-of-way running through the same.

(2) ''*Liquor*'' means that liquid as now defined as set forth by the Revised Code of Washington in RCW 66.04.010(1), (3), (25), (26) and (43).

(3) ''*Sale*'' and ''*sell*'' means as now defined as set forth by the Revised Code of Washington in RCW 66.04010(38).

(4) ''*Tribal retailer*'' means a liquor retailer wholly-owned by the Stillaguamish Tribe of Indians and located in Indian Country.

(5) ''*Tribally-licensed retailer*'' means a person who has a business license from the Tribe to sell liquor at retail from a business located in Indian Country.

3.06.604 Stillaguamish Tax Commission

The Board hereby authorizes the Tax Commission of the Stillaguamish Tribe of Indians to administer this Subchapter, including general control, management and supervision of all liquor sales, places of sale and sales outlets, and to exercise all of the powers and accomplish all of the purposes thereof as hereinafter set forth, and do the following acts and things for and on behalf of and in the name of the Tribe:

(A) Adopting and enforcing rules and regulations for the purpose of carrying into effect the provisions of this Subchapter in the performance of its functions;

(B) Collecting, auditing and issuing fees, licenses, taxes and permits; and

(C) Performing all matters and things incidental to and necessary to conduct its business and carry out its duties and functions under this Subchapter.

License Required

3.06.610 License Required of Tribal Retailers and Tribally-licensed Retailers

Every person engaging in the business of selling liquor within the Tribe's Indian Country shall secure a business license from the Tribe in the manner provided for by Subchapter 100 of this Title (''Business Licenses'') and otherwise comply with all provisions of Subchapter 100.

3.06.611 Prohibitions

(1) The purchase, sale, and dealing in liquor within the Tribe's Indian Country by any person, party, firm, or corporation except pursuant to the control, licensing, and regulation of the Stillaguamish Tax Commission, is hereby declared unlawful. Without limitation as to any other penalties and fines that may apply, any violation of this subsection is an infraction punishable by a fine of up to five hundred dollars ($500.00).

(2) Every person engaging in the business of selling liquor within the Tribe's Indian Country shall comply with the provisions of Chapter 8.40, Alcohol-Related Offenses, of the Stillaguamish Tribe of Indians Law and Order Code, the provisions of which are re-affirmed and are specifically incorporated herein by this reference. Any violation of this subsection is punishable pursuant to the penalty provisions of Chapter 8.40, Alcohol-Related Offenses of the Stillaguamish Tribe of Indians Law and Order Code.

3.06.612 Conformity With State Law As Required

Tribal retailers and Tribally-licensed retailers shall comply with any applicable Washington State liquor law standards to the extent required by 18 U.S.C. 1161 and the Agreement Between the Washington State Liquor Control Board and the Stillaguamish Indian Tribe for Purchase and Resale of Liquor in Indian Country (''Agreement''), if any. To the extent provisions of this Subchapter conflict with the Agreement, the terms of the Agreement control.

Taxation

3.06.620 Tribal Liquor Tax

The Tribe expressly reserves its inherent sovereign right to regulate the use and sale of liquor through the imposition of Tribal taxes thereon. The Board hereby authorizes and expressly reserves its authority to impose a Tribal Liquor Tax on sales of all alcoholic beverages, including packaged and retail sales of liquor, wine, and beer, at a rate determined to be fair and equitable by the Board through independent action.

3.06.621 Liquor Sales Not Subject to Tribal Retail Sales Tax

The Tribe's Retail Sales Tax shall not apply to retail sales of liquor.

Administration

3.06.630 Severability

If any section, provision, phrase, addition, word, sentence or amendment of this Subchapter or its application to any person is held invalid, such invalidity shall not affect the other provisions or applications of this Subchapter that can be given effect without the invalid application, and to that end the provisions of this Subchapter are declared severable.

3.06.631 Nondiscrimination

No provision of this Subchapter shall be construed as imposing a regulation or tax that discriminates on the basis of whether a retail liquor establishment is owned, managed or operated by a member of the Tribe.

3.06.632 Effective Date

This Subchapter shall be and become effective after thirty (30) days of publication by the United States Department of the Interior's certification in the **Federal Register**.

3.06.633 Sovereign Immunity

Nothing in this Subchapter shall be construed as a waiver or limitation of the inherent sovereign immunity of the Tribe.

[FR Doc. 2012–14229 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Notice of Filing

[LLNM940000. L1420000.BJ0000]

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, thirty (30) calendar days from the date of this publication.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, 301 Dinosaur Trail, Santa Fe, New Mexico. Copies may be obtained from this office upon payment. Contact Marcella Montoya at 505–954–2097, or by email at *mmontoya@nm.blm.gov,* for assistance. 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.

SUPPLEMENTARY INFORMATION:

Indian Meridian, Oklahoma (OK)

The plat, representing the dependent resurvey and survey in Township 24

North, Range 1 East, of the Indian Meridian, accepted April 12, 2012, for Group 211 OK.

The plat, representing the dependent resurvey and survey in Township 15 North, Range 24 East, of the Indian Meridian, accepted April 12, 2012, for Group 207 OK.

The plat, in six sheets, representing the dependent resurvey and survey in Township 13 North, Range 19 East, of the Indian Meridian, accepted April 20, 2012, for Group 67 OK.

New Mexico Principal Meridian, New Mexico (NM)

The plat, representing the dependent resurvey and survey in Townships 23 and 24 South, Range 19 East, of the New Mexico Principal Meridian, accepted April 26, 2012, for Group 1136 NM.

The plat, in two sheets, representing the dependent resurvey and survey, in Township 16 North, Range 18 West, of the New Mexico Principal Meridian, accepted April 30, 2012, for Group 1107 NM.

These plats are to be scheduled for official filing 30 days from the notice of publication in the **Federal Register**, as provided for in the BLM Manual Section 2097—Opening Orders. Notice from this office will be provided as to the date of said publication. If a protest against a survey, in accordance with 43 CFR 4.450–2, of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest.

A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

A person or party who wishes to protest against any of these surveys must file a written protest with the Bureau of Land Management New Mexico State Director stating that they wish to protest.

A statement of reasons for a protest may be filed with the Notice of protest to the State Director or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

Stephen W. Beyerlein,

Acting, Deputy State Director, Cadastral Survey/GeoSciences.

[FR Doc. 2012–14218 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10345; 2200–1100–665]

Notice of Intent To Repatriate a Cultural Item: San Diego Museum of Man, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The San Diego Museum of Man, in consultation with the appropriate Indian tribes, has determined that a cultural item meets the definition of unassociated funerary object and repatriation to the Indian tribes stated below may occur if no additional claimants come forward. Representatives of any Indian tribe that believes itself to be culturally affiliated with the cultural item may contact the San Diego Museum of Man.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the cultural item should contact the San Diego Museum of Man at the address below by July 12, 2012.

ADDRESSES: Philip Hoog, San Diego Museum of Man, San Diego, CA 92101, telephone (619) 239–2001, extension 43.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of the San Diego Museum of Man, San Diego, CA, that meets the definition of unassociated funerary object under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural item. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item

In 1929, one clay pipe (or bow pipe), about five inches in total length, was removed from archeological site SDM–W–1 (as named by archeologist Malcolm Rogers), also known as CA–SDI–39, generally referred to as the Spindrift site, located near the coast of the Pacific Ocean in present day La Jolla, CA. The pottery pipe is a bow-type with a beak-shaped holder and has diamond hatching incised about the bowl. It has a charred appearance, suggesting that it was burned. Shortly after its excavation, Malcolm Rogers transferred the clay pipe to the San Diego Museum of Man, where he was employed at the time.

Malcolm Rogers's 1929 excavation notes state that the pipe was discovered with one associated cremation, however, the cremated human remains do not reside at the Museum of Man. Kumeyaay tradition, confirmed through consultation with Kumeyaay representatives, also dictates that charred objects, such as this pipe, were part of burial offerings and were most likely associated to cremated human remains, most likely a male. Pursuant to 25 U.S.C. 3001(3)(B), the pipe is considered an unassociated funerary object. Clay pipes such as this one typically do not make an appearance in the archeological record until after A.D. 1000. Archeological evidence and Kumeyaay tradition both suggest that the present-day Kumeyaay people of Southern California occupied the area where the pipe was discovered during this period.

Determinations Made by the San Diego Museum of Man

Officials of the San Diego Museum of Man have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the one cultural item described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and is believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the clay pipe and the Kumeyaay Nation, as represented by the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Iipay Nation of Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation); Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission

Indians of California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California (hereafter referred to as ''The Tribes'').

Additional Requestors and Disposition

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary object should contact Philip Hoog, San Diego Museum of Man, 1350 El Prado, San Diego, CA 92101, telephone (619) 239–2001, ext. 43 before July 12, 2012. Repatriation of the unassociated funerary object to the Kumeyaay Nation, as represented by The Tribes may proceed after that date if no additional claimants come forward.

The San Diego Museum of Man is responsible for notifying the Kumeyaay Nation, as represented by The Tribes that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14299 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10363; 2200–1100–665]

Notice of Intent To Repatriate Cultural Items: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, Bureau of Indian Affairs, and Arizona State Museum, University of Arizona, in consultation with the appropriate Indian tribes, have determined that the cultural items meet the definition of unassociated funerary objects and repatriation to the Indian tribes stated below may occur if no additional claimants come forward. Representatives of any Indian tribe that believes itself to be culturally affiliated with the cultural items may contact the Arizona State Museum, University of Arizona.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the cultural items should contact the Arizona State Museum, University of Arizona at the address below by July 12, 2012.

ADDRESSES: John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, P.O. Box 210026, Tucson, AZ 85721; telephone (520) 626–2950.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Items

In 1934, cultural items were removed from the Snaketown site (AZ U:13:1 (ASM)), on the Gila River Indian Reservation, Pinal County, AZ, during archeological excavations conducted by the Gila Pueblo Foundation of Arizona. In December, 1950, the Gila Pueblo Foundation closed and the collections were donated to the Arizona State Museum. Additional cultural items were removed from the same site in 1964–1965 during legally authorized excavations conducted by the University of Arizona under the direction of Emil Haury. Collections obtained during the University of Arizona excavations were accessioned by the Arizona State Museum at the conclusion of the project. The items were reportedly found in association with human burials, but the human remains are not present in the collections. The 30 unassociated funerary objects are 1 ceramic plate, 1 ceramic vessel leg, 27 ceramic sherds, and 1 chipped stone artifact. Other unassociated funerary objects from this site were published in Notices of Intent to Repatriate in the **Federal Register** (66 FR 15741–15742, March 20, 2001; 69 FR 76779–76780, December 22, 2004; and 71 FR 13164–13165, March 14, 2006).

The archeological evidence, including characteristics of portable material culture, attributes of ceramic styles, domestic and ritual architecture, site organization, and canal-based agriculture of the settlement places the Snaketown site within the archeologically-defined Hohokam tradition, and within the Phoenix Basin local variant of that tradition. The occupation of the Snaketown site spans the years circa A.D. 500/700–1100/1150.

Continuities of mortuary practices, ethnographic materials, and technology indicate affiliation of Hohokam settlements with present-day O'odham (Piman) and Puebloan cultures. Documentation submitted by representatives of the Gila River Indian Community of the Gila River Indian Reservation, Arizona, on April 13, 2011, addresses continuities between the Hohokam and the O'odham tribes. Furthermore, oral traditions that are documented for the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona support affiliation with Hohokam sites in central Arizona.

Determinations Made by the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and the Arizona State Museum, University of Arizona, Tucson, AZ

Officials of the Bureau of Indian Affairs and the Arizona State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 30 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona.

Additional Requestors and Disposition

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, P.O.

Box 210026, Tucson, AZ 85721, telephone (520) 626–2950, before July 12, 2012. Repatriation of the unassociated funerary objects to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14305 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10397; 2200–1100–665]

Notice of Intent To Repatriate a Cultural Item: U.S. Department of the Interior, Indian Arts and Crafts Board, Museum of the Plains Indian, Browning, MT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, Indian Arts and Crafts Board, Museum of the Plains Indian, in consultation with the appropriate Indian tribe, has determined that a cultural item meets the definition of sacred object and repatriation to the Indian tribe stated below may occur if no additional claimants come forward. Representatives of any Indian tribe that believes itself to be culturally affiliated with the cultural item may contact the Museum of the Plains Indian, Indian Arts and Crafts Board.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the cultural item should contact the Museum of the Plains Indian, Indian Arts and Crafts Board at the address below by July 12, 2012.

ADDRESSES: David Dragonfly, Museum Technician, Museum of the Plains Indian, P.O. Box 410, Browning, MT 59417, telephone (406) 338–2230.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of the Museum of the Plains Indian, Browning, MT, that meets the definition of sacred object under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural item. The National Park Service is not responsible for the determinations in this notice.

History and Description of the Cultural Item

The sacred object is a Natoas bundle, used in the Blackfeet Sun Dance, and contained in two tubular rawhide cases. It includes a medicine woman's headdress complete with ornaments, a sacred digging stick with ornaments, skins used for drying perspiration, and a badger fur cover.

This bundle was purchased by the Museum of the Plains Indian from Theodore Last Star Piegan of Browning, MT, on September 20, 1941. Theodore Last Star received the bundle from John Old Chief. According to interviews with John Old Chief held before the purchase, this bundle had previously been used in ceremonies by John Old Chief's wife Cecile Little Skunk Old Chief, his mother Mourning Woman, and his grandmother, Strikes Back.

Determinations Made by the Indian Arts and Crafts Board

Officials of the Indian Arts and Crafts Board have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Natoas bundle and the Blackfeet Tribe of the Blackfeet Reservation of Montana.
- While the Indian Arts and Crafts Board has information to support a right of possession, it does not believe that it can reasonably overcome this claim under a preponderance of evidence standard.

Additional Requestors and Disposition

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the Natoas bundle should contact David Dragonfly, Museum Technician, Museum of the Plains Indian, P.O. Box 410, Browning, MT 59417, telephone (406) 338–2230, before July 12, 2012. Repatriation of the sacred object to the Blackfeet Tribe of the Blackfeet Reservation of Montana may proceed after that date if no additional claimants come forward.

The Indian Arts and Crafts Board is responsible for notifying the Blackfeet Tribe of the Blackfeet Reservation of Montana that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14296 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10376; 2200–1100–665]

Notice of Intent To Repatriate Cultural Items: U.S. Department of the Interior, National Park Service, Little Bighorn Battlefield National Monument, Crow Agency, MT

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: Little Bighorn Battlefield National Monument (LIBI), in consultation with the appropriate Indian tribes, has determined that the cultural items meet the definition of sacred objects and repatriation to the lineal descendant stated below may occur if no additional claimants come forward. Any other individuals who believe they are lineal descendants of the individual who owned these sacred objects and who wish to claim the items should contact LIBI.

DATES: Any other individuals who believe they are lineal descendants of the individual who owned these sacred objects and who wish to claim the items should contact LIBI at the address below by July 12, 2012.

ADDRESSES: Gus Sanchez, Acting Superintendent, Little Bighorn Battlefield National Monument, P.O. Box 39, Crow Agency, MT 59022–0039, telephone (406) 638–3201.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the U.S. Department of the Interior, National Park Service, LIBI, Crow Agency, MT that meet the definition of sacred objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the Superintendent, LIBI.

History and Description of the Cultural Items

The 18 cultural items are part of a medicine bundle and are one satchel made out of animal hide, 13 small medicine bags, and four stones. The items belonged to Spotted Hawk who resided on the Northern Cheyenne Reservation. On August 4, 1930, Cecilia Spotted Wolf, Spotted Hawk's sister, traded or gifted the items to Dr. Thomas B. Marquis, a physician on the Tongue River Reservation (Northern Cheyenne). In 1942, the 18 objects were donated to Custer Battlefield National Cemetery, now known as LIBI, by Dr. Marquis' daughters, Mrs. Millie Ellen Marquis Hastings and Mrs. Anna Rose Octavia Marquis Heil.

Jean Spotted Wolf Emmons, great-grand niece of Spotted Hawk, is requesting repatriation of the 18 cultural items. The medicine bundle is needed by Mrs. Emmons to continue traditional ceremonies. LIBI consulted with the Northern Cheyenne Cultural Commission and Tribal Historic Preservation Office to determine that Jean Emmons is an appropriate recipient under the Northern Cheyenne traditional kinship system and common law system of descendance.

Determinations Made by Little Bighorn Battlefield National Monument

Officials of LIBI have determined that:

- Pursuant to 25 U.S.C. 3001(3)(C), the 18 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- Pursuant to 25 U.S.C. 3005(a)(5)(A), Mrs. Emmons is the direct lineal descendant of the individual who owned these sacred objects.

Additional Requestors and Disposition

Any other individuals who believe they are lineal descendants of the individual who owned these sacred objects and who wish to claim the items should contact Gus Sanchez, Acting Superintendent, Little Bighorn Battlefield National Monument, P.O. Box 39, Crow Agency, MT 59022–0039, telephone (406) 638–3201, before July 12, 2012. Repatriation of the sacred objects to Mrs. Jean Spotted Wolf Emmons may proceed after that date if no additional claimants come forward.

LIBI is responsible for notifying Mrs. Jean Spotted Wolf Emmons; the Arapaho Tribe of the Wind River Reservation, Wyoming; Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne and Arapaho Tribes, Oklahoma (formerly the Cheyenne-Arapaho Tribes of Oklahoma); Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Crow Tribe of Montana; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; and the Yankton Sioux Tribe of South Dakota that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14311 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10346; 2200–1100–665]

Notice of Inventory Completion: University of Pennsylvania Museum of Archaeology & Anthropology, University of Pennsylvania, Philadelphia, PA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of Pennsylvania Museum of Archaeology & Anthropology has completed an inventory of human remains in consultation with the appropriate Indian tribe and has determined that there is a cultural affiliation between the human remains and a present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains may contact the Museum. Repatriation of the human remains to the Indian tribe stated below may occur if no additional claimants come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains should contact the Museum at the address below by July 12, 2012.

ADDRESSES: Dr. Richard Hodges, Director, University of Pennsylvania Museum of Archaeology & Anthropology, University of Pennsylvania, 3260 South Street, Philadelphia, PA 19104, telephone (215) 898–4050.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the University of Pennsylvania Museum of Archaeology & Anthropology, University of Pennsylvania, Philadelphia, PA. The human remains were removed from a site on the Platte River, near Overton, NE., and from an unknown site on or near the Missouri River, probably in Missouri or Nebraska.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the University of Pennsylvania Museum of Archaeology & Anthropology's professional staff in consultation with the Pawnee Nation of Oklahoma.

History and Description of the Remains

On April 18, 1820, human remains representing, at minimum, one individual were removed from a Pawnee winter camp near the Platte River approximately six and half miles from Overton, in Dawson County, NE., by Dr. Thomas Say, zoologist for the Stephen H. Long Expedition to the Rocky Mountains. Upon the completion of the expedition, the human remains were sent to the Philadelphia Museum

Company, also known as the Peale Museum. At an unknown date, the human remains were loaned to Dr. Samuel Morton for his study of human crania. Dr. Morton assigned the remains the catalogue number ''P'' and sometime between 1846 and 1849, Dr. Morton accessioned the cranium (No. 540) into his collections. From approximately 1830 until Dr. Morton's death in 1851, the Academy of Natural Science in Philadelphia provided storage space for much of Dr. Morton's collection, including the human remains. In 1853, the collection was purchased from Dr. Morton's estate and formally presented to the Academy. In 1966, Dr. Morton's collection, including these human remains (Museum accession number 97–606–540), was loaned to the University of Pennsylvania Museum of Archaeology and Anthropology. In 1997, the collection was formally gifted to the University of Pennsylvania Museum. No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the specific cultural and geographic attribution in the museum records. Collector's records, museum documentation, and published sources (Morton 1839, 1840, and 1849; Meigs 1857) identify the human remains as those of a female Pawnee Indian who was killed in 1820 at a Pawnee winter village near the Platte River, in present day Nebraska. The museum documentation further dates the remains to the Historic Period. Scholarly publications indicate that the Platte River in Nebraska is the ancestral homeland of the Pawnee Indians before their removal to Oklahoma.

At an unknown date, human remains representing, at minimum, one individual were removed by an unknown individual from a site on or near the Missouri River in Missouri or Nebraska. At an unknown date, the human remains were transferred to Dr. B.B. Brown of St. Louis, Missouri. Sometime prior to 1849, Dr. Brown sent the human remains to Dr. Samuel Morton of Philadelphia, who accessioned the human remains as No. 1043. From approximately 1830 until Dr. Morton's death in 1851, the Academy of Natural Science in Philadelphia provided storage space for much of Dr. Morton's collection, including the human remains. In 1853, the collection was purchased from Dr. Morton's estate and formally presented to the Academy. In 1966, Dr. Morton's collection, including these human remains (Museum accession number 97–606–1043), was loaned to the University of Pennsylvania Museum of Archaeology and Anthropology. In 1997, the collection was formally gifted to the University of Pennsylvania Museum. No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the specific cultural and geographic attribution in the museum records. Collector's records, museum documentation, and published sources (Morton 1849; Meigs 1857) identify the human remains as those of a female Pawnee Indian and date them to the Historic Period.

Determinations Made by the University of Pennsylvania Museum of Archaeology and Anthropology

Officials of the University of Pennsylvania Museum of Archaeology and Anthropology have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remain and the Pawnee Nation of Oklahoma.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains should contact Director Dr. Richard Hodges, University of Pennsylvania Museum of Archaeology & Anthropology, University of Pennsylvania, 3260 South Street, Philadelphia, PA, 19104, telephone (215) 898–4050 before July 12, 2012. Repatriation of the human remains to the Pawnee Nation of Oklahoma may proceed after that date if no additional claimants come forward.

The University of Pennsylvania Museum of Archaeology and Anthropology is responsible for notifying the Pawnee Nation of Oklahoma that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14309 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10360; 2200–1100–665]

Notice of Inventory Completion: San Diego State University, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: San Diego State University Archeology Collections Management Program has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact San Diego State University Archeology Collections Management Program. Repatriation of the human remains and associated funerary objects to the Indian tribes stated below may occur if no additional claimants come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains and associated funerary objects should contact San Diego State University Archeology Collections Management Program at the address below by July 12, 2012.

ADDRESSES: Jaime Lennox, Interim Director, San Diego State University Archeology Collections Management Program, 5500 Campanile Dr., San Diego, CA 92182–6040, telephone (619) 594–4575.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of San Diego State University Archeology Collections Management Program, San Diego, CA. The human remains and associated funerary objects were removed from the Buchanan Reservoir site in Madera County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The

National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the San Diego State University Archeology Collections Management Program professional staff in consultation with representatives of the Picayune Rancheria of Chukchansi Indians of California; Santa Rosa Indian Community of the Santa Rosa Rancheria, California; Table Mountain Rancheria of California; and the Tule River Indian Tribe of the Tule River Reservation, California (hereafter referred to as ''The Tribes'').

History and Description of the Remains

In 1972, human remains representing, at minimum, two individuals were removed from the Buchanan Reservoir site, SDSU–0368, MAD–117, (1972–15), located in Madera County, CA. This site was excavated as part of Thomas King's Ph.D. dissertation for the University of California, Riverside. The collection at San Diego State University appears to have been collected from back dirt by an unknown student and brought back to San Diego State University. The remains are two distal right humorous fragments and, based on diagnostics, represent two individuals. No known individuals were identified. The 92 associated funerary objects are 8 pieces of house daub, 61 chipped stone artifacts, 12 ground stone artifacts, 4 tools, 6 shells, and 1 lot of faunal remains.

These objects were determined to be associated funerary objects based upon reasonable evidence derived from the provenience information recorded for this collection, as well as consultation with representatives of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California. Geographic affiliation is consistent with the historically documented territory of the Picayune Rancheria of Chukchansi Indians of California and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California, Table Mountain Rancheria of California, and the Tule River Indian Tribe of the Tule River Reservation, California.

Determinations Made by the San Diego State University Archeology Collections Management Program

Officials of the San Diego State University Archeology Collections Management Program have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 92 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and The Tribes.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Jaime Lennox, Interim Director, San Diego State University Archeology Collections Management Program, 5500 Campanile Dr., San Diego, CA 92182–6040, telephone (619) 594–4575, before July 12, 2012. Repatriation of the human remains and associated funerary objects to The Tribes may proceed after that date if no additional claimants come forward.

The San Diego State University Archeology Collections Management Program is responsible for notifying The Tribes that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14293 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10362; 2200–1100–665]

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior, Bureau of Indian Affairs, and Arizona State Museum, University of Arizona, have completed an inventory of human remains, in consultation with the appropriate Indian tribes, and have determined that there is a cultural affiliation between the human remains and present-day Indian tribes. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains may contact the Arizona State Museum, University of Arizona. Repatriation of the human remains to the Indian tribes stated below may occur if no additional claimants come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains should contact the Arizona State Museum, University of Arizona, at the address below by July 12, 2012.

ADDRESSES: John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, P.O. Box 210026, Tucson, AZ 85721, telephone (520) 626–2950.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the physical custody of the Arizona State Museum, University of Arizona, Tucson, AZ. The human remains were removed from archeological sites located in Pinal County, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by Arizona State Museum professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona. The Gila River Indian Community of the Gila River Indian Reservation, Arizona, is acting on behalf of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and themselves.

History and Description of the Remains

In 1963, a surface collection survey was conducted by the Arizona State Museum at site AZ T:16:13 (ASM) in Pinal County, AZ. The survey

collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collection led to the discovery of human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ T:16:13 (ASM) is an historic Pima-Maricopa village, dating to about A.D. 1850. An earlier Hohokam Classic Period occupation, dating to A.D. 1150–1450 is also indicated, based on ceramic artifacts.

In 1973, a surface collection survey was conducted by the Arizona State Museum at site AZ U:13:9 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2007, a search through the survey collection led to the discovery of three human bone fragments representing, at minimum, one individual. No associated funerary objects are present. Other human remains from this site were published in a Notice of Inventory Completion in the **Federal Register** (65 FR 83080, December 29, 2000).

Based upon architecture, portable material culture, and site organization, site AZ U:13:9 (ASM) is recorded as a village site with occupation spanning the Pre-classic and Classic Hohokam periods from about A.D. 500–1400.

At an unknown date prior to 1979, a surface collection survey was conducted by the Arizona State Museum at site AZ U:13:10 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collection led to the discovery of one human bone fragment representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:13:10 (ASM) is recorded as a multicomponent site with artifacts representing the Hohokam period (A.D. 500–1540) as well as an historic Akimel O'odham occupation (A.D. 1500–1950).

In 1970, a surface collection survey was conducted by the Arizona State Museum under the direction of Don Wood at site AZ U:13:60 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collections led to the discovery of several human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:13:60 (ASM) is recorded as a Hohokam village site with ceramic, groundstone, and lithic artifacts. Historic house remnants were also present. Based on material culture and the mortuary program, occupation spanned the Hohokam to historic period, approximately A.D. 500–1900.

In 1970, a surface collection survey was conducted by the Arizona State Museum under the direction of Don Wood at site AZ U:13:118 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collections led to the discovery of several human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:13:118 (ASM) is recorded as a Hohokam village site on the basis of the artifact assemblage. The site may be dated to the period A.D. 500–1450.

In 1970, a surface collection survey was conducted by the Arizona State Museum under the direction of Don Wood at site AZ U:13:171 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collections led to the discovery of several human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:13:171 (ASM) is recorded as a sherd and cremation area. Other prehistoric and historic artifacts were also reported. Occupation spanning the Hohokam period to historic times, A.D. 500–1900 is indicated by the artifact assemblage.

In 1970, a surface collection survey was conducted by the Arizona State Museum under the direction of Don Wood at site AZ U:14:18 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collections led to the discovery of several human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:14:18 (ASM) is recorded as a large multicomponent Hohokam village. Based on the ceramic assemblage, occupation spanned the Pre-classic and Classic Hohokam periods, A.D. 500–1450.

In 1970, a surface collection survey was conducted by the Arizona State Museum under the direction of Don Wood at site AZ U:14:20 (ASM) in Pinal County, AZ. The survey collections were brought to the museum, but were not formally accessioned. In 2010, a search through the survey collections led to the discovery of several human bone fragments representing, at minimum, one individual. No associated funerary objects are present.

Site AZ U:14:20 (ASM) is recorded as a having several large artifact concentrations. The ceramic assemblage is consistent with occupation spanning the Pre-Classic and Classic Hohokam periods from A.D. 500–1450.

Continuities of mortuary practices, ethnographic materials, and technology indicate affiliation of Hohokam settlements with present-day O'odham (Piman) and Puebloan cultures. Documentation submitted by representatives of the Gila River Indian Community of the Gila River Indian Reservation, Arizona, on April 13, 2011, addresses continuities between the Hohokam and the O'odham tribes. Furthermore, oral traditions that are documented for the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona support affiliation with Hohokam sites in central Arizona.

Determinations Made by the U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and the Arizona State Museum, University of Arizona, Tucson, AZ

Officials of the Bureau of Indian Affairs and the Arizona State Museum have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of eight individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains should contact John McClelland, NAGPRA Coordinator, Arizona State Museum, University of Arizona, P.O. Box 210026, Tucson, AZ 85721; telephone (520) 626–2950 before July 12, 2012. Repatriation of the human

remains to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and the Tohono O'odham Nation of Arizona that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14306 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10375; 2200–1100–665]

Notice of Inventory Completion: Museum of Anthropology, University of Michigan, Ann Arbor, MI; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the University of Michigan, Ann Arbor, MI. The human remains were removed from Emmet County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the minimum number of individuals in the Notice of Inventory Completion published in the **Federal Register** (74 FR 42094–42095, August 20, 2009).

In the **Federal Register** (74 FR 42094, August 20, 2009), paragraph four is corrected by deleting the following sentences at the top of column three:

The human remains are of an adult and a second, younger adult individual. Since that time, based on skeletal and dental morphology, the older individual has been identified as being of mixed European and Native American ancestry. There is insufficient evidence to positively determine the biological affiliation of the younger individual, but they may also be of mixed European and Native American ancestry.

In the **Federal Register** (74 FR 42094, August 20, 2009), paragraph four is corrected by inserting the following sentences at the top of column three:

The human remains are of two adults and a third, younger adult individual. Since that time, based on skeletal and dental morphology, one of the older individuals has been identified as being of mixed European and Native American ancestry. There is insufficient evidence to positively determine the biological affiliation of the other individuals, but they may also be of mixed European and Native American ancestry.

In the **Federal Register** (74 FR 42094, August 20, 2009), paragraph seven is corrected by changing the words ''two individuals'' to ''three individuals.''

In the **Federal Register** (74 FR 42094, August 20, 2009), paragraph eight is corrected by changing the words ''two individuals'' to ''three individuals.''

Additional Requestors and Disposition

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. Ben Secunda, NAGPRA Project Manager, University of Michigan, Office of the Vice President for Research, 4080 Fleming Building, 503 Thompson St., Ann Arbor, MI 48109–1340; telephone (734) 647–9085, before July 12, 2012. Repatriation of the human remains to the Little Traverse Bay Bands of Odawa Indians may proceed after that date if no additional claimants come forward.

The University of Michigan is responsible for notifying the Little Traverse Bay Bands of Odawa Indians that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14301 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–10347; 2200–1100–665]

Notice of Inventory Completion: University of California, Santa Barbara, Repository of Archaeological and Ethnographic Collections, Santa Barbara, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The University of California, Santa Barbara (UCSB), has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribe, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and a present-day Indian tribe. Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact the UCSB. Repatriation of the human remains and associated funerary objects to the Indian tribe stated below may occur if no additional claimants come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains and associated funerary objects should contact the UCSB, at the address below by July 12, 2012.

ADDRESSES: Dr. Lynn Gamble, University of California, Santa Barbara, Santa Barbara, CA 93106–3210, telephone (805) 893–7341.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession and control of the UCSB, Repository for Archaeological and Ethnographic Collections, Santa Barbara, CA. The human remains and associated artifacts were removed from Kern, Los Angeles, and Santa Barbara Counties, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the UCSB professional staff in consultation with representatives of the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California, as well as non-Federally recognized Chumash Indian groups. Consultation began in 1991 with the formation of the UCSB Committee on Repatriation of Human Remains and Cultural Items. The committee's members included the NAGPRA representative of the Santa Ynez Band of Mission Indians and Chumash descendants who are not members of Federally recognized tribes. Over 100 letters were sent to tribal leaders, members of the Native American community, and other interested parties to inform them about the nature of UCSB's collections and the repatriation process. The committee reviewed the data collected during the inventory and used this information to make determinations of cultural affiliation. A more recent consultation took place with the Elder's Council of the Santa Ynez Band of Mission Indians in May of 2011 to inform the Chumash on the completion of the inventory.

History and Description of the Remains

In 1977, human remains representing a minimum of one individual from Burial 1 were removed from CA–KER–307, also known as the Castac Chumash village of Kashtiq, on the banks of Castac Lake, Kern County, CA, by David Jennings of Los Angeles Community College (Accession 212). No known individual was identified. The one associated funerary object is one lot of asphaltum basketry impressions, which was physically associated with Burial 1.

A single radiocarbon date from site CA–KER–307 indicates that it was occupied by A.D. 1545. It is not known whether the site was occupied in earlier periods. Site CA–KER–307 is the site designation for the Castac Chumash village of Kashtiq. The Castac Chumash region is located in the northeastern sector of the territory occupied by Chumash speakers at the time of European Contact.

At an unknown time, human remains representing a minimum of one individual were removed from Deer Creek near Malibu, Los Angeles County, CA, by Charles Rozaire of the Los Angeles County Museum. During an unknown year, the UCSB came into the possession of the human remains (Accession 520). No primary documentation or specific provenience information exists for the human remains. No known individual was identified. No associated funerary objects are present.

The age of the human remains is unknown. Although the collection lacks provenience information, considering the nature of the rest of the UCSB's collection, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

In 1958 and 1959, human remains representing a minimum of 14 individuals in 11 distinct burials were removed from CA–SBA–1C (SBA–119) at Rincon Point, Santa Barbara County, CA, by W. Harrison and P. Lyons with the permission of the private land owner, as part of W. Harrison's doctorate dissertation research at the University or Arizona, Tucson, AZ (Accession 104). No known individuals were identified. The approximately 479 associated funerary objects are 1 mortar, 1 ''killed'' mortar, 31 ground stone fragments, 1 metate, 2 manos, 5 utilized pebbles, 1 stone bowl, 4 stone projectile points (1 obsidian), 162 flakes, 5 ochre fragments, 1 quartz crystal, 157 unmodified olivella shells, 68 olivella beads, 3 clam shells, 4 abalone shell fragments, 17 bone projectile points, 3 turtle shells, 4 bird claws, 4 asphaltum impressions, 1 asphaltum fragment with embedded shark teeth, and 4 asphaltum fragments, which were all physically associated with the 11 burials at the time of excavation.

The human remains were removed from 11 burials and date to the Early and Middle periods (2000–600 B.C.). According to historic accounts, the Barbara Chumash village of Shuku was located at Rincon Point.

In 1958 and 1959, human remains representing a minimum of one individual from Burial 2 were excavated from CA–SBA–1D (SBA–141), Rincon Point, Santa Barbara County, CA, by W. Harrison and P. Lyons, as part of Harrison's doctorate dissertation research (Accession 126). No known individual was identified. The 22 associated funerary objects are 4 metate fragments, 4 grinding slabs, 2 manos, 1 mano/hammerstone, 3 mano fragments, 6 ground stone objects, 1 chert core, and 1 rubbing stone which were all physically associated with Burial 2 at the time of excavation.

The human remains from this loci (SBA–1D) date from the Early period (3000–2000 B.C.).

In or around 1928, human remains representing a minimum of 10 individuals were removed from CA–SBA–28, Santa Barbara County, CA, by J.P. Harrington, as part of a project conducted by the Museum of the American Indian, Heye Foundation. The collection was donated by W. Harrington to San Diego State University. In 1970, the collection was donated to the UCSB (Accession 227). No known individuals were identified. No associated funerary objects are present.

According to historic records, site C–SBA–28 is the location of the Barbareno Chumash village of Syuxtun. The age of the human remains is not known.

At an unknown date, human remains representing a minimum of one individual were removed from site CA–SBA–37, on the Atascadero Creek, east of Santa Barbara, Santa Barbara County, CA. At an unknown date, the human remains were donated to the UCSB by D.E. Brown (Accession 210). The human remains originated from where Brown's residence is located. No known individual was identified. No associated funerary objects are present.

Site CA–SBA–37 is a prehistoric shell midden; however, the age of the human remains is unknown. No radiocarbon dates are available to document the age of occupation of the site; however, D.B. Rogers of the Santa Barbara Museum of Natural History identified deposits from three prehistoric phases (Oak Grove, Hunting People, and Canalino).

In 1960, human remains representing a minimum of two individuals were removed from CA–SBA–38, overlooking Cieneguitas Creek at the west end of Santa Barbara, in Santa Barbara County, CA, during an archeological salvage project directed by William Harrison, as a result of bulldozing operations (Accession 131). No known individuals were identified. No associated funerary objects are present.

D.B. Rogers conducted surface reconnaissance and test trenching at site CA–SBA–38 between 1923 and 1924. At that time, Oak Grove and Canalino components were identified. The age of the human remains is unknown.

At an unknown date, human remains representing a minimum of one individual were removed possibly from CA–SBA–46, Santa Barbara County, CA. The attribution of the human remains to CA–SBA–46 is made based on its use in the Santa Barbara Museum of Natural History's Mescalitan Island (CA–SBA–46) diorama. The human remains were donated to the UCSB by the Santa Barbara Museum of Natural History at an unknown date (Accession 248–9). No known individual was identified. No associated funerary objects are present.

In 1961, human remains representing at least 10 individuals from Burials 1X, 2X, 3X, 1, 2, 3, 4, 5 and 6 were collected

from three cemeteries (C, D, and H) at the south end of Mescalitan Island (CA–SBA–46), Santa Barbara County, CA, by James Deetz of the UCSB, and a student crew as part of a salvage archeological project (Accession 144). No known individuals were identified. The 419 associated funerary objects are 1 mortar, 2 ground stone objects, 5 cores, 30 flakes, 2 chert fragments, 1 basket stone, 2 basket stone fragments, 7 tarring pebbles, 4 water worn pebbles, 1 siltstone object, 8 olivella shell beads, 3 olivella shells, 13 undifferentiated shells, 257 glass trade beads (all blue), 10 whale bone fragments, 59 wood fragments, 13 asphaltum fragments, and 1 soil sample, which were all physically associated with Burial 1X, 2X, and 3X from Cemetery D and Burial 1, 2, 3, 4 and 5 from Cemetery C/H at the time of salvage.

Evidence from a number of archeological projects in the 20th century indicates that site CA–SBA–46 was occupied in all of the major periods of local prehistory from the Oak Grove period (prior to 3000 B.C.) up to the Historic period.

In 1969, human remains representing a minimum of 16 individuals were excavated from Cemetery ''C'' on Mescalitan Island (CA–SBA–46C), Santa Barbara County, CA, by a joint UCSB and University of California, Los Angeles, summer field school, directed by Claude Warren (Accession 177). No known individuals were identified. No associated funerary objects are present.

Although areas of Mescalitan Island were occupied throughout all periods of Santa Barbara prehistory, the human remains from Cemetery C (CA–SBA–46C) date to A.D. 1000–1150.

In 1985, human remains representing a minimum of one individual were removed from Cemetery ''G'' at Mescalitan Island (CA–SBA–46G) at the east end of Goleta Slough, Santa Barbara County, CA, by S.R.S., a private contract archeology firm (Accession 351). No known individual was identified. No associated funerary objects are present.

The date of site CA–SBA–46G is post-A.D. 0. The human remains were identified among mixed faunal remains.

In 1954, human remains representing a minimum of two individuals were removed from CA–SBA–48, on the UCSB campus on the edge of the Goleta Slough, Santa Barbara County, CA, by an unknown individual during the construction of the Biology Building. The human remains were donated to the Anthropology Department by the Chairman of the Biology Department (Accession 326). No known individuals were identified. No associated funerary objects are present.

The age of the human remains from site CA–SBA–48 is not known. Historic accounts identify the site as the location of the Babareno Chumash village of Heliyik.

In 1964, human remains representing a minimum of one individual were collected from CA–SBA–51, which is west of the Goleta Slough, Santa Barbara County, CA, by James Deetz of the University of California, Santa Barbara, and a student crew from a test pit at the site (Accession 156). No known individual was identified. No associated funerary objects are present.

In the 1970s, human remains representing a minimum of three individuals, two of which from Burial 2, were excavated from CA–SBA–51, which is west of the Goleta Slough, Santa Barbara County, CA, by Dr. Michael Glassow of the UCSB, and a student crew during field classes (Accession 181). No known individuals were identified. The eight associated funerary objects are one mano, one core, five flake tools, and one sea mammal calcaneus, which were all physically associated with Burial 2.

Site CA–SBA–51 is a permanent village site of some antiquity and does not appear to have been occupied during the Historic period. However, there are no radiocarbon dates available. The age of the human remains from CA–SBA–51 is not known.

In 1956 and 1957, human remains representing a minimum of 21 individuals from Burials 2, A, B, C, D, E, F, G, H, I, J, K, L, M, N, and O were removed from CA–SBA–53 at the west end of the Goleta Slough, in Santa Barbara County, CA. The human remains and associated funerary objects were collected by William Harrison and Norman Gabel of the UCSB during salvage operations associated with grading operations for the construction of buildings for the Aerophysics Corporation (Accession 101). No known individuals were identified. The 69 funerary objects are 6 manos, 2 mano fragments, 4 pestles, 1 mortar, 2 ''killed'' mortars, 7 mortar fragments, 1 bifacial metate, 1 ''killed'' metate, 24 metate fragments, 2 hammerstones, 3 ground stone objects, 1 rubbing stone, 1 fire-affected rock, 2 scraper fragments, 2 flaked stone objects, 1 side notched blade fragment, 2 choppers, 1 grooved stone object, 1 rim fragment from a polished stone vessel, 1 flake, 1 bone fragment, 1 unmodified bone, 1 unmodified shell, and 1 fish vertebra, which were all physically associated with Burials A, B, C, E, H, J, K, L, N, and O at the time of salvage.

Three radiocarbon dates from site CA–SBA–53 indicate its occupation between 3030—2670 B.C., which implies an Early period date for the human remains.

At an unknown date, human remains representing a minimum of two individuals were removed from an unknown location. During an unknown year, the UCSB came into possession of the human remains. No original documentation exists for this collection. No known individuals were identified. No associated funerary objects are present.

The age of the human remains is unknown, but the preponderance of the evidence suggests that these remains are culturally affiliated with the Chumash, as one bone is labeled with the SBA–60 182-series number. This may indicate that the human remains derive from the larger collection from that site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

At an unknown date, human remains representing a minimum of four individuals were removed from an unknown location. During an unknown year, the UCSB came into possession of the human remains. No original documentation exists, but the tray in which the human remains were found contained a fragment of paper labeled ''burial #1.'' In the same tray as these bones were several other bones that were labeled 182 (from SBA–60). These labeled bones were removed. These unlabeled remains do not have a known provenience, but likely may also be from site CA–SBA–60, Santa Barbara County, CA. No known individuals were identified. No associated funerary objects are present.

The age of the unlabeled human remains is unknown. However, although the human remains lack provenience information, considering the nature of most of the UCSB's collection and their placement in the same tray as other bones labeled as CA–SBA–60, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

At an unknown date, human remains representing a minimum of seven individuals were removed from an unknown location, but possibly site CA–SBA–60, Santa Barbara County, CA. During an unknown year, the UCSB came into possession of the human remains. No original documentation accompanies the human remains. No known individuals were identified. No associated funerary objects are present.

Museum records indicate that the human remains may derive from the large SBA–60 collection. Five bones are labeled with 182 series numbers indicating association with the SBA–60 collection, but the majority of the human remains are unlabelled and therefore, clear association of the collections is impossible to verify. Although the human remains lack provenience information, considering the nature of the most of the UCSB's collection, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown location, but possibly site CA–SBA–60, Santa Barbara County, CA. During an unknown year, the UCSB came into possession of the human remains. No original documentation exists for this collection, but a note (most likely written by Repository staff) indicates that the collection 'may' derive from the large SBA–60 collection housed at the UCSB. No known individual was identified. No associated funerary objects are present.

Although the collection lacks provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from non-Chumash sites. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

At an unknown date, human remains representing a minimum of four individuals were removed from an unknown location, but possibly site CA–SBA–60, Santa Barbara County, CA. During an unknown year, the UCSB came into possession of the human remains. No original documentation exists for the collection, but it may derive from the large SBA–60 collection. No known individuals were identified. No associated funerary objects are present.

Although the collection lacks provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from non-Chumash sites. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash. The age of the human remains is unknown.

In 1963, human remains representing a minimum of one individual were excavated from CA–SBA–60 at the west end of the Goleta Slough, Santa Barbara County, CA. It is believed that the burial was excavated by Humphrey during a UCSB field school project (Accession 127). The age of the human remains is post-A.D. 1500. No known individual was identified. No associated funerary objects are present.

In 1968, human remains representing a minimum of 140 individuals were excavated at CA–SBA–60 on the north end of the Goleta Slough, Santa Barbara County, CA, during salvage excavations associated with ground leveling activities for a construction yard (Accession 182). Excavation was undertaken by Claude Warren of the UCSB and a student crew, as well as by the Santa Barbara County Archaeological Society. No known individuals were identified. No associated funerary objects are present.

Site CA–SBA–60 is the location of the former Barbareno Chumash town of S'axpilil. The mention of this large village site in historic accounts and the presence of Historic period artifacts, such as shell and glass beads, indicate that this site was occupied during the later part of the Prehistoric and Historic periods (post-A.D. 1500). The presence of earlier projectile points on the site may indicate a component as early as the later Middle period. There was a large collection of funerary objects (approximately 229 funerary objects) excavated from CA–SBA–60. These objects were originally curated by the Santa Barbara Archaeological Society's Museum of Early Man. After the museum dissolved, the collection was donated to the Quabajai Chumash Indian Association, who placed it on loan to the UCSB in the 1960s. Therefore, these funerary objects are not in the control of the UCSB.

In 1971, human remains representing a minimum of 33 individuals from Burials 1–27 were excavated from site CA–SBA–71, west of Santa Barbara, Santa Barbara County, CA, by Claude Warren of the UCSB and a student crew, as part of a field school project (Accession 185 & 187). The human remains were excavated from disturbed, primary burials. No known individuals were identified. The 355 associated funerary objects are 8 stone artifacts, 6 stone scrapers, 1 siltstone scraper, 6 stone projectile points, 1 stone graver, 2 cores, 76 stone flakes, 3 utilized flakes, 1 worked flake, 1 encrusted metate, 3 sandstone cobbles, 22 tarring pebbles, 3 asphaltum fragments, 1 abalone shell, 1 clam shell, 77 shell fragments, 118 shell beads, 7 shell pendants, 1 shell fish hook fragment, 1 whale bone fragment, 2 glass fragments, 1 iron fragment, 8 metal nails, 3 iron staples, 1 fragment of wire, and 1 fragment of carbonized wood, which were all physically associated with Burials 2, 5, 6, 7, 8, 11, 12, 13, 14, 15, 22, 24, 25, 26, and 27 at the time of excavation.

Site CA–SBA–71 was a heavily potted site. The association of metal and glass with the burials is due to site disturbance. Radiocarbon dates from this site date its occupation to the Middle period (160 B.C.–A.D. 160).

In 1968, human remains representing a minimum of two adult individuals were collected from an open grave on Santa Rosa Island, Santa Barbara County, CA, by an unknown individual (Accession 248–27). No known individuals were identified. No associated funerary objects are present.

The age of the human remains is unknown. Considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown location. In 1983, the human remains were anonymously donated to the UCSB (Accession 248–19). A note with the human remains states that they were ''Found in graveyard in southern California near Vandenberg.'' No known individual was identified. No associated funerary objects are present.

The age of the human remains is not known. Although the collection lacks precise provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

In 1985, human remains representing a minimum of one individual were found and collected from an unknown site northeast of Diablo Peak on Santa Cruz Island, Santa Barbara County, CA, by Robert Peterson (Accession 248–33). No known individual was identified. No associated funerary objects are present.

Although the collection lacks precise provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from a non-Chumash site. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash. The age of the human remains is not known.

At an unknown date, human remains representing a minimum of one individual were removed from an

eroding sea cliff at CA–SBA–1494 at the mouth of Bulito Canyon, Hollister Ranch, Santa Barbara County, CA, by an unknown person. During an unknown year, the UCSB came into the possession of the human remains (Accession 250–215). No known individual was identified. No associated funerary objects are present.

Site CA–SBA–1494 is a medium sized Historic period village, indicating occupation during the Historic period. One radiocarbon date from the site (A.D. 610) also dates a component to the Middle period.

In 1983, human remains representing a minimum of one individual were collected from the surface of CA–SBA–75, Tecolote Canyon, Santa Barbara County, CA, by Jon Erlandson during an assessment of cultural resources associated with the proposed Hyatt Regency Resort and Hotel (Accession 328). The remains were recovered from a surface-collected faunal sample. No known individual was identified. No associated funerary objects are present.

Radiocarbon dates collected from site CA–SBA–75 indicate that it was occupied between 4115—3360 B.C.

Between 1950 and 1952, human remains representing a minimum of 18 individuals from Burials 1–3, 5–12, X1/13, X3/15, X4/16, 18, 20, 23, and 34 were excavated from primary burial contexts at CA–SBA–485 at the south end of Lake Cachuma, Santa Barbara County, CA, by Martin Baumhoff from the University of California, Berkeley, under the auspices of the River Basin Surveys of the Smithsonian Institute (Accession 261). No known individuals were identified. The 46 associated funerary objects are 13 olivella shell beads, 17 limpet shell beads, 6 cowry shell beads, 1 limpet shell ornament, 3 limpet shell fragments, 1 pismo clam shell, 1 abalone shell dish, 2 manos, 1 metate fragment, 1 stone projectile point, which were all physically associated with Burials X1/13, X3/15, X4/16, 1, 3, 10 and 11 at the time of excavation.

In 1965, human remains representing a minimum of five individuals from Burials 1–5 were excavated from CA–SBA–485 at the south end of Lake Cachuma, Santa Barbara County, CA, as part of a field school excavation by Jay Rub, UCSB, and a student crew (Accession 158). No known individuals were identified. The 25 associated funerary objects are 1 metate fragment, 2 mano fragments, 1 chert projectile point, 1 chert knife, 1 chert scraper, 4 chert cores, 12 utilized flakes, 2 retouched flakes, and 1 clam shell ornament, which were all physically associated with the burials, which were all physically associated with Burial 4 and Burial 5 at the time of excavation.

No radiocarbon dates are available for site CA–SBA–485. Historic accounts do indicate that it was occupied by the Chumash during the Mission period (A.D. 1782–1834). The presence of certain shell artifacts recovered during excavation also indicate a Late period occupation (post-A.D. 1150), and some projectile point evidence may point to a more debatable Middle period component (1400 B.C.–A.D. 1150).

In 1958–1959, human remains representing a minimum of one individual were collected from the surface of CA–SBA–78, Dos Pueblos Ranch, Santa Barbara County, CA, by William Harrison during his field school excavations (Accession 164). No known individual was identified. No associated funerary objects are present.

In 1958–1959, human remains representing a minimum of 17 individuals were removed from CA–SBA–78 at the mouth of Dos Pueblos Canyon, Dos Pueblos Ranch, Santa Barbara County, CA, during excavations by William Harrison, UCSB, and a student crew, as part of a summer field school with the permission of the private land owner (Accession 117). No known individuals were identified. No associated funerary objects are present.

Site CA–SBA–78 is the location of one of the largest Historic period villages in the region. Radiocarbon dates from this site, Mikiw, indicate a long occupation history beginning as early as 5000 B.C. and culminating in the Historic period.

In 1961, human remains representing a minimum 12 individuals representing two discrete burial (Burial 1 and 2) and many human bone fragments that could not be associated with a single burial from CA–SBA–167 in the Santa Ynez Valley, Santa Barbara County, CA, by James Deetz, UCSB, and a student crew, during a summer field school with permission of the private land owner (Accession 140). No known individuals were identified. The approximately 1,104 associated funerary objects are 1 chert projectile point (Cottonwood Type), 1 chert fragment, 1 worked stone fragment, approximately 1,000 Olivella shell beads, approximately 2 bead fragments (asphaltum staining), 9 steatite beads, 1 blue glass bead, 82 glass trade beads, 1 glass trade bead fragment, 1 bone bead, 1 unmodified bone fragment, and 4 charcoal fragments, which were all physically associated with Burial 1 and Burial 2 at the time of excavation.

Site CA–SBA–167 is located in the Historic period village of Soxtonokmu' (SBA–167). Although no radiocarbon dates are available from this site, its presence in historic documents lead Dr. John Johnson, Santa Barbara Museum of Natural History, to believe that the site dates to the Late period (after A.D. 1150). It is evident from historic documents and the presence of post-European artifacts that the site was occupied after A.D. 1782.

In 1970, human remains representing a minimum of four individuals were removed from CA–SCRI–236 at Christy Ranch, Santa Cruz Island, Santa Barbara County, CA, during excavations by Glassow, UCSB, with permission of the private land owner (Accession 186). No known individuals were identified. No associated funerary objects are present.

Radiocarbon dates from site CA–SCRI–236 indicate at least intermittent occupation from as early as 2485 B.C. into the Late period.

In 1973, human remains representing a minimum of two individuals from Burials 1 and 2 were excavated from disturbed areas of CA–SCRI–163, Stanton Ranch, Santa Cruz Island, Santa Barbara County, CA, during salvage excavations by Glassow and Albert Spaulding with the permission of the private land owner in the first year of the Santa Cruz Island Project, which was funded by the National Science Foundation (Accession 211). The human remains were excavated during salvage work in disturbed areas of the site. No known individuals were identified. The 36 associated funerary objects are 1 doughnut stone, 1 chert projectile point, 1 chert borer, 3 flake tools, 29 olivella shell beads, and 1 unmodified mammal bone, which were all physically associated with Burial 1 and Burial 2 at the time of excavation.

The age of the human remains is not known. Site CA–SCRI–163 is a prehistoric midden located adjacent to the upper winery on the Stanton Ranch.

In 1973, human remains representing a minimum of six individuals were collected from an eroding hillside at site CA–SCRI–381, Santa Cruz Island, Santa Barbara County, CA, by Glassow with the permission of the private land owner (Accession 211). No known individuals were identified. No associated funerary objects are present.

The age of the human remains from site CA–SCRI–381 is not known. Site CA–SCRI–381 is a prehistoric midden located on the west side of Platts Harbor.

In 1973–1974, human remains representing a minimum of seven individuals were collected from CA–SCRI–240 at Prisoner's Harbor on the north shore of Santa Cruz Island, Santa Barbara County, CA. The Santa Cruz Island Project excavation was funded by the National Science Foundation. The

excavation was done with the permission of the private land owner, and co-directed by Glassow and Spaulding, UCSB (Accession 211). The human remains originated in both burial and non-burial contexts, and were collected from an eroding stream bank at the site. No known individuals were identified. No associated funerary objects are present.

In 1974, human remains representing a minimum of 11 individuals from Burials 1 and 2 as well as from non-burial contexts were excavated from CA–SCRI–240 on the north shore of Santa Cruz Island at Prisoner's Harbor, Santa Barbara County, CA, by Spaulding, UCSB, as part of the Santa Cruz Island Project, with the permission of the private land owner (Accession 206). No known individuals were identified. The 1,421 associated funerary objects are 1 donut stone, 1 steatite bead, 6 hammerstones, 1 projectile point, 33 chert borers, 17 cores, 23 bladelet cores, 510 flakes, 50 flake tools, 195 bladelets, 28 chert blades, 5 tarring pebbles, 1 hematite nodule, 18 asphaltum nodules, 1 shell fishhook, 405 shell beads, 1 bone tool, 3 modified bones, 106 unmodified mammal bones, and 16 unmodified fish bones, which were all physically associated with Burials 1, 2, 3, and Feature 3 Infant Burial, Feature 5 Burial, Feature 6 Burial, Feature 7 Burial and Feature 9 Burial at the time of excavation.

Radicarbon dates obtained from site CA–SCRI–240 document its occupation between 2480 B.C. and A.D. 1425, and indicate that it may be the location for the Cruzeno Chumash village of Kaxas. Its presence in historic documents also indicates that it was occupied into the Historic period.

In 1973–1974, human remains representing a minimum of two individuals were collected from an unspecified location or locations on Santa Cruz Island, Santa Barbara County, CA, by Glassow, UCSB, and a student crew, as part of the Santa Cruz Island Project, with the permission of the private land owner (Accession 201–31 & 201–49). No known individuals were identified. No associated funerary objects are present. The age of the human remains is not known. Although the collection lacks specific provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from non-Chumash sites. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

In 1974, human remains representing a minimum of seven individuals were excavated from secondary burial contexts at CA–SCRI–328 near Forney Cove on the west end of Santa Cruz Island, Santa Barbara County, CA, by Steve Horne, a UCSB graduate student, with the permission of the private land owner. The excavation occurred as part of the Santa Cruz Island Project, and was co-directed by Spaulding and Glassow (Accession 209). No known individuals were identified. No associated funerary objects are present.

Radiocarbon dates obtained from site CA–SCRI–328 indicate its occupation was between A.D. 1470 and A.D. 1800. The presence of glass beads within the deposits also indicates occupation during Late and Historic periods.

Between 1974 and 1979, human remains representing a minimum of 15 individuals were excavated from CA–SBA–143 on the grounds of Dos Pueblos High School in Goleta, Santa Barbara County, CA, by archeology classes of the Don Pueblo High School (Accession 320). No known individuals were identified. No associated funerary objects are present.

The human remains were probably originally from primary burial contexts. Radiocarbon dates indicate the occupation of site CA–SBA–143 was during the Early period (4650–2870 B.C.).

At an unknown date, human remains representing a minimum of two individuals were removed from the Christie Ranch bunkhouse on the western end of Santa Cruz Island, Santa Barbara County, CA, by ranch hands. In 1976, the human remains were acquired by the UCSB (Accession 211–112). The age of the human remains is unknown. No known individuals were identified. No associated funerary objects are present.

Although the collection lacks specific provenience information, considering the nature of most of the UCSB's collection, it is unlikely that the human remains are derived from non-Chumash sites. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

In 1976, human remains representing a minimum of one individual were collected from the surface of CA–SCRI–382 at Platts Harbor on the north coast of Santa Cruz Island, Santa Barbara County, CA, by Glassow, UCSB, with the permission of the private land owner (Accession 211). At the same time, human remains representing a minimum of one individual recently collected from the surface of CA–SCRI–382 at Platts Harbor on the north coast of Santa Cruz Island, Santa Barbara County, CA, were turned over to Glassow, UCSB, by a recreational boater (Accession 211). No known individuals were identified. No associated funerary objects are present.

Site CA–SCRI–382 is a prehistoric midden deposit located on a steep slope on the west side of Platts Harbor. It is located close to site CA–SCRI–381.

In 1984, human remains representing a minimum of one individual were removed from site CA–SBA–1826 on Santa Agueda Creek, Santa Barbara County, CA, by Dr. P. Walker and the Santa Barbara County Coroner (Accession 521). No known individual was identified. No associated funerary objects are present.

The human remains were identified eroding from the creek bank by the land owner. Initially believed to have been modern, they were ultimately identified as prehistoric. However, the age of the human remains from site CA–SBA–1826 is unknown. The site is within the historically documented geographic area of the Santa Ynez Band of the Mission Indians and the territory occupied by Chumash speakers at the time of European Contact. Therefore, the preponderance of the evidence suggests that the human remains are culturally affiliated with the Chumash.

Determinations Made by the University of California, Santa Barbara

Officials of the UCSB have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described above represent the physical remains of 395 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 3,985 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Additional Requestors and Disposition

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. Lynn Gamble, University of California, Santa Barbara, Santa Barbara, CA 93106–3210, telephone (805) 893–7341, before July 12, 2012. Repatriation of the human remains and associated

funerary objects to the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California, may proceed after that date if no additional claimants come forward.

The UCSB is responsible for notifying the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California, that this notice has been published.

Dated: June 7, 2012.

David Tarler,

Acting Manager, National NAGPRA Program.

[FR Doc. 2012–14290 Filed 6–11–12; 8:45 am]

BILLING CODE 4312–50–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–AKRO–DENA–10403; 9924–PYS]

Notice of June 30, 2012, Meeting for Denali National Park Subsistence Resource Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: This notice sets the date of the June 30, 2012, meeting of the Denali Subsistence Resource Commission.

DATES: The public meeting of the Denali Subsistence Resource Commission will be held on Saturday, June 30, 2012, from 9:00 a.m. to 5:00 p.m. (Alaska) or until business is completed. Should a quorum not be available on June 30, 2012, an alternate meeting date has been scheduled on Saturday, July 21, 2012, from 9 a.m. to 5 p.m. If the meeting dates and location are changed, a notice will be published in local newspapers and announced on local radio stations prior to the meeting date. SRC meeting locations and dates may need to be changed based on inclement weather or exceptional circumstances.

Location: The meeting will be held at the Nikolai Tribal Council Office in Nikolai, AK.

Proposed Agenda

The proposed meeting agenda for each meeting includes the following:

1. Call to order—Confirm Quorum
2. Welcome and Introductions (SRC Chair and Superintendent)
3. Administrative Announcements
4. Approval of Agenda and Minutes
5. SRC Member Reports on Subsistence Issues/Activities
6. Public and Other Agency Comments
7. Old Business
   —NPS Subsistence Collections Environmental Assessment Update
8. New Business
   —Community Sheep Hunt Proposal
   —Status of SRC Membership—Vacancies
9. NPS Staff Reports
   —Subsistence Project Updates
   —Ranger Division Updates
   —Resource Management Program Updates
   —Fish and Wildlife Updates
10. Public and Other Agency Comments
11. Select Time and Location for Next Meeting
12. Adjourn Meeting

FOR FURTHER INFORMATION CONTACT: Paul Anderson, Superintendent or Amy Craver, Subsistence Manager at (907) 683–2294 or Clarence Summers, Subsistence Manager, NPS Alaska Regional Office at (907) 644–3603. If you are interested in applying for Denali National Park SRC membership, contact the Superintendent at P.O. Box 9, Denali Park, AK 99755, or visit the park Web site at: *http://www.nps.gov/dena/contacts.htm.*

SUPPLEMENTARY INFORMATION: Denali National Park Subsistence Resource Commission (SRC) will meet to develop and continue work on National Park Service (NPS) subsistence program recommendations and other related subsistence management issues. The NPS SRC program is authorized under Title VIII, Section 808 of the Alaska National Interest Lands Conservation Act, Public Law 96–487, to operate in accordance with the provisions of the Federal Advisory Committee Act. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting to be announced in the **Federal Register**. The meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days 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.

Dated: June 5, 2012.

Debora Cooper,

Associate Regional Director, Resources and Subsistence, Alaska Region.

[FR Doc. 2012–14292 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–PF–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1202–1203 (Preliminary)]

Xanthan Gum From Austria and China; Institution of Antidumping Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping investigation Nos. 731–TA–1202–03 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Austria and/or China of xanthan gum, provided for in subheading 3913.90.20 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by July 20, 2012. The Commission's views are due at Commerce within five business days thereafter, or by July 27, 2012.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* June 5, 2012.

FOR FURTHER INFORMATION CONTACT: Cynthia Trainor (202–205–3354), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://*

www.usitc.gov). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on June 5, 2012, by CP Kelco US, Atlanta, GA.

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. 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 investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with this investigation for 9:30 a.m. on June 26, 2012, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be filed with the Office of the Secretary (*William.bishop@usitc.gov and Sharon.bellamy@usitc.gov*) on or before June 22, 2012. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before June 29, 2012, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: June 6, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–14158 Filed 6–11–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–58]

Darryl J. Mohr, M.D.; Affirmance of Immediate Suspension Order

On January 20, 2011, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision (also ALJ). Thereafter, Respondent filed exceptions to the decision.

Having reviewed the entire record including the ALJ's recommended decision[1] and Respondent's exceptions, I have decided to adopt the ALJ's rulings, findings of fact and conclusions of law, except as noted below.[2] However, because Respondent's registration expired shortly after the ALJ issued his decision and Respondent did not file a renewal application, I reject the ALJ's recommendation that I revoke his registration and deny any pending application.[3] While there is neither a registration, nor an application, to act upon, I affirm the immediate suspension order.

In his exceptions, Respondent contends that the ALJ's decision should be rejected because it is based on an unsupported assumption that ''Respondent [can] not be trusted to avoid repeating his mistakes.'' Exc. at 2. Respondent further contends that the State Board has placed him on probation and imposed various conditions, including that within six months of the State Order, he ''attend an

[1] All citations to the ALJ's decision are to the slip opinion as issued on January 20, 2011.

[2] The ALJ found that Respondent materially falsified his January 2008 renewal application by failing to disclose that in 2001, the Arizona Medical Board had placed him on probation based on his having prescribed Viagra to an FDA undercover agent without having conducted a physical examination and determining whether the drug was clinically indicated or contraindicated for the patient. *See* ALJ at 37; *see also* GX 2, at 3–4. The State Board also found that Respondent had been named as a defendant in a lawsuit brought by the Attorney General of Illinois which had alleged that he engaged ''in the use of electronic internet communication for the prescribing and dispensing of prescription medications'' in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; Pharmacy Practice Act of 1987, and Medical Practice Act of 1987; Respondent accepted a settlement in which he did not admit to any illegality ''but agreed not to engage in the internet prescribing or dispensing of prescription medication in Illinois.'' GX 2, at 3–4. The State did not, however, suspend or revoke his medical license.

Viagra is not, however, a controlled substance and the Government did not offer any evidence that Respondent had engaged in the internet prescribing of controlled substances. Moreover, the Government did not offer any evidence explaining why Respondent's Internet prescribing of Viagra was ''capable of influencing the decision'' of the Agency as to whether to grant his application. *See Scott C. Bickman,* 76 FR 17694, 17701 (2011) (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988) (other citations omitted)). Nor did the Government cite to any decision of this Agency holding that an application for registration may be denied on the ground that the applicant had prescribed a non-controlled substance inappropriately. Accordingly, while Respondent falsified his application, the falsification was not material. I thus do not adopt the ALJ's finding that Respondent materially falsified his renewal application.

[3] Both the Government and Respondent nonetheless maintain that this case is not moot under the collateral consequences doctrine. *See* Gov. Note. Regarding Resp.'s DEA Registration, at 1–2 (citing *William Lockridge,* 71 FR 77,791 (2006)); Resp. Exceptions at 2 n.1. Neither party explains what collateral consequences attach in this case.

intensive education program regarding medical recordkeeping and the prescribing of controlled substances,'' and that upon completion of the program, he submit his charts to a Board-approved contractor who is to review his documentation and prescribing practices. *Id.* at 3.

In Respondent's view, the ALJ's finding that he did not accept responsibility for his misconduct is erroneous because the ALJ placed excessive weight on Respondent's failure to implement the monitoring program required by the Board's Order. *Id.* at 4. According to Respondent, the ALJ erroneously assumed that he was required to have ''the monitoring program * * * up and running as of the time of the hearing'' when the Board's Order does not require ''that the monitoring itself would * * * take place until *after* he had completed the PACE education program.'' *Id.* Respondent further maintains that he cannot be faulted for failing to implement the monitoring program because the ''program was to assess prescribing and documentation in the context of [his] prescribing [of] controlled substances,'' which he is unable to do because his registration was immediately suspended. *Id.*

However, subsequent to the ALJ's issuance of his decision, on February 25, 2011, the Arizona Medical Board issued to Respondent an Interim Order For Practice Restriction And Consent To The Same. I take Official Notice of the Board's Order.[4] Therein, the Board found that Respondent had failed to complete ''either the PACE prescribing course or the Pace medical recordkeeping course.'' Interim Order, at 2. The Board further found ''that a practice restriction is needed in order to protect the public.'' *Id.* The Board therefore placed Respondent ''on a practice restriction that prohibits him from prescribing, administering, or dispensing any Controlled Substances until he applies to the Board and receives permission to do so.'' *Id.* at 3.

Accordingly, Respondent no longer has authority under Arizona law to prescribe controlled substances and is not entitled to be registered under the Controlled Substances Act. *See* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance in the course of professional practice''). *See also id.* § 823(f) (The Attorney General shall register practitioners * * * to dispense * * * controlled substances * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''); *id.* § 824(a)(3) (authorizing the revocation of a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances''). Thus, even if Respondent had filed a renewal application and prevailed in this proceeding, he would not be entitled to be registered. *See, e.g., Jovencio L. Raneses, M.D.,* 75 FR 11563 (2010).

Moreover, even assuming that Respondent intends to remain in professional practice, *cf.* Resp. Exc. n.1., contrary to Respondent's understanding and notwithstanding the collateral consequences doctrine, his challenge to the ALJ's finding that he did not accept responsibility for his misconduct is now moot. As DEA's case law makes clear, the issue of whether a registrant has accepted responsibility for his misconduct and has demonstrated that he will not engage in future misconduct is in play in only two circumstances: (1) In determining whether a registrant's continued registration is consistent with the public interest, *see* 21 U.S.C. 824(a)(4); and (2) in determining whether granting an applicant's application for registration is consistent with the public interest. *Id.* § 823(f). However, where, as here, a registrant allows his registration to expire, and does not file a renewal application, there is neither a registration nor an application to act upon and the issue of whether a registrant's continued registration is consistent with the public interest is off the table. *Ronald J. Reigel,* 63 FR 67132, 67133 (1998). While this Agency has recognized that because an immediate suspension order involves the exercise of summary process, it is reviewable in a proceeding under 21 U.S.C. 824, even where collateral consequences exist, review of the order is limited to challenging its factual and legal basis. Whether a former registrant has accepted responsibility for his misconduct has no bearing on the validity of the suspension order.

As the ALJ found (and as the Government's Expert testified), Respondent prescribed narcotic controlled substances to the two undercover patients even though he did not obtain a patient history or perform a bona fide physical exam during any of the four undercover visits, ALJ at 48, notwithstanding that Arizona law explicitly provides that it is ''[u]nprofessional conduct'' to ''fail[] or refus[e] to maintain adequate records on a patient'' or to ''[p]rescrib[e], dispens[e] or furnish[] a prescription medication * * * to a person unless the licensee first conducts a physical examination of that person or has previously established a doctor-patient relationship.'' *Id.* at 52 (quoting Ariz. Rev. Stat. § 32–1401(27)(e) & (ss)).

As the Government's Expert testified, Respondent's records for the two undercover patients ''showed no substantiation for a diagnosis, a plan, or a treatment with opioid medication.'' *Id.* at 48 (quoting Tr. 416). Indeed, at their initial visits, both undercover patients had indicated on their intake form (''Opioid Flow Sheet) that they had a pain level of ''0'' on a scale of 0 to 10. GX 15, at 2 (K.R. visit of 11/13/09); GX 16, at 2 (B.K. visit of 11/18/09).[5] Respondent did not discuss a treatment plan with either undercover patient.

Moreover, there is ample evidence establishing that Respondent knew that the undercover officers were not legitimate patients but were seeking the controlled substances to abuse them. At her first visit, K.R. told Respondent that she had been using her father's Percocet and did not make any claim of being in pain in her conversation with Respondent. GX 21, at 144. During K.R.'s visit, Respondent told her that ''[t]he only place you can get these medications from is me,'' which K.R. then acknowledged with ''o.k.'' GX 21, at 147. Respondent then stated: ''You

[4] Under the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding-even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request, to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Order, which shall begin on the date it is mailed.

[5] With respect to the undercover visitors, Respondent asserted that this did not give reason for concern because ''0'' on the flow sheet indicated that this was their pain score ''with medications.'' Resp. Proposed Findings of Fact and Conclusion of Law, at 7 (¶ 22) & 10 (¶ 34). During K.R.'s visit, Respondent asked her how long it had been since she had taken medication. GX 21, at 144. In response, K.R. stated that she had used her father's Percocet and that it had been several weeks since she had done so. GX 21, at 142–45. K.R. did not represent that she was currently in pain. *See id.*

What is obvious is that no matter what number on the pain scale was circled, this form would always provide justification to prescribe controlled substances. If, as in K.R.'s visit, the patient circled ''0,'' Respondent could claim that this was because of the medications the patient was on. Notably, during the visit, Respondent did not ask K.R. to rate her pain level without medications.

can't, you go, you can't go to me and then another doctor and another doctor cause they you're gonna, it's all computerized, so your gonna get red-flagged and they're gonna call you a drug addict and a doctor shopper and then all of a sudden no pharmacy is gonna give you any medication.'' *Id.* Respondent was also well aware of the ''high street value'' of both Percocet and OxyContin. *Id.* at 147–48.

While Respondent did a superficial examination, noting that ''I'm gonna poke you. I gotta find something out about ya,'' he had already agreed to write a prescription for K.R. *Id.* at 150–51. As this interaction demonstrates, Respondent knew that K.R. was not a legitimate patient but needed to find something to justify the prescription he had already agreed to issue. Moreover, while during the visit, K.R. had stated that she had used Percocet (which contains only 5 mg of oxycodone) or even oxycodone 10 mg, Respondent gave her a prescription for seventy tablets of oxycodone 30 mg. *See* GX 21, at 144; Tr. 207.

As for the first visit of B.K. (the second undercover patient), Respondent, immediately upon introducing himself, stated: ''Obviously you're looking for pain medication. What did you do?'' GX 22, at 159. When Respondent then asked B.K. to state the location of his pain, B.K. stated: ''You name it'' and added that he had ''basically, you know general pain.'' *Id.* at 159–60. When Respondent asked if he had been in an auto accident, B.K. stated that he had been ''[p]robably a couple years'' ago. *Id.*

Respondent then asked B.K. ''what kind of medication are you looking to get?'' *Id.* at 161. B.K. stated ''well Oxy. Probably thirties'' and added that he got them ''wherever I can.'' *Id.* When Respondent asked how B.K. got ''started on oxycodones,'' B.K. answered ''[o]h just general pain'' and ''achiness.'' *Id.* Respondent then suggested that there were ''other medications to take except a schedule II narcotic''; B.K. answered: ''[w]ell that was available to me.'' *Id.* Manifesting his recognition that B.K. was not a legitimate patient, Respondent then stated that ''the issue is * * * that I can't write for pain medication unless I have proof of injury. * * * You're not giving me proof of injury, you're just telling me you, you ache all over.'' *Id.* To this B.K. replied: ''Right.'' *Id.*

Respondent then stated:

> I mean there's other medications that you can take. Uh, you've never even been on, or whatever you're doing if you're buying this off the street, and I don't care whether you are or not, I have patients that do that. Uh, but basically that's why they're coming because they're very expensive on the street, plus they need to be evaluated and find out what their problem is. Uh, but for me just to write a script * * * for a patient that walks in the door and says, ''I'm just having general pain'' that doesn't work. I mean there's no way I'm going to lose my license.

Id. at 162.

While Respondent told B.K. that he was going to have to find another doctor, he then explained that:

> the point is, I can't write you a prescription for medication at this level without any proof of injury. So, if you're having pain, you know I can certainly give you something less than the Percocet. I can give you some Vicodin, I can give you some Darvocet, I can give you some Tyonol[sic] three's, but to give you this level * * * drug is, no, that's out.

Id.

After B.K. stated ''ok,'' Respondent added that ''[i]f you want a lesser drug I'd be more than happy to write it for you. * * * But that's up to you.'' *Id.* B.K. stated ''[t]hat'd be great'' and Respondent asked him if he had ever been on Vicodin, Darvocet or Tylenol Three. *Id.* When B.K. told Respondent that he had previously ''been on the strongest Vicodin * * * the 10–325,'' Respondent offered to write the prescription and give B.K. a thirty-day supply (120 tablets), even though he acknowledged that B.K. ''got no * * * chronic pain syndrome'' and ''no etiology.'' *Id.* at 162–63.

When B.K. then asked Respondent whether he could get another appointment, Respondent agreed that B.K. could ''come back'' on December 23rd even though he had no ''proof of injury.'' *Id.* at 165. Respondent then told B.K. that he was giving him the medication ''because you're telling me you're having pain'' (even though B.K. never identified any specific area of pain) and told him that he would have to find himself ''a primary care physician.' '' *Id.* at 166. Respondent gave B.K. a prescription for 120 Vicodin 10/325, a highly abused schedule III narcotic. Tr. 255; *see also* 21 CFR 1308.13(e)(1).

On December 23rd, B.K. returned to Respondent. Shortly after the visit commenced, B.K. stated that he was ''not better'' and Respondent stated that he was going to give him the medication, but that he did not think that B.K. would ''find anybody that's really gonna give you these narcotic medications just because you're stating that you're not better.'' GX 23, at 171. While Respondent recommended that B.K. get insurance and see a rheumatologist and stated that he would give B.K. another prescription for 120 Vicodin 10/325 but was discharging him, B.K. asked Respondent if he could come back if he was able to get ''[p]roof of an injury.'' *Id.* at 172. Respondent then stated that because B.K. did not ''have proof of injury * * * at this point you couldn't come back to me and say well all of a sudden I've got an injury I forgot about'' because ''that tells me you're lying to me.'' *Id.* at 172–73. Respondent then stated that ''I'm not gonna write you narcotics knowing that you've already told me that there's nothing wrong with you.'' *Id.* at 173. Respondent then told B.K. that he would have to go see a rheumatologist and get checked out. *Id.* Notwithstanding his acknowledgment that there was nothing wrong with B.K., Respondent then wrote B.K. another prescription for 120 Vicodin 10/325 before discharging him.

The Government's Expert reviewed Respondent's medical records for K.R. and B.K., the audiotapes of their initial visits, the video tape of B.K.'s second visit, and the available transcripts.[6] GX 18, at 1. The Government's Expert concluded that both K.R. and B.K. ''portrayed drug seeking individuals, with 0/10 pain, [and] with no documentation through past records, present records, radiologic studies, or physical examination of any condition warranting treatment with opioid medication.'' *Id.* at 3. Continuing, the Expert found that ''[t]he Medical Records are inadequate, inaccurate, representing falsifications and omissions, with no proper history and physical, no documentation of pathology that would warrant treatment with opioids, with fabricated details in an attempt to substantiate opioid prescriptions.'' *Id.* at 4. The Expert also explained that ''[t]here is no 120 day window, as mentioned by [Respondent], that allows opioid prescribing without past records and documentation.'' *Id.; see also* Tr. 431. The Expert further opined that Respondent's prescribing of controlled substances to both undercover patients lacked a ''legitimate medical purpose.'' Tr. 431.

I agree. Based on the record, I conclude that Respondent's prescribing of controlled substances to the undercover patients went ''beyond the bounds of any legitimate medical practice,'' *United States* v. *McIver,* 470 F.3d 550, 559 (4th Cir. 2006), and ''completely betrayed any semblance of legitimate medical treatment.'' *United States* v. *Feingold,* 454 F.3d 1001, 1010 (9th Cir. 2006).

At the hearing, Respondent offered testimony only in regards to his prescribing to K.R. Tr. 761. Respondent

[6] Due to an equipment malfunction, there was no recording of K.R.'s second visit.

asserted that he had examined K.R. and she had told him that she had pain in her back. *Id.* However, as the ALJ found, Respondent had already agreed to write a prescription (which he did for 70 tablets of oxycodone 30 mg, a schedule II controlled substance) before he did his ''exam.'' ALJ at 49. Moreover, K.R. had told him she was getting Percocet from her father (and not from a physician) and never stated that she had pain (other than after he poked her), let alone pain that would support prescribing a schedule II narcotic. Tr. 406. (testimony of Government's Expert discussing titration and adjustment of dosage).

K.R. made a second visit to Respondent at which she again obtained a prescription for 70 tablets of oxycodone 30 mg, even though she again made no representation that she had pain and Respondent did not perform a physical exam or take a history. Tr. 218–20. However, Respondent offered no testimony as to why he prescribed to her at this visit. Moreover, Respondent offered no testimony addressing his medical justification for prescribing Vicodin 10/325 [7] to B.K. at either visit.

It is well settled that the Agency can draw an adverse inference from a respondent's failure ''to testify in response to probative evidence offered against'' him. *See Baxter* v. *Palmigiano,* 425 U.S. 308, 316 (1976); *see also United States* v. *Solano-Godines,* 120 F.3d 957, 962 (9th Cir. 1997) (''In civil proceedings * * * the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify.''). Based on Respondent's failure to address why he prescribed to K.R. at her second visit, and B.K. at both of his visits, it is appropriate to draw the adverse inference that Respondent knowingly prescribed controlled substances to both B.K. and K.R. without a legitimate medical purpose.

While in his testimony Respondent asserted that when he opened his pain practice, he did not ''comprehend the deceit of many of my patients to get narcotics,'' and that ''[a]s time progressed, I learned more about pain management,'' and started ''doing better documentation, drug screening, * * * appropriate physical testing, better validation and proof of injury,'' Tr. at 756–57, the undercover visits make clear that Respondent knowingly diverted controlled substances. Notably, when the State sanctioned Respondent based on his prescribing of Viagra, the State found that his doing so ''without first conducting a physical examination'' constituted ''unprofessional conduct'' under Arizona law. GX 2, at 3–4. Yet Respondent prescribed to both undercover officers without performing a physical examination (other than to perform a cursory physical examination on K.R. to, in his words, ''find something out about ya,'' after he had already agreed to write the prescription). Accordingly, this is not a case of a ''naive or gullible'' practitioner who did not intentionally prescribe to drug abusers and who has since learned from his mistakes and reformed his practices.[8] *See Paul J. Caragine, Jr.,* 63 FR 51592, 51601 (1998).

Based on the above, I find that Respondent knowingly diverted controlled substances by issuing prescriptions outside of the usual course of profession practice and which lacked a legitimate medical purpose to the two undercover officers. 21 CFR 1306.04(a). This finding is sufficient to support the conclusion that Respondent committed acts which rendered the continuance of his then-existing registration ''inconsistent with the public interest'' and ''an imminent danger to public health and safety,'' and thus supported the suspension of his registration pursuant to 21 U.S.C. 824(d).[9] I therefore affirm the Order of Immediate Suspension.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824, as well as 28 CFR 0.100(b), I order that the Order of Immediate Suspension issued to Darryl J. Mohr, M.D., be, and it hereby is, affirmed. This Order is effective immediately.

Dated: June 2, 2012.

Michele M. Leonhart,

Administrator.

Dedra S. Curteman, Esq., *for the Government*

Mary Baluss, Esq., *for the Respondent*

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Introduction

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., to determine whether the Drug Enforcement Administration (DEA) should revoke a physician's Certificate of Registration (COR) as a practitioner. Without this registration the practitioner, Respondent Darryl J. Mohr, M.D. (Respondent), of Phoenix, Arizona, will be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances in the course of his practice.

On May 25, 2010, the Deputy Administrator, DEA, issued an Order to Show Cause and Immediate Suspension of Registration (OSC/IS), immediately suspending Respondent's DEA COR and giving Respondent notice to show cause why the DEA should not revoke his COR pursuant to 21 U.S.C. § 824(a)(1), on grounds that his continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. §§ 824(a)(4), 823(f) and 823(g)(2)(E)(i).

In substance, the OSC/IS alleges that: Respondent is registered with DEA as a practitioner in Schedules II–V under DEA COR BM2040498 at Access 2 Care Family Medical Center, 4607 North 12th Street, Phoenix, Arizona 85014; that COR BM2040498 expires by its terms on January 31, 2011; that pursuant to the Drug Addiction Treatment Act (DATA), Respondent is authorized to treat no more than thirty narcotic dependent patients at any one time with Schedule III–V narcotic controlled substances; that Respondent materially falsified his applications for renewal of his DEA COR on January 26, 2005, and January 29, 2008, by answering ''no'' to the liability questions despite the fact that his state medical license was suspended on November 27, 2001, in violation of 21 U.S.C. § 843(a)(4); and that Respondent prescribes and dispenses inordinate amounts of controlled substances, primarily hydrocodone compounds, Schedule III controlled substances, among others, under circumstances where Respondent knows or should know the prescriptions are not for legitimate medical purposes or are issued outside the course of usual professional practice. (ALJ Ex. 1.)

The OSC/IS includes the following specific allegations: Family Practice and Pain Management recommends that patients fill their prescriptions at one pharmacy, Community Pharmacy (in various locations) and often provides a coupon for patients' use. On November 27, 2009, Respondent's patient,

[7] Vicodin is a schedule III narcotic, which contains hydrocodone.

[8] Respondent also takes exception to the weight which the ALJ gave to the hearsay statements made by two of his patients (J.G. and L.W.) to the Task Force Officers. However, the statements have no bearing on the issue of whether Respondent's prescriptions to the undercover officers complied with Federal law. I therefore do not consider the exception.

[9] Respondent did not challenge the imminent danger finding at any point in this proceeding.

''[MC],'' [1] died at [MC]'s home from ''Combined Drug Toxicity.'' Three days before [MC]'s death, on November 24, 2009, Respondent prescribed [MC] 150 oxycodone 30 mg tablets, 70 alprazolam 2 mg tablets and 35 amphetamine salts 30 mg tablets. [MC] filled the prescription on the same day at the Community Pharmacy located at 17233 N. Holmes Blvd., Suite 1615, Phoenix, Arizona 85053. Respondent also prescribed controlled substances in various amounts on October 20, 2009, September 16, 2009, August 17, 2009, July 22, 2009, June 25, 2009, and May 27, 2009. The drugs found near [MC]'s body and in [MC]'s system at the time of death were consistent with the controlled substances Respondent prescribed for [MC]. (ALJ Ex. 1.)

The OSC/IS further alleges that on January 6, 2010, Respondent's patient, ''[CS],'' died at [CS]'s home; that [CS] received prescriptions from Respondent as recently as December 31, 2009, when Respondent prescribed 90 oxycodone 15 mg tablets and 60 alprazolam 2 mg tablets; and that [CS] obtained prescriptions for controlled substances from Respondent on a monthly basis since December 2008. (ALJ Ex. 1.)

In addition, the OSC/IS alleges that on February 10, 2010, B.R., a twenty-four-year-old male, died of a possible overdose at his home; that at the time of Mr. B.R.'s death, the Phoenix Police Department found a blue medical bottle prescribed by Respondent to ''[TR]'' with a date of December 16, 2009, for alprazolam 2 mg; that law enforcement personnel conducted four undercover visits to Respondent's office in November and December 2009; and that on these occasions Respondent prescribed controlled substances including Schedule II and III controlled substances to undercover law enforcement personnel with cursory or no medical examinations, without medical records and without a legitimate medical purpose in violation of 21 C.F.R. § 1306.04 and Ariz. Rev. Stat. §§ 32–1401(27)(a), (q) & (ss) (2010). (ALJ Ex. 1.)

On June 23, 2010, in a letter dated June 21, 2010, Respondent, through counsel, timely filed a request for hearing on the allegations in the OSC/IS. Following prehearing procedures, a hearing was held in Phoenix, Arizona, between September 21–23, 2010, and in Arlington, Virginia, on October 19, 2010, with the Government and Respondent both represented by counsel. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

I. Issue

Whether the record evidence establishes by substantial evidence that Respondent's DEA COR should be revoked as inconsistent with the public interest as that term is used in 21 U.S.C. §§ 824(a)(4), 823(f) and 823(g)(2)(E)(i); and because Respondent materially falsified an application for DEA registration or renewal pursuant to 21 U.S.C. § 824(a)(1).

II. Evidence and Incorporated Findings of Fact

I find, by a preponderance of the evidence, the following facts:

A. Background

(a) Darryl J. Mohr, M.D. (Respondent)

Respondent received his medical degree in 1970. (Transcript (Tr.) at 34.) After thirty years of working in other practitioners' practices, Respondent opened his own practice on August 3, 2009. (Tr. 34–35, 39–40.) He has no certifications or training in pain management. (Tr. 36.)

Respondent's most recent previous practice was a family practice. (Tr. 35.) Respondent's current practice entails approximately eighty percent pain management and twenty percent family care. (Tr. 35–36, 39.)

Respondent is the only physician at his practice. (Tr. 40.) Each month he sees between 225 and 300 patients, or approximately three to four patients per hour, devoting fifteen minutes to each patient. (Tr. 36, 37.) Approximately eighty percent of Respondent's patients are cash-only. (Tr. 38.) The average age range of his patients is twenty-seven to thirty-three. (Tr. 61.)

(b) Respondent's Employees

Respondent began his new practice with ''[CP],'' [2] his sole employee at that time. (Tr. 38–39.) In November 2009 he began to train a receptionist named Ana. (Tr. 38.) Ana could not handle the patient load, and left after about two months. (Tr. 38, 39.) Respondent next hired Erin Kelly, who also left after about two months. (Tr. 39.)

In January 2010, Respondent hired ''[SO]'' to be his medical assistant. (Tr. 39.) [SO] is also a patient of Respondent. (Tr. 41.) Respondent pays a salary for [SO]'s work; he also prescribes [SO] controlled substances as a patient. (Tr. 41.)

(c) Respondent's Arizona State Medical License

Respondent possesses a state medical license, but that license has been suspended in the past. (Tr. 85–86; *see* Gov't Exs. 2 & 3.)

(d) The Arizona Controlled Substances Prescription Monitoring Program (PMP)

The Arizona PMP is a database maintained by the Arizona State Board of Pharmacy (Board of Pharmacy) since approximately April 2008. (Tr. 96–97, 124, 318.) Every pharmacy provides records of filled prescriptions for controlled substances, as well as information such as the prescribing doctor and DEA registration number. (Tr. 97.) The Board of Pharmacy collects data from pharmacies on a weekly basis, and there can be a lag of up to two weeks before data appears on a PMP report. (Tr. 153.) Checking the PMP allows a doctor to determine whether a patient is receiving prescriptions from multiple doctors. (Tr. 171.) The normal way to access the PMP is via the Internet. (Tr. 97.) Doctors simply provide their credentials and receive Internet and phone access. (Tr. 386.)

B. The Evidence

(a) The Government's Witnesses

Task Force Officer Jeremy Dean (TFO Dean) is a member of the Apache Junction Police Department and is currently assigned to the Phoenix field division of the DEA. He was the lead investigator on Respondent's case. (Tr. 70–72.) He began as a task force officer in March 2009. (Tr. 120.) Before joining the DEA Task Force, which is responsible for investigating the diversion of legitimate pharmaceuticals to the illegitimate market, TFO Dean served for three years as a patrol officer at the Apache Junction Police Department and a large telecommunications company. (Tr. 71–72.)

Diversion Investigator Gary Linder (DI Linder) has worked as a DEA Diversion Investigator for approximately five years. (Tr. 176.) He previously served as a police officer for six years and received a bachelor's degree in criminal justice. (Tr. 176.)

Task Force Officer Mike Baldwin (TFO Baldwin) is a DEA Task Force

[1] To protect patient privacy, initials are used in this Recommended Decision when referring to Respondent's current and former patients.

[2] As noted below, [CP] is also a patient of Respondent (Tr. 693), and her name is therefore redacted.

Officer and a detective with the city of Surprise. (Tr. 181–82.) He has been a Task Force Officer with the DEA for approximately one and one half years. (Tr. 182.) TFO Baldwin has worked for the Surprise Police Department for approximately nine years, investigating illicit drug use in many cases. (Tr. 184.) He received a bachelor's degree in secondary education. (Tr. 184.)

Task Force Officer ''[JB]'' [3] (TFO [JB]) is a Task Force Officer with DEA's Tactical Diversion Squad in Phoenix. (Tr. 204.) She is employed by the City of Phoenix Police Department and has been a Task Force Officer since March 2009. (Tr. 204.) Before joining the Tactical Diversion Squad, TFO [JB] was a narcotics detective for the City of Phoenix Police Department for over twelve years, serving as a patrol officer and a field training officer. (Tr. 204.)

Task Force Officer ''[BK]'' [4] (TFO [BK]) is a detective with the City of Peoria Police Department and a task force officer with the Phoenix field division of the DEA in the diversion area task force. (Tr. 252–53.) TFO [BK] has been a Task Force Officer since June 2009. He previously worked as a narcotics detective with the City of Peoria Police Department for four years. (Tr. 253.) He also worked for six years as a patrol officer. (Tr. 253–54.) TFO [BK] received a bachelor's degree in psychology. (Tr. 254.)

Intelligence Research Specialist Stone (IRS Stone) is a DEA Intelligence Research Specialist. (Tr. 302.) He is a pattern analyst, looking at data to discern trends. (Tr. 303.) IRS Stone has worked at DEA for nineteen years, following a career as an intelligence officer with the U.S. Army. (Tr. 302–03.) He received a bachelor's degree in accounting. (Tr. 303.)

The Government's expert witness, Stephen Borowsky, M.D. (Dr. Borowsky), is a board-certified anesthesiologist,[5] board-certified and re-certified in pain medicine. (Tr. 378, 384.) His specialty is pain medicine and he is the founding president of the Arizona Pain Society. He belongs to regional, national and international societies for pain management. (Tr. 384–85.)

In addition to working at John C. Lincoln North Mountain Hospital and Phoenix Surgicenter, Dr. Borowsky also works at the U.S. Department of Veterans Affairs Hospital (VA) one day a week and teaches at the University of Arizona Medical School. He is a member of a group of physicians that conducts independent medical examinations. (Tr. 378.) He has worked in his specialty for thirty years. (Tr. 379.)

Dr. Borowsky holds a degree in mechanical engineering from Drexel University and a medical degree from Temple University. He interned at Baystate Medical Center in Massachusetts, and served two years in the U.S. Public Health Service in the Indian Health Service in a remote reservation in South Dakota. (Tr. 379.) He completed his anesthesia residency at Beth Israel Hospital in Boston, and was simultaneously considered a Fellow at Harvard Medical School. He then served as a staff physician at Beth Israel and as an instructor at Harvard. (Tr. 379.) He began practicing pain medicine when he was appointed Assistant Clinical Professor of Anesthesia at Boston University. (Tr. 379.)

Dr. Borowsky came to Phoenix in 1980, where he practiced anesthesia and was recruited to work at a pain program. (Tr. 380.) He has served on the staff of eleven area hospitals. (Tr. 380.) He is a Clinical Professor of Anesthesia at the University of Arizona College of Medicine, and served on several task forces for the Arizona Legislature on chronic pain. He also served on the task force from the Board of Pharmacy for establishing the PMP. (Tr. 381, 385–86.) He participated in the development of the PMP. (Tr. 386.)

Dr. Borowsky currently cares for eighty to ninety patients and performs procedures at the VA and other locations. (Tr. 381.) He is co-chairman of the VA hospital's Multidisciplinary Pain Committee. (Tr. 382.) He sees between ten and twenty patients, all of which are pain patients, on the one day per week he works at the VA hospital. (Tr. 382–83.)

Dr. Borowsky is a lecturer in the area of pain management. He stays apprised of recent developments in the field by reading journals and Internet web sites, attending or holding conferences and communicating with other practitioners. (Tr. 387–88; *see generally* Gov't Ex. 17.)

(b) Respondent's Witnesses

In addition to his own testimony, Respondent presented testimony by his patient ''[CM].'' Respondent also presented testimony by his employees ''[SO]'' and [CP], who are current or former patients. Finally, Respondent presented testimony of ''[RF],'' the fiancé of Respondent's late patient ''[CS].''

(c) About the DEA Investigation of Respondent, Generally

The DEA's investigation of Respondent, which began in August of 2009, centered around: (1) Allegations that Respondent falsified his application for a DEA registration; (2) allegations that Respondent was practicing at an unregistered location; (3) allegations that Respondent was prescribing controlled substances outside of a normal, professional practice; and (4) a number of fatalities allegedly connected with Respondent's prescribing practices. (Tr. 72–74.)

TFO Dean testified that a federal search warrant was executed at Respondent's medical practice in May 2010. (Tr. 115–16.) Items seized included medical records for approximately eight patients, controlled substances and financial documents. (Tr. 116.)

DI G.L. testified that he served Respondent with the OSC/IS on May 26, 2010, at Respondent's business, at 16601 North 40th Street, Suite 115 in Phoenix. (Tr. 177.)

(d) Material Falsification of DEA Application

As discussed in a later section of this Recommended Decision,[6] there is uncertainty as to some of the details of Respondent's history of registration with the DEA. Certain details, however, are clear and undisputed. Respondent presently holds DEA COR number BM2040498. (Tr. 78; Gov't Ex. 1 at 2.) He applied to renew his COR on January 29, 2008. (Gov't Ex. 1 at 2; *see also* Tr. 795.) On his 2008 renewal application, Respondent answered ''no'' to liability questions inquiring, in pertinent part, whether Respondent had ever had a state medical license suspended or placed on probation (*see, e.g.,* Gov't Ex. 28), notwithstanding the fact that the Arizona Medical Board had previously suspended Respondent's medical license in 2001. (*See* Tr. 85–86, 760–61; Gov't Ex. 28; Gov't Ex. 3 at 4.) Respondent testified that he did not ''really have a good answer'' for why he said ''no'' on the renewal application, ''other than I didn't pay much attention to the wording.'' (Tr. 760.) Respondent

[3] As noted below, TFO [JB] and TFO ''[BK]'' conducted undercover visits to Respondent's office while posing as patients ''[KR]'' and ''[BK].'' Although they visited Respondent for the purpose of an investigation, TFO [JB] and TFO [BK] are nevertheless assumed, *arguendo,* to be patients of Respondent, and their privacy is protected in this Recommended Decision by the use of initials. *See supra* note 1.

[4] Supra note 3.

[5] Dr. Borowsky has previously submitted questions for the board certification in anesthesiology. (Tr. 384.)

[6] *See generally infra* Section III.B (discussing ambiguities surrounding the dates of Respondent's COR registration and renewal(s)).

maintains that he ''never tried to deceive anyone.'' (Tr. 760–61.)

Record evidence indicates that on October 23, 2000, the Arizona Medical Board issued a consent agreement and order. (Tr. 86–87; *see* Gov't Ex. 2.) The consent agreement reprimanded Respondent for unprofessional conduct and required forty hours of continuing medical education in pharmacology. (Tr. 87; *see* Gov't Ex. 2 at 4.) Moreover, on November 27, 2001, the Board placed Respondent's medical license on probation.[7] (Tr. 88; *see* Gov't Ex. 3.)

(e) Respondent's Registered Location and Practice Location

Respondent testified that his current practice location is 16601 North 40th Street, Suite 115, Phoenix Arizona 85032. (Tr. 34.) Respondent conceded that this location is not reflected on his DEA COR. (Tr. 35; *see also* Tr. 90.) Respondent's COR reflects a registered address of ''Access2care Family Medical Center, 4607 N. 12th Street, Phoenix, Arizona 85014.'' (Gov't Ex. 28.) Respondent explained that when he last filled out the application to renew his COR, he ''was working at Access to Care, and that was a family practice.''[8] (Tr. 35.) Respondent failed to update his address when he moved to his new practice in August 2009. (Tr. 760.) Respondent testified he did not realize he had to notify DEA of the change in address in addition to notifying the Arizona Medical Board. (Tr. 760.)

(f) Respondent's Care as a Physician

(1) Proof of Patient Identity

Respondent testified that he requires every patient to provide identification, but leaves the type of identification up to his staff. (Tr. 47–48.) While somewhat credible, this testimony is rebutted by record evidence that Respondent's staff permitted TFO [BK], posing as patient [BK], to see Respondent after producing only an ''admin per se form,'' despite the fact that Respondent's staff stated that the admin per se form was not an acceptable form of identification. (Tr. 258, 295–96.) On his second visit to Respondent, on December 23, 2009, TFO [BK] was again permitted to see Respondent, who prescribed controlled substances to TFO [BK] for a second time without verifying the patient's identification. (Tr. 266–67.)

(2) Proof of Injury

The Government's expert medical witness, Dr. Borowsky, opined that obtaining a patient's medical history is critical to avoiding diversion and overdose, which are becoming widespread. (Tr. 396.) Indeed, Dr. Borowsky testified that the Arizona Medical Board requires that physicians maintain medical records for patients. (Tr. 418.) In his own pain management practice, every patient Dr. Borowsky sees is referred to him by another practitioner; he does not accept walk-ins. (Tr. 388–89.) Moreover, Dr. Borowsky reviews patients' medical records before consulting with patients, ''so I know whether this is an appropriate patient for me or whether it [sic] needs some other direction, so that we're not wasting anybody's time.'' (Tr. 389, 404.) He refuses to see patients ''unless there's the proper documentation and radiologic studies that have been done. I'm not a primary [care] physician, and I want to make sure everything has been done before they get to me.'' (Tr. 390.) He conceded, however, that when a patient needs testing, he orders testing. (Tr. 390.)

Respondent's employee [CP] testified that Respondent has had a policy of requiring proof of injury ''[f]rom day one.'' (Tr. 713.) Respondent's testimony, however, shows otherwise. Respondent testified that in the past, because it could take three or four months to acquire a patient's medical records (Tr. 42), Respondent would write prescriptions beginning once the patient signed release forms to permit Respondent to acquire her records. (Tr. 42–43.) Respondent explained that he did this as a ''compassionate doctor.'' (Tr. 42.) ''I always required proof of injury. But I waited sometimes for the proof of injury to come in'' and prescribed controlled substances in the interim. (Tr. 43–44; *see also* Tr. 45.)

Respondent further testified that he began requiring proof of injury from pain management patients in December 2009 or January 2010. (Tr. 42.) Now that Respondent has ''gotten more into the pain management process,'' Respondent requires that every patient present proof of injury. (Tr. 42–44.) Proof of injury can take the form of MRIs, CTs, X-ray reports, reports from a previous doctor or blood work, depending on the diagnosis. (Tr. 43, 46.) Respondent might accept a three-year-old MRI that shows significant disease. (Tr. 45.) In some cases, he has accepted a six-year-old MRI. (Tr. 46.)

Respondent's testimony that he has required proof of injury since December 2009 or January 2010 is called into question by record evidence that TFO [BK], posing as patient [BK], provided no medical records before or during his December 23, 2009 visit to Respondent, at which Respondent prescribed controlled substances. (Tr. 265–67.) Similarly, the record shows that Respondent prescribed controlled substances to TFO [JB] on December 18, 2009, without requiring any past medical records. (Tr. 219, 247.) Indeed, TFO [JB] testified that Respondent stated that ''if he were to continue to prescribe to me, I would need to get proof of injury because he was in danger of losing his license.'' (Tr. 220; *see* Tr. 244.) Moreover, ''Respondent does not contest the fact that he prescribed to the two undercover agents without demanding previous medical records,'' (Resp't Br. at 39), explaining that ''I'm a good doctor and that at times I found myself not being prepared to manage such difficult situations,'' (Tr. 756.) I find by substantial evidence that during the relevant time period, Respondent did not consistently require proof of injury.

(3) Physical Examination of Patients

Dr. Borowsky testified that the Arizona Medical Board requires that physicians conduct a physical examination and patient history. (Tr. at 416.) An examination is important to show discrepancies and determine whether a patient is credibly in pain. (Tr. 397.) Dr. Borowsky testified on the importance of being skeptical, and that prescribing properly requires picking the right patient and monitoring the patient. (Tr. 397.)

In his own pain management practice, Dr. Borowsky does not take vital records on every patient; it depends on the patient. (Tr. 391–92.) However, he does conduct physical examinations. (Tr. 393.) An examination of a patient with low back pain, for instance, would include directing the patient to walk both on her heels and on her toes. (Tr. 393.) Dr. Borowsky would direct the patient to sit and do straight leg-raising, ''and if that was positive, ultimately, I would lay them down and look for continuing [sic] with a straight leg-raise to see if it was the same result.'' (Tr. 393, *see also* Tr. 394.) Throughout the examination, Dr. Borowsky would watch for ''non-organic findings, in

[7] Respondent also conceded that the Arizona Medical Board recently placed his license on probation for two years, (Tr. 62), on August 11, 2010. (*See* Gov't Ex. 27 at 4). Respondent stated that the Board required him to be monitored, and that he has signed a contract to employ monitors. Respondent equivocated, however, as to whether the monitoring program is currently in place. (Tr. 62–63, 67–68.) Because this probation occurred after Respondent applied to renew his COR in 2008, it is not relevant for purposes of the material falsification analysis. *But compare infra* Section III.D (discussing Respondent's August 11, 2010 probation in light of the 21 U.S.C. § 823(f) public interest analysis).

[8] The different spellings of Respondent's former clinic, *compare* Tr. 35 (''Access to Care''), *with* Gov't Ex. 28 (''Access2care Family Medical Center''), appear to reflect a typographical error in the transcript.

other words, non-physical findings like Waddell's signs. One of those would be lightly pressing on somebody's head, and if they respond by exclaiming that they have radiating leg pain, that's not a physical finding that creates a credible picture.'' (Tr. 394.)

Respondent's patients ''[CM],'' ''[CP]'' and ''[RF]'' each testified that Respondent examined them on their first visits. (Tr. 515, 567, 700.) In addition, Respondent testified that when he conducts physical examinations of patients, he does not use the Waddell's signs test. Instead, his exams are ''heel to toe, hip flexion, range of motion, reflexes.'' (Tr. 48.) This testimony is undercut by record evidence that Respondent conducted no physical examination of TFO [BK] when the latter posed as patient [BK] on November 18, 2009, and December 23, 2009. (Tr. 258, 260, 267–68.) Respondent gave TFO [BK] prescriptions for controlled substances on both occasions. (Tr. 256, 265.) Moreover, Respondent failed to conduct a physical examination of TFO [JB] when the latter posed as patient [KR] on December 18, 2009. (Tr. 219.) Respondent gave TFO [JB] a prescription for controlled substances anyway. (Tr. 247.)

In mitigation, the record reflects that during TFO [JB]'s November 13, 2009 undercover visit, Respondent did touch TFO [JB]'s back in several places, asked if it hurt and moved her right foot. (Tr. 215, 238–40.) This incident, however, occurred only as Respondent was starting to leave the examination room, after he had already told TFO [JB] of his decision to prescribe controlled substances. (Tr. 214–15, 246.) Moreover, Dr. Borowsky testified that Respondent's purported examination in this regard was inadequate because Respondent's statement '''I'm poking you' . . . is not a physical exam.'' (*See* Tr. 421–22.) I find by substantial evidence that during the relevant time period, Respondent did not consistently conduct adequate physical examinations before prescribing controlled substances.

(4) Patient Drug Screens

Dr. Borowsky testified that in his own pain management practice, before prescribing a controlled substance, he orders patients to complete a urine drug test. (Tr. 392–93.)

Respondent testified that he performs drug screens on ''[e]very patient that walked through the door'' at every appointment. (Tr. 46.) Under certain circumstances, however, when a patient with an opioid prescription tests negative for opiates, Respondent might nevertheless prescribe controlled substances, such as, for example, if the patient loses the medication or forgets to take it. (Tr. 47.)

The credibility of Respondent's testimony that he performs drug screens on all patients is called into question by evidence that Respondent did not require undercover investigators posing as patients to complete drug screens on November 13, 2009 (Tr. 209), November 18, 2009 (Tr. 258), December 18, 2009 (Tr. 219) or December 23, 2009 (Tr. 267). This discrepancy, however, may be explained in part by Respondent's testimony that he began conducting drug screens in February 2010. (Tr. 805; *see generally* Tr. 221, 616–17.) In any event, ''Respondent . . . concedes that his willingness to prescribe based on office observation, examination and patient complaints was unwise.'' (Resp't Br. at 40.)

(5) Referrals for Treatment by Specialists

Dr. Borowsky testified that the Arizona Medical Board requires that physicians consult with specialists (Tr. 417) because ''[m]ost of these problems involve areas that can be beyond the practitioner, even a pain management doctor, and it's important to get the appropriate consultations . . . .'' (Tr. 429.) Respondent testified that he makes referrals for psychiatric evaluation to patients with insurance. (Tr. 48.) For patients without insurance, Respondent asks them about their psychiatric treatment history. (Tr. 49.) Most of his patients lacking insurance cannot afford psychiatric treatment, ''[b]ut I tell them they still need to go if the situation calls for it.'' (Tr. 49.)

Respondent's testimony that he makes referrals is called into question by his failure to make a referral to TFO [BK], posing as patient [BK], notwithstanding Respondent's stated concern that TFO [BK] might have fibromyalgia. (Gov't Ex. 23 at 1.)

(6) Respondent's Use of the Arizona PMP

Dr. Borowsky testified that it is the obligation of a doctor to check the PMP.[9] (Tr. 386–87; *accord* Tr. 170 (testimony of TFO Dean).) When prescribing controlled substances, however, Respondent did not initially consult the PMP. (Tr. 50.) Respondent explained that he did not initially know about the PMP, and ''there were certain things I didn't know about pain management.'' (Tr. 50.) But once he was informed of the PMP, in approximately December 2009 or January or February of 2010, he did start to use it. (Tr. 50–51.) This testimony is slightly undercut by Respondent's statement to TFO [JB] on November 13, 2009, that ''the only place you can get these medications is from me . . . it's all computerized, so you're gonna get red-flagged and they're gonna call you a drug addict and a doctor shopper and then all of a sudden no pharmacy . . . is gonna give you any medication'' (Gov't Ex. 21 at 147; *see also* Tr. 213), which evinces Respondent's knowledge of the PMP on that earlier date.

Respondent also testified to relying on a pharmacy to check the PMP for him. (Tr. 51.) The pharmacy would call Respondent if a review of the PMP indicated ''doctor shopping.'' (Tr. 51.) ''And if that were the case, every one of those patients got discharged.'' (Tr. 52.)

(7) Patient Treatment Plans

Dr. Borowsky testified that the Arizona Medical Board requires that physicians document a treatment plan. (Tr. 417.) He opined that it is critical to document both patient treatment plans and informed consent to substantiate the basis for treating the patient and the patient's diagnosis. (Tr. 399–400.) ''[I]f it's not in writing, others will assume that it was not done.'' (Tr. 400.)

Dr. Borowsky testified that in his own pain management practice, following the physical examination of a patient, he consults with the nurse case manager to develop a written plan of treatment. (Tr. 395.) Frequently, such a treatment plan would involve any of the following: physical therapy, psychology, referral to a psychiatrist and injection techniques such as epidural steroid injections or trigger-point injections. (Tr. 394–95.) Treatment could also involve medication management, such as opioids, narcotics, anti-inflammatories, anti-convulsives, antidepressants and various medications along that line. (Tr. 394–95.)

Respondent testified that he formulates treatment plans in his mind for his patients. (Tr. 52.) Respondent's testimony was unclear as to whether he reduces his treatment plans to writing. (*See* Tr. 52.) The testimony of DEA investigators posing as patients indicates that Respondent discussed no treatment plan before prescribing

[9] Respondent argues that Dr. Borowsky used the term ''obligation'' ''in the aspirational or hortatory sense.'' (Resp't Br. at 22 ¶ 106 (citing Tr. 479–80).) Respondent was given ample opportunity before, during and after the hearing in Phoenix, Arizona to present testimony by an expert witness of his choosing. Such testimony could have addressed, *inter alia,* whether an Arizona physician is obligated to consult the PMP. Respondent declined to call an expert witness. (Tr. 863.) Dr. Borowsky's unqualified and fully credible testimony therefore stands unrebutted.

controlled substances on November 13, 2009 (Tr. 212) November 18, 2009 (Tr. 262) December 18, 2009 (Tr. 220) or December 23, 2009 (Tr. 269). Moreover, the patient files of TFO [JB], posing as [KR], and TFO [BK], posing as [BK], reveal no treatment plans.[10] (Tr. 416; *see also* Gov't Exs. 15 & 16.)

(8) Informed Consent and Opioid Contract

Dr. Borowsky testified that the Arizona Medical Board requires that physicians obtain informed consent from patients. (Tr. 417.) In his own pain management practice, Dr. Borowsky discusses the risks and benefits of medications he prescribes to patients. (Tr. 395.) He also directs patients to sign an informed consent agreement using a standard form that is readily available in pain management societies. (Tr. 399.) He said it is critical to discuss with patients the risks and benefits of medications, especially opioids. (Tr. 399.) Dr. Borowsky opined that it is critical to document treatment plans and informed consent to substantiate the basis for treating the patient and the patient's diagnosis. (Tr. 399–400.) Although diagnoses can be vague after patients undergo various surgeries and treatments, there does ultimately need to be credibility and substantiation for a diagnosis. (Tr. 398.)

Respondent testified that he has required patients to sign an opioid contract since December 2009 or January 2010, but he was not sure exactly when. (Tr. 55.) Before he began using his current opioid contract, Respondent used an ''opioid flow sheet,'' which ''explained about taking the drugs, and being responsible for how you take the drugs and potential side effects, and so on and so forth.'' (Tr. 55.) Respondent has an informed consent agreement in place as a part of the opioid contract. (Tr. 65.) Respondent took the language in the opioid contract from his previous clinic. (Tr. 65–66.)

In contrast to Respondent's testimony, TFO [BK] testified that Respondent did not discuss the risks and benefits of the controlled substances he prescribed to TFO [BK] on December 23, 2009. (Tr. 269.) Nor did Respondent discuss the risks and benefits of the drugs he prescribed to TFO [JB] during her second visit in an undercover capacity on December 18, 2009. (Tr. 220.) Taken together, this testimony calls into question the extent to which Respondent consistently obtains informed consent from his patients.

(9) Pain Scale

Dr. Borowsky testified that in his own pain management practice, it is customary to have patients fill out a questionnaire that includes a pain diagram. He stated that ''the coloring-in of the location of pain many times can give you a good idea of the diagnosis.'' (Tr. 390.) His intake form also includes a pain scale ranging from zero to ten, as well as adjectives that patients can circle to describe their pain. (Tr. 390.) Dr. Borowsky conceded that under some circumstances, a patient circling zero on a pain scale might mean zero pain while on medication. (Tr. 430–31.) Respondent testified that he would prescribe controlled substances to a patient that indicated zero on the pain scale. (Tr. 59.) Indeed, TFO [JB], posing as patient [BK], indicated zero out of ten on a patient intake form on November 13, 2009 and again on December 18, 2009. (Tr. 208, 219, 223; *see* Gov't Ex. 15 & 16.) Respondent prescribed controlled substances to TFO [JB] on both occasions. (Tr. 207, 211–12, 247.) Similarly, TFO [BK], posing as a patient on November 18, 2009, indicated zero out of ten on a pain scale. (Tr. 257; *see* Gov't Ex. 16.) On his second undercover visit, on December 23, 2009, TFO [BK] left the pain scale blank. (Tr. 266; *see* Gov't Ex. 16.) Respondent prescribed controlled substances to TFO [BK] in both instances. (Tr. 256, 265.)

(g) Respondent's Knowledge of Controlled Substances

DI G.L. testified that when he served the OSC/IS on Respondent on May 26, 2010, Respondent asked DI G.L. ''what a controlled substance was, and if Xanax was a controlled substance.'' (Tr. 177–79.) DI G.L. replied that ''Xanax was in fact a controlled substance, and if he needed to refer to anything else, he could go to [the DEA] Web site, and there would be a full list of controlled substances on the diversion Web site.'' (Tr. 179.) DI G.L. testified that in his experience as a DEA investigator, DI G.L. had never encountered that question before. (Tr. 179.)

(h) Quantity of Controlled Substances Prescribed

Dr. Borowsky testified that when prescribing controlled substances, it is appropriate to ''start[] off with the lowest level of medication . . . If you start high, you can't go back very easily, but if you start low, you can assess [the patient's] response.'' (Tr. 406.) He elaborated that ''it's not just the pain relief that you're looking for. The goal . . . is not just pain relief, but improvement in function . . . .'' (Tr. at 406.)

Respondent testified that the average amount of oxycodone he prescribes is 30 mg, with the dosages running from ninety to one hundred and fifty, corresponding to three to five times per day. (Tr. 54.) Thirty milligrams is the highest dosage available of oxycodone. (Tr. 55.)

(1) ''Street Value'' of Controlled Substances

TFO [JB] noted that based on her experience as an investigator, the term ''on the street,'' in the context of controlled substances, means the controlled substances are received illegally, or from illegal means. (Tr. 213–14.) TFO Dean testified that ''many of the drugs [Respondent] was prescribing were ending up in the illegitimate market, in the street market.'' (Tr. 73.)

Respondent acknowledged prescribing to patients when he knew the patients bought drugs on the street in the past. (Tr. 58.) He said patients subsequently ''came to me because they didn't want to continue breaking the law.'' (Tr. 57.) When he sees such patients, he tells them not to buy on the street and only to get drugs from him. (Tr. 58.)

Respondent testified that he did not personally know any patients who sell pills on the street, and that he immediately discharges any patient he discovers to be selling drugs. (Tr. 55–56.) Respondent estimated that the amount of patients he discovers are selling constitutes less than one percent. (Tr. 56–57.) Yet Respondent also testified that between December 2009 and May 2010, he discharged 264 patients. (Tr. 757.) ''The reasons were from selling drugs, using medications that weren't prescribed by me, multiple doctor shopping, using the pharmacy monitoring program, use of illicit drugs and drug screens where they came positive for cocaine or methamphetamine . . ..'' (Tr. 757.)

Dr. Borowsky testified that he does not discuss the street value of medications with his patients. (Tr. 428.) Respondent stated that in general, he does not discuss street values of drugs with patients. (Tr. 59.) However, he conceded having done so in the past. (Tr. 59.) ''I would tell them what my

[10] Respondent proposes that it is ''not necessarily reasonable to expect an elaborate treatment plan for patients who have been advised to get diagnostics ([JB]) or to find a primary care doctor to provide evaluation, diagnostics and probably referral ([BK]).'' (Resp't Br. at 38 n.10.) Respondent was given ample opportunity before, during and after the hearing in Phoenix, Arizona to present testimony by an expert witness of his choosing. Such testimony could have addressed, *inter alia,* whether a treatment plan was called for in the case of TFO [JB] and TFO [BK]. Respondent declined to call an expert witness. (Tr. 863.) Dr. Borowsky's unqualified and fully credible testimony therefore stands unrebutted.

patients tell me. I know nothing about street drugs per se. I repeat what I've heard from my patients.'' (Tr. 59.) This testimony by Respondent stands in contrast to other record evidence that on November 13, 2009, Respondent told TFO [JB] that the drugs he prescribed to her possessed a high street value. He noted that the pills sold for about ten dollars per pill on the street and that OxyContin sold for forty dollars to eighty dollars on the street. (Tr. 213.) In mitigation, a transcript of that visit suggests that when Respondent discussed the street value of drugs with TFO [JB], he did so for the patient's own protection:

these medications . . . there's a high street value for them. That's number one. So it's not a good idea for you to tell your friends that you're taking these medications because [even] your mother will take them from you . . . These medications go for about ten dollars a pill on the street . . . what's called oxycontins . . . go like anywhere from like 40 to 80 dollars a pill . . . So there's a huge street value. People are always stealing them. So be careful. Uh because if you lose your medications, even if you have a police report, can't get em. Once a month is all you can get. (Gov't Ex. 21 at 147–48.)

(2) Statistical Analysis of Respondent's Prescribing Practices

IRS Stone testified that he analyzed the PMP data on Respondent's prescriptions. (Tr. 303.) He focused on the number of patients involved, the dates covered and the kinds and combinations of controlled substances Respondent prescribed. (Tr. 304.) Government Exhibit 14 consists of charts IRS Stone prepared on this basis. (Tr. 305; *see* Gov't Ex. 14.) IRS Stone did not verify that the data he was given was correct before analyzing it, because he had no basis to do so. (Tr. 318.)

The category ''oxycodone'' on the first chart of Government Exhibit 14 refers to drugs prescribed by Respondent in which oxycodone is the main ingredient, including Percocet, Endocet, OxyContin and 12 oxycodone 30s. (Tr. 306.) The category ''benzodiazepine'' in the same chart refers to drugs prescribed by Respondent in which benzodiazepine is an active ingredient, such as Klonopin, Xanax, alprazolam, clonazepam and lorazepam. (Tr. 306–07.)

The first chart indicates that between August 2009 and March 2010, Respondent wrote 9411 prescriptions. (Tr. 307.) The highest number of prescriptions was 5126, for oxycodone. (Tr. 307, 310.) The total tablet count was 681,590. (Tr. 310.) This amount represents 54.47 percent of Respondent's prescriptions and 71.08 percent of the tablets he prescribed. (Tr. 311.)

The second highest number of prescriptions Respondent wrote between August 2009 and March 2010 was 3230, for benzodiazepine. (Tr. 307, 310.) The total tablet count was 208,318. (Tr. 310.) This amount represents 34.32 percent of Respondent's prescriptions and 21.72 percent of the tablets he prescribed. (Tr. 311; *see* Gov't Ex. 14 at 2.) The tablet counts noted above do not distinguish between tablets of various dosages. (Tr. 319.)

The second chart of Government Exhibit 14 contains the number of prescriptions within each drug group, the number of tablets prescribed within that drug group and the average number of tablets per prescription. (Tr. 307–08.) For instance, when Respondent prescribed hydrocodone, he did so with an average of one-hundred and ten tablets per prescription. (Tr. 309.) This average prescription indicates a patient taking a prescription more than three times per day during a month of thirty days. (Tr. 309.) The prescription average for oxycodone was one-hundred and thirty-three. (Tr. 310.)

The third chart identifies how many of Respondent's patients received various drugs between August 2009 and March 2010. (Tr. 311–14.) According to information IRS Stone received from the PMP, the age group in Arizona that received the highest number of prescriptions for controlled substances was the fifty to fifty-nine age group. (*See* Tr. 491 (correcting mistake in witness's prior testimony, *see* Tr. 317).)

(3) [JG] and Diversion

TFO Baldwin testified to an interview he conducted with ''[JG].'' (Tr. 184.) [JG] was twenty nine or thirty years old at the time of the interview. (Tr. 189.) [JG] said she was addicted to oxycodone, and that she visits Respondent on a monthly basis and pays cash. (Tr. 185.) She has her prescriptions filled at Community Pharmacy, at 29th Avenue and Bell Road. (Tr. 186.) That location is ten miles away from Respondent's office; to get from Respondent's office to that location, one passes by many other pharmacies on the way. (Tr. 186.) TFO Baldwin testified that [JG] said she goes to that particular location of Community Pharmacy because it has the cheapest price in town, because it always has her stock on-hand and because Respondent directed her to go there. (Tr. 186.) TFO Baldwin has heard that Community Pharmacy has ''the cheapest cash prices. That's how they advertise.'' (Tr. 197.)

TFO Baldwin testified that [JG] said that she and her boyfriend sell their pills to pay their bills. (Tr. 187.) She and her boyfriend go to Respondent because a friend of hers had said: ''Hey, this doctor can give you the hook up.'' (Tr. 187, 197.) TFO Baldwin testified that he understood that to mean that without a lot of questions asked, a person can get the medications that they seek. (Tr. 187.) TFO Baldwin testified that he asked [JG] if Respondent knew that she was selling her pills, and her response was that ''he should know because half the patients in there are just like me.'' (Tr. 196.)

TFO Baldwin further testified that [JG] said that fifty percent of Respondent's patients are getting pills for no medical reason. (Tr. 187.)

(4) [LW] and Diversion

TFO [JB] testified that she talked with ''[LW],'' one of Respondent's patients, at a pharmacy on November 13, 2009. (Tr. 216.) TFO [JB] knew [LW] was a patient of Respondent because they saw one another in Respondent's waiting room. (Tr. 244.) [LW] said she was taking oxycodone 30, and that she was addicted. (Tr. 216.) She usually took five pills per day; she used to sell part of her prescription on the street but now needs to take all of them to avoid withdrawal. (Tr. 217.)

[LW] said she sent several patients to Respondent to get prescriptions to sell on the street. (Tr. 217.) [LW] told TFO [JB] that Respondent had never asked [LW] for proof of injury, nor did she provide any, but that he had recently begun to ask patients for proof of injury. (Tr. 217.)

(5) Pharmacists Questioning Respondent's Prescribing Practices

Respondent testified that a pharmacist has never questioned his prescribing of controlled substances. (Tr. 61.) On multiple occasions, however, pharmacists have contacted Respondent to ensure a prescription was valid. (Tr. 66.) In such situations, Respondent asked the pharmacist to fax him the suspicious prescription, and Respondent advised whether it was his own handwriting. (Tr. 66–67.)

Contrary to Respondent's testimony that a pharmacist has never questioned Respondent's prescribing of controlled substances (*see* Tr. 61), the testimony of TFO Dean and an August 10, 2009 letter by pharmacist S.G. (*see* Gov't Ex. 4) suggest otherwise. (*See also* Tr. 168.)

TFO Dean testified that the official investigation of Respondent began when pharmacist S.G. contacted TFO Dean because he was suspicious of Respondent's prescribing practices. (Tr.

73.) S.G. told TFO Dean that Respondent ''had a large number of customers at his pharmacy who all were receiving similar prescriptions, usually oxycodone and alprazolam, and that many of them seemed to be organized in some sort of group, as they were all using the same physical prescription discount card.'' (Tr. 74.)

Directly contradicting Respondent's testimony, TFO Dean testified that S.G. contacted Respondent and expressed his suspicion that some of Respondent's patients were diverting drugs. (Tr. 74.) According to TFO Dean, Respondent replied to S.G. that all the prescriptions in question were legitimate. (Tr. 75.) TFO Dean testified that S.G. said Respondent told S.G. a story about a previous practice where Respondent had worked, where Respondent had prescribed to a family of ten patients, but only two of them needed their medications. (Tr. 75.) On cross examination, TFO Dean said S.G. did not indicate where or when this story was said to have occurred, other than at a previous employer of Respondent. (Tr. 132–33.) TFO Dean testified that Respondent told this story to S.G. in response to S.G.'s suspicions. (Tr. 168.) In his testimony, Respondent denied that such a family existed, and denied prescribing to any such family. (Tr. 774–76.)

TFO Dean stated that following his conversation with S.G., TFO Dean asked S.G. in late July or early August 2009 to formalize in a letter what they had talked about. (Tr. 124–25.) The record reflects a letter from S.G. to the DEA dated August 10, 2009. (Gov't Ex. 4; *see* Tr. 76.)

TFO Dean testified on cross examination as to how S.G. connected an individual prescription by Respondent to concerns of diversion. For one thing, the amounts of some prescriptions were similar. Moreover, S.G. noted that patients were using the same physical prescription discount card because it was creased in a particular way. (Tr. 128.)

S.G. told TFO Dean that S.G. followed patients out into the parking lot and saw them exchange cash with someone in a vehicle. (Tr. 128.) S.G. said he and his staff ''would see them go outside—they'd come inside often, ask how much their prescriptions were going to be, go out to a vehicle, receive cash from the driver, walk back in. [They would p]ay with that cash, and go back and get in a vehicle and leave.'' (Tr. 126–29, 130, 168.)

TFO Dean did not recall whether S.G. said he had told Respondent about following the patients into the parking lot. (Tr. 130.) On redirect examination, TFO Dean testified that TFO Dean did not inform Respondent of his suspicions relating to the parking lot story, but that S.G. did. (Tr. 168.)

(i) Undercover Visits to Respondent, Generally

Pursuant to a federal warrant executed on Respondent's medical practice in May 2010, law enforcement officers seized medical files under the names of [BK] and [KR]. (Tr. 116.) These files are patient records associated with four undercover visits by two undercover law enforcement officers. (Tr. 118–19; *see* Gov't Ex. 15 & 16.)

Law enforcement officers made audio or video recordings of three of these undercover visits.[11] (Tr. 118–19.) TFO Dean monitored all of the undercover visits via audio receiver. (Tr. 119.)

(j) Undercover Visits to Respondent by TFO [JB], AKA ''[KR]''

TFO [JB] testified that on November 13, 2009, and December 18, 2009, she visited Respondent in an undercover capacity, posing as patient ''[KR],'' and Respondent gave her prescriptions for 70 oxycodone 30 mg. (Tr. 205–06, 211, 221.)

(1) TFO [JB] Undercover Visit of November 13, 2009

During her first undercover visit to Respondent's office, posing as ''[KR],'' TFO [JB] possessed a functioning recording device. (Tr. 206–07, 230; *see* Gov't Exs. 21 & 24.) TFO [JB] filled out a patient intake form and paid seventy dollars in cash. (Tr. 208.) The patient intake form included a pain scale of zero to ten for ''pain score on medications,'' on which TFO [JB] marked ''zero,'' indicating no pain. (Tr. 208, 223.) TFO [JB] did not provide medical records. (Tr. 208.)

The consultation with Respondent lasted ten minutes, and Respondent also took a phone call during that time. (Tr. 207; *see* Gov't Ex. 21 at 145.) When Respondent entered the examination room, Respondent asked who sent TFO [JB] to him. (Tr. 210; Gov't Ex. 21 at 142.) He then stated that he was going to flirt with TFO [JB], because he flirts with his good-looking patients. (Tr. 210; Gov't Ex. 21 at 143.) After approximately the third time he said this to her, she responded ''Oh, that's fine.'' (Tr. 236; Gov't Ex. 21 at 143.) Respondent asked if TFO [JB] was single, and whether she had ever been out with a doctor. (Tr. 214; Gov't Ex. 21 at 148.) He told her that she was attractive, and that she was single, and that he was single. (Tr. 215; Gov't Ex. 21 at 148–50.) TFO [JB] testified that Respondent made her feel uncomfortable (Tr. 234, 246), and that she was not sure whether he was joking or not. (Tr. 234.) This had never occurred in her investigation of other doctors. (Tr. 246.)

The examination room contained an examination table, but no instruments. (Tr. 209.) No one checked her vital signs, such as her pulse, heart rate, height, weight or blood pressure. (Tr. 208–09.) She did not submit a urinalysis for drug screening. (Tr. 209.) TFO [JB] said Respondent did not give her a physical, neurological or musculoskeletal examination. (Tr. 212.) He asked if she had had an MRI; she said she had not and Respondent recommended she go to Simon Med, which would give her a discount. (Tr. 212; Gov't Ex. 21 at 144, 146.)

TFO [JB] did not say she had any pain. (Tr. 210, 245; *see e.g.,* Gov't Ex. 21 at 143.) She said she had been taking her father's Percocet ''to feel good, or better.'' (Tr. 211; *see* Gov't Ex. 21 at 144.) She said she had not seen a doctor in a few years. (Tr. 210; Gov't Ex. 21 at 143.) Respondent then asked how TFO [JB] hurt her back, even though TFO [JB] never said her back hurt. (Tr. 210, 245; Gov't Ex. 21 at 143.) TFO [JB] explained that Respondent coached her, and when he said ''lower back?'' she agreed. (Tr. 210–11; Gov't Ex. 21 at 145; *see also* Tr. at 233.)

Respondent did not discuss a treatment plan with TFO [JB], nor did he discuss the risks and benefits of the controlled substances he ultimately gave her. (Tr. 212; *see generally* Gov't Ex. 21.) Although Respondent initially said he would prescribe oxycodone 15 mg, he ultimately prescribed oxycodone 30 mg 70 tablets, representing a little more than one month's supply. (Tr. 207, 211–12; *see also* Gov't Ex. 21 at 146.)

As Respondent started to leave the examination room, and after he had already told TFO [JB] that he would write her a prescription, he turned back and asked TFO [JB] to roll over on the examination table onto her stomach. (Tr. 214–15, 246; Gov't Ex. 21 at 150.) TFO [JB] told Respondent she did not need an examination. (Tr. 215.) Respondent replied: ''An exam? . . . No. I'm gonna poke you. I gotta find something out about ya . . . let me know whether that causes you pain.'' (Gov't Ex. 21 at 151. *See generally* Tr. 215.) He then had her roll over, touched her back in several places, asked if it hurt and moved her right foot. (Tr. 215, 238–40.) TFO [JB] testified that she told him there was no pain. (Tr. 215.) On cross examination,

[11] TFO [JB]'s recording device malfunctioned during the December 18, 2009 undercover visit. (Tr. 218.)

however, she conceded that she had said ''Oh, yes, that does'' when he poked a part of her back. (Tr. 238; Gov't Ex. 21 at 151.) TFO [JB] explained that Respondent's touch startled her. (Tr. 239, 248.) She felt very uncomfortable when Respondent asked her to roll onto her stomach and found the whole visit unnerving. (Tr. 247.)

TFO [JB] testified that Respondent stated that the prescription he gave her had high street value. (Tr. 213; Gov't Ex. 21 at 147.) Particularly, the pills he was giving her went for ten dollars each on the street; OxyContins went for forty to eighty dollars on the street. (Tr. 213; Gov't Ex. 21 at 147.) Respondent also said she ''could only get the medication from him because it was electronically tracked, and I could be labeled a doctor shopper, or a drug user, or drug addict, and then I wouldn't be able to get the mediation [sic] anymore.'' (Tr. 213; *see* Gov't Ex. 21 at 147 (''medication'').) The transcript of the visit provides some context for these remarks, and also evinces a degree of concern by Respondent for TFO [JB]'s wellbeing.

these medications . . . there's a high street value for them . . . So it's not a good idea for you to tell your friends that you're taking these medications because [even] your mother will take them from you . . . People are always stealing them. So be careful. Uh because if you lose your medications, even if you have a police report, can't get em. Once a month is all you can get. (Gov't Ex. 21 at 147–48.)

TFO [JB] testified that Respondent's staff recommended Community Pharmacy, located about five miles away from Respondent's office, which had a five-dollar coupon. (Tr. 216.) She had never encountered pharmacy coupons offered in any other doctor's office. (Tr. 247.)

(2) TFO [JB] Undercover Visit of December 18, 2009

TFO [JB] returned to Respondent's office on December 18, 2009. (Tr. 218.) Although her recording device malfunctioned that day, the transmitter functioned properly. (Tr. 218.)

TFO [JB] did not tell Respondent or indicate on any paperwork during the second visit that she had pain. (Tr. 218–19.) She again marked zero on the pain scale. (Tr. 219.) Respondent completed no physical, neurological or musculoskeletal examination of TFO [JB]. (Tr. 219.) TFO [JB] did not submit any medical records, nor did she submit a urinalysis for drug testing. (Tr. 219.) Respondent asked if TFO [JB] had an MRI; she said no. Respondent answered that ''if he were to continue to prescribe to me, I would need to get proof of injury because he was in danger of losing his license.'' (Tr. 220; *see* Tr. 244.)

But Respondent prescribed controlled substances to TFO [JB] on her second visit anyway. (Tr. 247.) Respondent said he had noted that TFO [JB] was taking fifteen-mg oxycodone. (Tr. 221.) TFO [JB] corrected him and said Respondent had actually given her thirty-mg oxycodone on the previous visit. (Tr. 221.) Respondent replied ''Well, I wrote 15 milligrams in the chart, but I sometimes make mistakes.'' (Tr. 221.) Respondent gave TFO [JB] a second prescription identical to the first: Another prescription for 70 tablets of oxycodone 30 mg. (Tr. 218.) Respondent did not discuss a treatment plan, nor did he discuss the risks and benefits of the drugs he prescribed to TFO [JB] during her second visit. (Tr. 220.)

Respondent said he was in debt due to the day-to-day cost of operating his office. (Tr. 220.) He said he intended to raise the office visit fee to eighty dollars per visit, to cover the cost of the urinalysis testing he was going to begin, and to help with his own debt. (Tr. 221.) Respondent also stated that some of his patients used to get their drugs on the street. (Tr. 221.)

(k) Undercover Visits to Respondent by TFO [BK], AKA ''[BK]''

TFO [BK] testified that on November 18, 2009, and December 23, 2009, he visited Respondent's office in an undercover capacity, posing as patient ''[BK],'' and Respondent gave him prescriptions for 120 Vicodin 10/325 mg on each visit. (Tr. 255–56, 265; *see* Gov't Exs. 16, 22, 23, 25 & 26.)

(1) TFO [BK] Undercover Visit of November 18, 2009

During his first undercover visit to Respondent, TFO [BK] used a functioning recording device. (Tr. 256–57.) The interaction with Respondent lasted approximately five to ten minutes. (Tr. 257.) TFO [BK] filled out an intake form and indicated zero out of ten on a pain scale, with zero meaning ''no pain.'' (Tr. 257.)

As part of the intake process, TFO [BK] provided an admin per se form that indicated his driver's license had been taken away due to a DUI.[12] (Tr. 258.) Respondent's office staff told TFO [BK] that the admin per se form was not an acceptable form of identification, but Respondent saw him anyway.[13] (Tr. 258, 295–96.) He paid cash and did not provide medical records during the intake process. (Tr. 258.)

TFO [BK] described the examination room as approximately eight by eight feet with an examination table, chair and desk, but no medical equipment. (Tr. 259.) When Respondent entered the room, he told TFO [BK] ''[o]bviously you're here looking for pain medication,'' (Gov't Ex. 22 at 159), and asked what TFO [BK] did that he needed it. (Tr. 259–60.) TFO [BK] said Respondent went on to suggest several reasons, including back and arm pain. (Tr. 260.) TFO [BK] did not respond with a specific reason, but just said ''you name it,'' and also ''general pain.'' (Tr. 260.) Respondent then said there would need to be a specific reason, and suggested a motor vehicle accident. (Tr. 260–61.) TFO [BK] agreed to a motor vehicle accident. (Tr. 261.) Respondent then stated that TFO [BK] would need to produce proof of injury. (Tr. 261.)

TFO [BK] testified that Respondent recommended that TFO [BK] go to Simon Med, where he could get a discount on an MRI. (Tr. 262.) This testimony is called into question by other evidence of record. As Respondent notes (Resp't Br. at 10), the audio recording and the transcript of the November 18, 2009 visit are devoid of any discussion of Simon Med or an MRI. (*See* Gov't Ex. 22 & Gov't Ex. 25 at track one.) One possible explanation is that a number of sections of the recording are inaudible, with corresponding blank spaces appearing in the transcript. Even so, TFO [BK] testified at hearing that he listened to the recording and that it accurately reflects what occurred during the visit. (Tr. 270.) Accordingly, I do not assign any weight to TFO [BK]'s assertion that Respondent recommended Simon Med to him. The remaining testimony of TFO [BK], however, is otherwise internally consistent and credible, and does appear to be corroborated by other record evidence.[14]

TFO [BK] further testified that Respondent asked TFO [BK] what kind of medication he wanted. TFO [BK] responded that he wanted ''oxy 30s,'' or oxycodone 30-milligram pain medication. Respondent asked where TFO [BK] got oxy 30s; TFO [BK] responded that he was getting them wherever he could. (Tr. 261.)

During the meeting, Respondent sat approximately four to six feet away from

[12] DEA prepared the admin per se form for this undercover purpose. (Tr. 258.)

[13] Respondent's staff asked: ''[D]o you have any kind of photo id with your picture on it?'' (Gov't Ex. 23 at 157). I therefore reject Respondent's assertion that ''in November new patient [BK] was not asked for his ID.'' (Resp't Br. at 13 ¶ 50.)

[14] *But see infra* note 15 (discussing the TFO [BK]'s testimony as to Simon Med during his second visit).

TFO [BK] and never came any closer. (Tr. 260.) No one took TFO [BK]'s pulse, heart rate, height, weight or blood pressure. (Tr. 258.) Nor did TFO [BK] submit a urinalysis for drug testing. (Tr. 258.) Respondent conducted no physical, neurological, musculoskeletal or other examination of TFO [BK]. (Tr. 260, 262.)

Respondent gave TFO [BK] a prescription for 120 Vicodin 10/325 mg, a hydrocodone/acetaminophen compound and Schedule II narcotic. (Tr. 256.) The quantity was enough for thirty-five days. (Tr. 256.) Respondent did not discuss the medication's risks and benefits. (Tr. 262.)

TFO [BK] testified that Respondent told him that Respondent has some patients who get drugs off the street, and ''I don't care whether you are or not, I have patients that do that . . . .'' (Gov't Ex. 22 at 162.) Respondent told TFO [BK] that it is more expensive to buy drugs off the street. Therefore, some of Respondent's patients come to him to be evaluated and obtain prescriptions at a lower price. (Tr. 263.)

TFO [BK] testified that the people present in Respondent's waiting room were in their twenties and thirties and appeared sleepy. (Tr. 259, 284.) TFO [BK] estimated observing between fifteen and twenty patients. (Tr. 284.) He did not notice any outward signs of chronic pain. (Tr. 259.)

Respondent recommended that TFO [BK] fill his prescription at Community Pharmacy, located approximately thirteen miles away. There was a coupon for Community Pharmacy in the lobby. (Tr. 264.)

(2) TFO [BK] Undercover Visit of December 23, 2009

On December 23, 2009, TFO [BK] provided no identification whatsoever, nor did he provide medical records, but Respondent nevertheless allowed him a second office visit. (Tr. 266–67.) TFO [BK] possessed a functioning audio and video recording device and transmitter. (Tr. 264–65.) The visit lasted between five and ten minutes. (Tr. 266.)

TFO [BK] brought no proof of injury to the second visit. (Tr. 266.) He filled out intake forms, leaving the pain scale blank. (Tr. 266.) On cross examination, TFO [BK] agreed that circling ''zero'' indicated ''with medication, no pain.'' (Tr. 281.) He also told Respondent that he was obtaining medication ''here and there.'' (Tr. 282; *see* Gov't Ex. 23.) He told Respondent he was experiencing ''general pain.'' (Tr. 285.) The transcript of the visit corroborates that Respondent suggested to TFO [BK] options in terms where his pain might stem from. (Gov't Ex. 23 at 171; Tr. 297.) The evidence supports TFO [BK]'s assertion that ''I followed [Respondent] down the road I was led.'' (Tr. 287.)

Respondent told TFO [BK] that he would need to obtain proof of injury. (Tr. 268, 285.) As with the first visit, TFO [BK] testified that Respondent recommended getting a discount MRI at Simon Med. Also as with the first visit, this testimony is inconsistent with other record evidence.[15] (Tr. 268.)

TFO [BK] testified that during the second visit, Respondent prescribed the same prescription as at the first visit: 120 count Vicodin 10/325 mg. (Tr. 265.) Vicodin is a controlled substance. (Tr. 298.) On cross examination, TFO [BK] conceded that while he had requested ''Oxy 30s . . . I got [a lesser strength].'' (Tr. 283.) TFO [BK] filled the second prescription at Community Pharmacy. (Tr. 269.)

Respondent did not discuss a treatment plan, nor did he discuss the risks and benefits of the medication he prescribed to TFO [BK]. (Tr. 269.) No one took TFO [BK]'s vital signs, nor did TFO [BK] submit a urinalysis for drug testing. (Tr. 267.) Neither Respondent nor his staff conducted a physical, neurological or musculoskeletal examination of TFO [BK], and Respondent again sat four to six feet away from him throughout the course of the meeting. (Tr. 267–68.)

(l) Dr. Borowsky's Evaluation Regarding Undercover Visits to Respondent

The Government's expert witness, Dr. Borowsky, reviewed Respondent's records relating to the undercover visits discussed above by TFO [JB] and TFO [BK], to determine whether Respondent complied with the standard of care in prescribing opioids. (Tr. at 408, 410.) In evaluating Respondent's conduct, Dr. Borowsky relied on the Arizona Medical Board Guidelines for the Use of Controlled Substances for the Treatment of Chronic Pain. He also relied on the Model Policy for the Use of Controlled Substances for the Treatment of Pain, published by the Federation of State Medical Boards. (Tr. 411–13.)

Dr. Borowsky found that Respondent's evaluation and treatment was nearly identical for both patients, and ''[t]he medical records showed no substantiation for a diagnosis, a plan, or a treatment with opioid medication . . ..'' (Tr. 416.) He further found that both patients presented as drug-seeking individuals due to their lack of insurance, complaints of zero pain on a pain scale, and lack of background history or documentation to support any claims of pain. (Tr. 418–19.) He testified that Respondent failed to acquire patient histories and that Respondent's documentation was both ''inappropriate'' and ''inadequate.'' (Tr. 421, 430.) Moreover, he testified that Respondent did not conduct any physical examination of TFO [BK] at either visit. (*See* Tr. 421–22.) With respect to TFO [JB], he found that Respondent did not conduct a physical examination on one visit, and that for the other visit Respondent's statement that ''I'm poking you'' did not constitute an adequate physical examination. (Tr. at 421–22.) Respondent moreover failed to conduct neurological or musculoskeletal examinations. (Tr. 422–23.) Respondent did not document an adequate treatment plan or plan for periodic review for either patient. (Tr. 424–28.) Respondent did not perform urinalysis or other drug screens on either patient. (Tr. 428.) Nor did he access the Arizona PMP. (Tr. 428.) Respondent did not consult with specialists. (Tr. 428.)

In sum, Dr. Borowsky credibly found that Respondent's prescription of controlled substances to TFO [BK] and TFO [JB] were not issued for a legitimate medical purpose. (*See* Tr. at 431.)

(m) Deaths of Three Individuals

(1) [CS]

Respondent's patient [CS] was born on June 26, 1968, and died on January 6, 2010. (Tr. 105; Gov't Ex. 8.) A PMP report shows that Respondent prescribed controlled substances to [CS] starting in approximately August 2008, with the most recent prescription on December 31, 2009 for 90 oxycodone 15 mg and 60 alprazolam 2 mg. (Tr. 106–07; Gov't Ex. 9.) The oxycodone prescription was filled on New Year's Eve; the alprazolam prescription was filled on January 2, 2010. (Tr. 107.) The PMP report indicates that Respondent saw [CS] monthly. (Tr. 108.)

According to an autopsy report, a bottle of oxycodone was found near [CS]'s body. (Gov't Ex. 10 at 2.) Respondent had recently prescribed oxycodone to [CS]. (Tr. 109.) The autopsy report listed the cause of death as ''Intoxication due to the combined effects of multiple prescription medications including oxycodone.'' (Gov't Ex. 10 at 1; Tr. 109.)

TFO Dean testified that he did not know the colors of various pills listed in

[15] As Respondent notes (Resp't Br. at 11 ¶ 37), TFO [BK]'s testimony about Simon Med is inconsistent with the transcript and recording of the second visit, which contain no reference to Simon Med. (Gov't Exs. 23 & 26.) I do not assign any weight to TFO [BK]'s testimony about Simon Med. I find, however, TFO [BK]'s other testimony to be generally credible and internally consistent. *See supra* text at note 14 (discussing similar issue).

the police report as present when [CS] died: calcium, folic acid, CVS vitamins, vitamin D and zinc. (Tr. 150–51.) Even carisoprodol, which is usually white, can be a different color depending on the brand. (Tr. 151; *see generally* Tr. 152; Gov't Ex 8 & 9.)

TFO Dean testified that Respondent was one of several doctors prescribing medication for [CS] shortly before her death, based on the PMP report. (Tr. 156; *see* Gov't Ex. 9.) Indeed, TFO Dean testified that Respondent was not the only doctor prescribing oxycodone and hydrocodone to [CS]. (Tr. 157–58; *see* Gov't Ex. 9 at 69.) TFO Dean testified that a patient who receives prescriptions for the same controlled substance from multiple doctors is an indication of diversion. (Tr. 170–71.)

[RF], Respondent's patient and fiancé of [CS], testified about the circumstances of [CS]'s death. Having known [CS] since 2006 and being generally aware of [CS]'s many medical problems, [RF] testified that he found it impossible that Respondent had anything to do with [CS]'s death. (Tr. 550–53, 555–56.) In the weeks before her death, [CS] suffered an injury to her ileostomy wound for which she did not seek treatment. (Tr. 558, 575.) On the day [CS] died, [RF] testified that [RF] did not see her take any medication nor does he recall seeing a bottle of oxycodone near [CS] when she died. (Tr. 561–62.) [RF] also testified that Respondent is a good doctor and that he did not observe anything unusual in Respondent's practice. (Tr. 566, 569.) I find [RF]'s testimony credible. His testimony was internally consistent and the witness was able to recall factual events with a reasonable level of certainty.

(2) B.R.

B.R. was born on February 14, 1985, and died on February 10, 2010. (Tr. 111, Gov't Ex. 11.) Investigators at the time of death found medications that Respondent prescribed. (Tr. 111.) In particular, investigators found a blue medication bottle with prescription number C255226 prescribed to Respondent's patient ''[TR],'' filled December 16, 2009, for alprazolam 2 mg tablets. (Tr. 112.) They also found two and one half white tablets imprinted with ''G3722,'' which is consistent with an alprazolam two milligram tablet. (Tr. 112.)

A PMP report reveals that Respondent wrote an alprazolam prescription to [TR] on November 19, 2009, which was filled on December 16, 2009. (Tr. 114; Gov't Ex. 12.) An autopsy of Mr. B.R.'s body revealed the presence of alprazolam. (Tr. 115; Gov't Ex. 15.)

On cross examination, TFO Dean conceded that neither he nor any agent interviewed Respondent's patient, [TR], at the time of Mr. B.R.'s death. (Tr. 164.) However, ''[h]e spoke with someone recently.'' (Tr. 164.) TFO Dean said he believed [TR] is no longer a patient of Respondent and stated that [TR] acquired prescriptions for controlled substances after Respondent's DEA COR was suspended. (Tr. 165–66.)

(3) [MC]

On November 27, 2009, [MC] was found dead in his house with foam coming out of his mouth. (Tr. 101, 137; Gov't Ex. 5.) Prescription bottles with Respondent's name on them were found near his body. (Tr. 101.) A PMP report confirmed that Respondent prescribed controlled substances to [MC]. (Tr. 98, 101; Gov't Ex. 5.)

In particular, [MC] ''received prescriptions for amphetamine salts in a 30-milligram tablet, oxycodone in a 30-milligram tablet. Also alprazolam in a two-milligram tablet.'' (Tr. 99.) On November 24, 2009, just days before he died, [MC] received ''70 alprazolam two-milligram tablets, 150 oxycodone 30-milligram tablets, and 35 amphetamine salt 30-milligram tablets.'' (Tr. 99–100.) These prescriptions constituted only minor variations from what Respondent prescribed to [MC] in the past. (Tr. 100.)

Substances present in [MC]'s blood at death included oxycodone metabolites, amphetamine, alprazolam and nordiazepam. (Tr. 103; Gov't Ex. 7.) TFO Dean testified that these substances were consistent with Respondent's prescriptions. (Tr. 103.) On cross examination, TFO Dean conceded that Respondent did not prescribe the diazepam. (Tr. 148; *see* Gov't Ex. 6.) Indeed, the PMP report did not show that [MC] had received diazepam, a controlled substance, from any doctor. (Tr. 148–49.)

[MC]'s house contained evidence that he abused cocaine or other drugs. (*See* Tr. 137–38.) There was a square piece of mirror on the armoire, with white powder residue and a red straw, and a credit card with white powder residue on it. (Tr. 141.) TFO Dean testified that this was consistent with both cocaine and also with smashing and snorting oxycodone and alprazolam. (Tr. 141–42.) Alprazolam is commonly snorted. (Tr. 142.) TFO Dean testified that he did not know what the white powdery substance in the bedroom was. (Tr. 142.)

In addition, the bedroom armoire contained several plastic baggies containing a white powdery residue that TFO Dean testified was consistent with drug sales and storage. (Tr. 142–43.) The small digital scales and syringes found near [MC] were also consistent with drug distribution. (Tr. 144.) TFO Dean testified that the substances in the white plastic baggies could have been a variety of substances, including substances Respondent did not prescribe. (Tr. 143.) Moreover, the white powdery substance was never tested. (Tr. 143.) TFO Dean conceded that the plastic baggies could have been the source of the white powder on the armoire. (Tr. 144.)

TFO Dean did not know when the bottles and partially used blister pack found near [MC] at death had been used. (Tr. 138.) TFO Dean also conceded that the police report of [MC]'s death was unclear as to whether any medication remained in the bottles labeled oxycodone 30 mg, alprazolam or amphetamine salts. (Tr. 139–40.)

TFO Dean also testified to being unfamiliar with a number of drugs that the police report listed as present near [MC]'s body: biobolt, undecyclenate and eltrenam. (Tr. 144–45.) The police report indicated that one of the drugs was indicated ''for veterinary use,'' which led TFO Dean to speculate it was not prescribed to an individual for his own use. (Tr. 145.) TFO Dean also conceded that [MC]'s housemates told the police that [MC] had some injuries. (Tr. 146.) Referring to the PMP report for [MC] (*see* Gov't Ex. 6), TFO Dean indicated that a prescription for Suboxone was prescribed by Michael Warren Carlton and not by Respondent. (Tr. 146.)

III. The Parties' Contentions

A. Government

The Government argues that Dr. Borowsky's testimony, which was unrebutted, establishes by a preponderance of the evidence that Respondent failed to act within the bounds of professional practice and issued controlled substances without a legitimate medical purpose, in contravention of the law, such as 21 C.F.R. § 1306.04 (2010). (Gov't Br. 23.)

The Government also highlights Dr. Borowsky's testimony. Analyzing whether Respondent conformed to Arizona practice standards, Dr. Borowsky testified that Respondent's medical records demonstrated no substantiation for a diagnosis plan or treatment with opioid medication. (Tr. 416.) Dr. Borowsky opined that Respondent's evaluation and treatment of undercover agents TFO [JB] and TFO [BK] posing as patients who exhibited drug-seeking behavior (Tr. 416; Gov't Ex. 18 at 130), ''was identical and exhibited no adherence to the Guidelines for Treatment of Chronic

Pain from the Arizona Medical Board.'' (Gov't Ex. 18 at 130.) With Respect to TFO [BK], for instance, Dr. Borowsky testified that Respondent should not have prescribed 120 Vicodin 10 mg. (Tr. 421.)

Moreover, the Government argues that Respondent performed no patient monitoring, indicated by the lack of drug screens or access to the Arizona PMP. (Gov't Ex. 18 at 130.) Respondent did not take a patient history, perform a physical examination, execute a treatment plan, provide informed consent and a treatment agreement, consult with specialists or maintain adequate and accurate medical records. (Gov't Ex. 18 at 130–31.)

The Government also argues that Respondent has failed to accept responsibility for his actions. (Gov't Br. at 26.) The Government notes that Respondent has failed to admit specific wrongdoing, and has merely made a blanket assertion of ''shortcomings.'' The Government finally argues that because the Government has made a prima facie case, the burden of proof shifts to Respondent, and Respondent has failed to demonstrate he will not engage in future misconduct.

B. Respondent

Respondent argues in defense that he is naïve. (Tr. 24.) While he concedes he was casual about documentation (*see* Tr. 24, 28–29), he argues he is not indifferent to drug abuse and diversion and has no state convictions. (Tr. 24.) Respondent argues that opening a new practice in August of 2009 was a ''learning experience'' (Tr. 25), which was a ''work in progress period.'' (Tr. 28.) Respondent argues that, over time, he has sought to improve his practice standards. For instance, Respondent terminated over 250 patients for failing drug screens or failing to produce health records. (Tr. 27; *see generally* Tr. 752.) Additionally, Respondent has accepted the Arizona Medical Board's requirement that he establish a monitoring program for his documentation. (Tr. 29.) Moreover, Respondent has started dictating his reports. (Tr. 28.) In any event, Respondent denies that the care of his patients was substandard. (Tr. 28.) He moreover argues that except as confirmed by the recordings and transcripts of TFO [BK]'s undercover visits, the testimony of TFO [BK] is not credible. (Resp't Br. at 11 ¶ 41.) In addition, Respondent contends that ''no reasonable conclusion can be drawn from the fact of [the] numbers or frequencies'' of controlled substances that Respondent prescribed. (Resp't Br. at 32.) Finally, Respondent argues that there is no causal connection between Respondent's prescribing practices and the deaths of [CS], B.R. and [MC]. (Tr. 27.)

III. Discussion and Conclusions

A. The Applicable Statutory and Regulatory Provisions

The Controlled Substances Act (CSA) provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.[16] ''A separate registration shall be required at each principal place of business or professional practice where the applicant . . . dispenses controlled substances.'' [17] DEA regulations provide that any registrant may apply to modify his registration to change his address but such modification shall be handled in the same manner as an application for registration.[18]

''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner'' with a corresponding responsibility on the pharmacist who fills the prescription.[19] It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to a valid prescription from a practitioner acting in the course of his professional practice.[20] In addition, I conclude that the reference in 21 U.S.C. § 823(f)(5) to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in § 824(a).[21]

In an action to revoke or deny a registrant's application for a DEA COR, the DEA has the burden of proving that the requirements for granting registration are not satisfied.[22] The burden of proof shifts to Respondent once the Government has made its prima facie case.[23]

B. Material Falsification of Application

The CSA, at 21 U.S.C. § 824(a)(1), provides, insofar as pertinent to this proceeding, that the Deputy Administrator may revoke a registration if an applicant or registrant ''has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter.''

The evidence reflects that Respondent falsified his applications for renewal of his DEA registration on at least one occasion, by answering ''no'' to the liability questions, notwithstanding the fact that Respondent had previously had his medical license suspended in 2001. TFO Dean testified in substance that his investigation revealed Respondent falsified his application because the Arizona Medical Board previously investigated and suspended Respondent's medical license. (Tr. 85–86.) Respondent testified that he did not ''really have a good answer'' for why he said ''no'' on the re-registration form, ''other than I didn't pay much attention to the wording.'' Respondent maintained that he ''never tried to deceive anyone.'' (Tr. 760–61.)

The evidence also includes a September 21, 2010 sworn certification by Richard A. Boyd, Chief, DEA Registration and Support Section, stating in substance that he is the DEA official charged with custody and control of all documents relative to registration of practitioners, among others. Mr. Boyd certified that DEA registration ''BM2040498 was assigned to [Respondent] on *October 4, 1998,* that the last two renewals of this registration were issued to [Respondent] on *January 29, 2005,* at the address of Access2care Family Medical Center, 4607 N. 12th Street, Phoenix, Arizona 85014.'' (Gov't Ex. 28.) (emphasis supplied). Mr. Boyd further certified that Respondent answered ''background questions'' to include: ''3. Has the applicant ever had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or place [sic] on probation, or is any such action pending? 'No'.'' (*Id.*)

The evidence also includes a June 30, 2010 sworn certification from Mr. Boyd, certifying that DEA registration ''BM2040498 was assigned to [Respondent] on or before *October 04, 1989* . . . [and the] last renewal of this registration was on *January 29, 2008.* . . . '' (Gov't Ex. 1.) (emphasis supplied). The evidence further includes a DEA Master Information Report for DEA Number BM2040498, reflecting a registration date of October

[16] 21 U.S.C. § 822(a)(2).

[17] 21 U.S.C. § 822(e).

[18] 21 C.F.R. § 1301.51 (2010).

[19] 21 C.F.R. § 1306.04(a).

[20] 21 U.S.C. § 844(a).

[21] *See Kuen H. Chen, M.D.,* 58 Fed. Reg. 65,401, 65,402 (DEA 1993).

[22] *See* 21 C.F.R. § 1301.44(d) (2010).

[23] *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008); *see also Thomas E. Johnston,* 45 Fed. Reg. 72,311, 72,311 (DEA 1980).

10, 1989, and last renewal date of January 29, 2008. (Gov't Ex. 1 at 2.)

Neither the testimony at hearing nor the post-hearing briefs addressed the date discrepancies between the two certifications, nor is it entirely apparent from the record evidence exactly what the correct dates should be. For example, the September 21, 2010 sworn certification indicates an assignment of registration on *October 4, 1998,* and then states the last two renewals were issued on *January 29, 2005.* Clearly the last two renewals were unlikely to both have been issued on the same date, which is also consistent with Respondent's testimony that he believes he last renewed his registration in 2008. (Tr. 795.) The information contained within the DEA Master Information Report is also consistent with Respondent's recollection. There is also an unexplained discrepancy regarding the registration assignment date, with one date listed as October 4, 1998 (Gov't Ex. 28) and the second listed as ''on or before October 04, 1989,'' (Gov't Ex. 1 at 2.) Again, the DEA Master Information Report (Gov't Ex. 1 at 2) suggests that the ten-year discrepancy between the initial registration dates listed in the two certifications may simply be a typographical error, but speculating on possible reasons for the errors offers little assurance about the reliability of either certification.

The issue of dates is certainly material, because the premise of the false statement allegation rests on when Respondent was first subject to a suspension that could serve as the predicate for a false statement. The record establishes that Respondent's first relevant suspension occurred in 2001. (*See* Gov't Ex. 3 at 4.) I find the inconsistencies and apparent errors in the two DEA certifications discussed above of sufficient consequence to preclude their use as substantial evidence for purposes of relevant dates.[24]

Accordingly, I do not assign any weight to Mr. Boyd's June 30, 2010 (Gov't Ex. 1 at 1) or September 21, 2010 (Gov't Ex. 28) certifications with regard to information as to Respondent's registration or re-registration dates.

The remaining record evidence, including the DEA Master Information Report (Gov't Ex. 1 at 2) and Respondent's testimony, does support a finding by substantial evidence that on one occasion in January 2008 Respondent materially falsified his application for re-registration, by failing to acknowledge a prior adverse action against his state medical license. A DEA COR may be revoked based on an unintentional falsification of an application, ''but lack of intent to deceive is a relevant consideration in determining whether a registrant or applicant should possess a DEA registration.'' *Rosalind A. Cropper, M.D.,* 66 Fed. Reg. 41,040, 41,048 (DEA 2001). The unrebutted record evidence reflects that on November 6, 2000, the Arizona Medical Board issued Respondent a Letter of Reprimand, a $5,000.00 fine and forty hours of continuing medical education (CME), among other restrictions. (Gov't Ex. 2 at 4.) On December 6, 2001, the same entity entered an order suspending Respondent's medical license for a period of twelve months, but stayed the suspension during a probationary period. (Gov't Ex. 3 at 4.) The gravamen of Respondent's misconduct was an instance of Respondent prescribing without first conducting a physical examination or establishing a physician-patient relationship with an undercover agent.

Respondent's history of state action regarding his medical license, as set forth below in further detail,[25] was sufficiently significant that he could not under any reasonable circumstances have answered the relevant background question in the negative. Respondent's brief explanation of the issue, including a claim of lack of intent to deceive, is not credible. Respondent's failure to disclose the relevant information was material because it had ''a natural tendency to influence, or was capable of influencing'' the decision to renew Respondent's registration. *Gilbert Eugene Johnson, M.D.,* 74 Fed. Reg. 65,663, 65,665 (DEA 2010). In fact, DEA renewed Respondent's registration in January 2008, a decision that relied in part on Respondent's false statement.

Accordingly, I find the Government has met its burden of proving a violation of Section 824(a)(1), *see* 21 CFR § 1301.44(d) (2010), placing the burden on Respondent to show that despite his material false statement, revoking his registration would be contrary to the public interest. *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008); *see also Thomas E. Johnston,* 45 Fed. Reg. 72,311, 72,311 (DEA 1980). I further find that for reasons set forth below, revoking Respondent's COR is in the public interest and substantial evidence supports revocation of Respondent's COR on the material falsification ground alone.

C. The Public Interest Standard

The CSA, at 21 U.S.C. § 824(a)(4), provides, insofar as pertinent to this proceeding, that the Deputy Administrator may revoke a COR if she finds that the continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. § 823(f).

Pursuant to 21 U.S.C. § 823(f), the Deputy Administrator may deny an application for a DEA COR if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the Deputy Administrator is required to consider the following factors:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research, with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances.

(4) Compliance with applicable state, federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

As a threshold matter, the factors specified in Section 823(f) are to be considered in the disjunctive: the Deputy Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. *See David H. Gillis, M.D.,* 58 Fed. Reg. 37,507, 37,508 (DEA 1993); *see also D & S Sales,* 71 Fed. Reg. 37,607, 37,610 (DEA 2006); *Joy's Ideas,* 70 Fed. Reg. 33,195, 33,197 (DEA 2005); *Henry J. Schwarz, Jr., M.D.,* 54 Fed. Reg. 16,422, 16,424 (DEA 1989). Additionally, in an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied.[26] The burden of proof shifts to the registrant once the Government has made its prima facie case.

[24] I also note there is significant Agency precedent taking official notice of records of the Agency, to include filing of renewal applications. *See, e.g. East Main Street Pharmacy,* 75 Fed. Reg. 66,149, 66,152 (DEA 2010). The errors evidenced in the instant record, however, undermine any use of official notice to clarify this issue, because the record does not reveal whether the errors are due to preparation of the sworn certifications or whether the record checks of agency data on different dates produce different results.

[25] *Infra* Section III.D.

[26] 21 CFR § 1301.44(e) (2010).

D. The Factors to Be Considered

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority and Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

In this case, regarding Factor One, it is undisputed that Respondent currently holds a valid medical license in the State of Arizona, but Respondent's medical license has been the subject of state disciplinary action in the past. On November 6, 2000, the Arizona Medical Board, pursuant to a consent order, issued Respondent a Letter of Reprimand, a $5,000.00 fine and forty hours of CME, among other restrictions. (Gov't Ex. 2 at 4.) The stipulated findings of fact included an instance of Respondent prescribing without first conducting a physical examination or establishing a physician-patient relationship with an undercover agent of the Food and Drug Administration. (Gov't Ex. 2.) On December 6, 2001, the Board entered an order suspending Respondent for a period of twelve months, which was stayed during a probationary period. Respondent was further required to complete the requirements of the November 6, 2000 Board order. (Gov't Ex. 3.)

On August 11, 2010, pursuant to a consent order, the Board issued Respondent a Letter of Reprimand and two years' probation with terms and conditions to include Board pre-approved monitoring (periodic chart reviews) by a contractor. (Gov't Ex. 27 at 4–5.) The Board action was initiated ''after receiving a complaint regarding Respondent's care and treatment of five patients. During the Board's investigation, five patient charts were reviewed and deviations were found in all five.'' (Gov't Ex. 27 at 1.) The Board concluded Respondent's conduct constituted ''unprofessional conduct pursuant to A.R.S. § 32–1401(27)(e) ('[f]ailing or refusing to maintain adequate records on a patient.') and A.R.S. § 32–1401(27)(q) ('[a]ny conduct or practice that is or might be harmful or dangerous to the health of the patient or the public.').'' (*Id.* at 4.)

The most recent action by the Arizona Medical Board reflects a determination that Respondent, notwithstanding findings of unprofessional conduct, can be entrusted with a medical license subject to probationary terms and conditions. While not dispositive,[27] this action by the Arizona Medical Board does weigh against a finding that Respondent's continued registration would be inconsistent with the public interest. *See Robert A. Leslie, M.D.,* 68 Fed. Reg. 15,227, 15,230 (DEA 2003) (under Factor One, prior suspension of respondent's state medical license held not dispositive where state license currently under no restrictions).

Regarding Factor Three, there is no evidence that Respondent has ever been convicted under any federal or state law relating to the manufacture, distribution or dispensing of controlled substances. I therefore find that this factor, although not dispositive, weighs against a finding that Respondent's continued registration would be inconsistent with the public interest.

Factors 2 and 4: Respondent's Experience in Handling Controlled Substances; and Compliance With Applicable State, Federal or Local Laws Relating to Controlled Substances

(a) Respondent's Registered Location

Federal law requires every person who dispenses (including prescribing) any controlled substance to obtain a registration from the Attorney General.[28] Additionally, a separate registration must be obtained for each principal place of practice where a registrant dispenses controlled substances and a registrant must report any change of address by applying to modify his or her registration to change his or her address, which shall be treated as an application for registration.[29] The Code of Federal Regulations delineates the procedures a registrant must follow to request a change in registered address.[30]

In this case, the undisputed evidence indicates that Respondent's DEA registered address is ''Access2care Family Medical Center, 4607 N. 12th Street, Phoenix, Arizona 85014.'' (Gov't Ex. 28.) In or about August 2009, Respondent moved from that location to his current practice at 16601 N. 40th Street, Suite 115, Phoenix, Arizona. (Tr. 36, 90.) Respondent testified that he was unaware that he had to notify DEA when he moved to his new office. (Tr. 760.) In mitigation, Respondent explained that ''I called the Arizona Medical Board and gave them my change of address. I didn't know that I had to do anything more than that.'' (Tr. 760.)

Respondent's failure to properly request a change in registered location does not appear to have been done with intent to deceive, given the unrebutted testimony that Respondent notified the Arizona Medical Board of the change. It does, however, demonstrate Respondent's lack of compliance with applicable DEA regulations, weighing in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

(b) Deceased Patients [MC] and [CS]; B.R.

The evidence at hearing included information related to the deaths of two of Respondent's patients: [MC], who died on November 27, 2009; [CS], who died on January 6, 2010; and a non-patient, B.R., who died on February 10, 2010, in possession of a prescription issued to Respondent's patient [TR]. (Tr. 93.)

The documentary evidence with regard to patient [MC] consists of a police report, a PMP report for [MC], and an autopsy report. (Gov't Exs. 5–7.) The autopsy report lists the cause of death as accidental ''combined drug toxicity.'' (Gov't Ex. 7.) The findings of a toxicological report noted positive findings for the presence of: oxycodone, noroxycodone, oxymorphone, amphetamine, alprazolam and nordiazepam. (Gov't Ex. 7 at 6.) A Phoenix Police Department report noted that [MC] was found dead in his bedroom at home on November 27, 2009, and that located in an adjacent nightstand were three empty prescription bottles for oxycodone, alprazolam and cephalexin, with prescription labels in Respondent's name, dated between June 2009 and October 2009. (Gov't Ex. 5.) A partially used fifteen-count ''blister pack'' for omifin with two blisters remaining was also found. (*See* Tr. 128.) Also found at the foot of [MC]'s bed were prescriptions bearing Respondent's name dated November 24, 2009, for oxycodone, alprazolam and amphetamine salt. (Tr. 139–40.) Additionally, an empty prescription bottle of carisoprodol in Respondent's name was noted.[31] (Gov't Ex. 5 at 7.) The police report also noted that on top of an armoire in the bedroom rested a mirror with white powder residue, along with a red straw and credit card. (Tr. 137–8, 141.) Inside the armoire were numerous small plastic bags, several of which contained white

[27] *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8209, 8210 (DEA 1990) (finding DEA maintains separate oversight responsibility and statutory obligation to make independent determination whether to grant registration).

[28] 21 U.S.C. § 822(a)(2).

[29] 21 U.S.C. §§ 822(e), 827(g); 21 C.F.R. § 1301.51 (2010).

[30] *See* 21 C.F.R. § 1301.51 (2010).

[31] The spelling in the police report of Respondent's name as ''Dr. Moher,'' (*see* Gov't Ex. 5 at 7), appears to be a typographical error.

powder residue and digital scales, among other items. (Tr. 142–43.)

TFO Dean testified that he did not participate in the investigation pertaining to [MC]'s death, other than having a few conversations with detectives at the Phoenix Police Department. (Tr. 95.) TFO Dean further testified that he was unaware of what the white powdery substance was, but the items found in the bedroom were consistent with buying, selling and storing drugs. (Tr. 143.) TFO Dean also opined that the mirror, white powder residue, straw and credit card were consistent with drug use, common to cocaine use and ''also common to the process of smashing up oxycodone or alprazolam, and using those to snort drugs.'' (Tr. 141–42.) TFO Dean also testified that the PMP report confirmed that Respondent prescribed controlled substances to [MC] just prior to [MC]'s death, but the report did not reflect any prior prescriptions for diazepam. (Tr. 148–49.)

The documentary evidence with regard to patient [CS] consists of a police report, a prescription history report and an autopsy report. (Gov't Exs. 8–10.) The January 8, 2010 autopsy report found cause of death to be ''[i]ntoxication due to the combined effects of multiple prescription medications including oxycodone.'' (Gov't Ex. 10 at 1.) The report also noted a history of Crohn's disease and depression, and a ''bottle of oxycodone, found in close proximity to her, appeared to have been taken at an accelerated rate.'' (*Id.* at 2.) A PMP history report covering the time period January 1, 2008 to March 8, 2010, reflects that [CS] was prescribed multiple controlled substances by multiple practitioners, including Respondent. (Gov't Ex. 9.) A Tempe, Arizona Police Department report dated January 6, 2010, reflects that [CS] was found unresponsive at home by her fiancé, [RF]. (Gov't Ex. 8 at 2.) It further notes that [CS] suffered from numerous medical conditions including Crohn's disease, and had been complaining of a fever and hip pain. (Gov't Ex. 8 at 2.) Contrary to the autopsy report, the police report does not reflect any notations regarding a bottle of oxycodone found in close proximity to [CS] or evidence that it was taken at an accelerated rate. (Tr. 161. *Compare* Gov't Ex. 10 at 2, *with* Gov't Ex. 8.)

Respondent presented the testimony of [CS]'s fiancé, [RF], regarding the circumstances of [CS]'s death. [RF] testified in substance that he had known [CS] since 2006, and is himself a patient of Respondent. (Tr. 550–51.) [RF] testified to a number of medical problems that [CS] had experienced and found it impossible that Respondent's care had anything to do with her death. (Tr. 552–53, 555–56.) [RF] testified that [CS] had been ''unusually sick'' a couple of weeks prior to her death and that she had had an altercation with a police officer, to include an injury to her ileostomy wound. (Tr. 558.) [RF] testified that [CS] did not seek any medical attention as a result of the altercation. (Tr. 556, 575.) [RF] further testified that on the day of [CS]'s death he did not see her take any medications and does not recall seeing a bottle of oxycodone anywhere in proximity to [CS] at the time of her death. (Tr. 561–62.) [RF] also testified that in his experience Respondent is a good doctor, and he has not observed anything unusual at Respondent's practice. (Tr. 566, 569.)

The documentary evidence regarding the death of B.R. on February 10, 2010, includes a police report, an autopsy report and a PMP report for prescriptions issued to [TR]. (Gov't Exs. 11–13.) The evidence at hearing reflected that Mr. B.R. was not a patient of Respondent, but an empty medication bottle bearing prescription number C255226 and prescribed by Respondent to patient [TR] on December 16, 2009, for 70 alprazolam [32] 2 mg tablets was found near Mr. B.R.'s body. (Tr. 112.) Other items found in the vicinity included empty beer bottles, short straws, a rolled up one dollar bill with white residue inside and a plastic baggie containing two and one half pills, identified in the police report as alprazolam 2 mg tablets. (Gov't Ex. 11; Tr. 93, 112–13.) A PMP report for patient [TR] reflects a prescription for 70 alprazolam 2 mg tablets written by Respondent on November 19, 2009, with a fill date of December 16, 2009. (Gov't Ex. 12.) A February 11, 2010 autopsy report for B.R. listed the cause of death as accidental acute opiate, benzodiazepine and alcohol intoxication. (Gov't Ex. 13.)

Respondent argues that the Government has not proven by a preponderance of the evidence that the deaths of two patients and a third person stem from Respondent's prescribing practices.[33] In fact, no evidence was presented at hearing involving any of the foregoing patients' medical files, nor did either party offer testimony or other evidence of specific facts surrounding Respondent's prescribing practices with regard to patients [TR], [CS] or [MC]. The expert testimony offered at hearing related to only the patient records of two law enforcement undercover agents posing as patients. I find that the Government has not established by a preponderance of the evidence that Respondent's prescribing practices caused the foregoing deaths. For example, the evidence relating to the death of patient [CS] and the linkage to one oxycodone prescription cited in an autopsy report was directly contradicted by the sworn testimony of [RF], corroborated by the relevant police report. (*Compare* Gov't Ex. 10 at 2, *with* Tr. 561–62, *and* Gov't Ex. 8.) In the case of patient [MC], there is evidence that the cause of death was accidental and due to a combination of drugs, (Gov't Ex. 7 at 1), and other evidence found in the vicinity of [MC]'s body is consistent with the buying, selling and storage of drugs, (Tr. 143). Yet there was no evidence or testimony offered at hearing related to Respondent's prescribing or treatment of patient [MC]. The evidence regarding patient [TR] and the death of Mr. B.R. is even more tenuous in terms of linking the cause of death to Respondent's prescribing practices.

With regard to all three decedents, there is no evidence of record, such as, for example, relevant medical files, sufficient to determine and evaluate Respondent's prescribing practices with regard to the three deaths. Making a finding that Respondent's prescribing practices caused the deaths of these decedents, therefore, would require engaging in pure speculation. ''Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.'' *White ex rel. Smith v. Apfel,* 167 F.3d 369, 375 (7th Cir. 1999) (citing *Erhardt v. Sec'y, DHS,* 969 F.2d 534, 538 (7th Cir. 1992)). I find there is insufficient evidence to conclude that Respondent's prescribing practices caused the deaths of these decedents. This finding weighs against a finding that Respondent's continued registration would be inconsistent with the public interest.

Although the evidence regarding the foregoing decedents does not support a finding that Respondent's prescribing practices caused their deaths, the evidence with regard to patient [MC] does reflect varying degrees of drug misuse or acts of diversion by Respondent's patient, at least as of November 2009. I find this evidence is consistent with other record evidence, including Respondent's testimony, that Respondent's prescribing practices during the same time period were significantly deficient in terms of

[32] Alprazolam is a benzodiazepine and Schedule IV depressant. *See* 21 C.F.R. § 1308.14(c) (2010); *infra* note 46.

[33] Resp't Br. at 33–37.

properly supervising his patients to prevent them from abusing or diverting controlled substances.

(c) Respondent's Prescribing Practices

The OSC/IS alleged that Respondent prescribes and dispenses inordinate amounts of controlled substances, primarily hydrocodone compounds, Schedule III controlled substances, among others, under circumstances where Respondent knows or should know the prescriptions are not for legitimate medical purposes or are issued outside the course of usual professional practice. (ALJ Ex. 1.)

To be effective, and lawful, a prescription for a controlled substance ''must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice . . . An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription . . . and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' [34]

Revocation of an existing registration under the public interest standard of 21 U.S.C. § 823(f) is not limited to practitioners who intentionally violate the prescription requirement, but also includes a ''practitioner's failure to properly supervise her patients to prevent them from personally abusing controlled substances or selling them to others . . .'' *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8227 (DEA 2010). A practitioner must also ''have established a bona fide doctor-patient relationship with the individual for whom the prescription is written.'' *Mohammed F. Abdel-Hameed, M.D.,* 66 Fed. Reg. 61,366, 61,369 (DEA 2009). As to the issue of a bona fide doctor-patient relationship, the CSA looks to state law in determining whether a physician has established a valid doctor-patient relationship. *United Prescription Servs., Inc.,* 72 Fed. Reg. 50,397, 50,407 (DEA 2007).

The evidence at hearing regarding Respondent's prescribing practices included testimony from Dr. Stephen Borowsky, offered by the Government as an expert in pain management. Dr. Borowsky's testimony and related written report (Gov't Ex. 18) centered on his review of two patient files (Gov't Ex. 15 & 16) involving four undercover law enforcement visits to Respondent in November and December 2009. (*See also* Gov't Exs. 17 & 18.) Dr. Borowsky's experience includes board certification in pain medicine, among other specialties, and includes approximately thirty years of experience. (Tr. 378–79.) Dr. Borowsky has practiced in Arizona since 1980 and he has served on several task forces for the Arizona Legislature related to chronic pain. Additionally, Dr. Borowsky participated in the development of Arizona's Prescription Monitoring Program and at the time of hearing was involved in the care of approximately twenty pain patients per week on the one day per week that he saw pain patients. (Tr. 382–86.) Although Respondent timely objected to the witness's qualifications ''as a pain management expert in the primary care level,'' (Tr. 395–96), I have evaluated his testimony as an expert witness in pain management. Dr. Borowsky is clearly qualified to testify as an expert with regard to the standard of care and treatment of patients with pain management issues, based on his education, training and experience over thirty years. Dr. Borowsky's testimony at hearing was internally consistent and fully credible.

Dr. Borowsky testified in substance on direct examination that prior to being contacted by DEA he had no familiarity with Respondent. (Tr. 408). Dr. Borowsky further testified that he was asked to review two patient files in the name of [KR] and [BK] to determine how the records fit with established guidelines for prescribing opiates. (Tr. 410; *see* Gov't Exs. 15 & 16.) The evidence also included a written report prepared by Dr. Borowsky discussing his findings and opinion on review of the two patient files. (Gov't Ex. 18.)

Dr. Borowsky next testified to his conclusions regarding the [KR] and [BK] medical files, corresponding to undercover visits by TFO [JB] and TFO [BK]. With regard to both files, Dr. Borowsky's concluded that the ''records showed no substantiation for a diagnosis, a plan, or a treatment with opioid medication . . . .'' (Tr. 416.) Additionally, Dr. Borowsky opined that Respondent obtained no patient history in either case and conducted no appropriate physical examination. (Tr. 418–22.) Dr. Borowsky further opined that Respondent issued prescriptions for controlled substances to both patients without a legitimate medical purpose. (Tr. 431.)

On cross examination, Dr. Borowsky testified that over the past ten years perceptions of pain management have changed. (Tr. 435.) The term pseudo-addiction means a patient is undertreated with medication and may appear drug seeking, but really requires more medication. (Tr. 435–36.) Dr. Borowsky further testified that treatment of a pseudo-addict requires a rational understanding of the situation rather than just prescribing more medication. (Tr. 437.) Dr. Borowsky also testified that he routinely uses drug screens when prescribing controlled substances (Tr. 440) and only takes cases by referral. (Tr. 445.) Within the standard of care for prescribing opioids, he advised, there is room for individual decisions. (Tr. 458–59.)

The testimony from two undercover law enforcement agents, TFO [JB] and TFO [BK], who posed as patients [KR] and [BK], was fully consistent with Dr. Borowsky's findings. For example, TFO [JB] testified in substance that she met with Respondent at his office for an initial medical appointment on November 13, 2009, and again on December 18, 2009. During the November 13, 2009 initial visit, TFO [JB], posing as patient [KR], met with Respondent for approximately ten minutes, which included Respondent taking a telephone call. (Tr. 207.) TFO [JB] testified that she had marked zero for pain on a patient intake form and at no time during the visit was her pulse, heart rate, height, weight or blood pressure checked, nor was she given a urinalysis drug screen. (Tr. 209–09, 223.) TFO [JB] further testified that Respondent did not discuss a treatment plan, and the only incident arguably consisting of a physical examination occurred at the end of the visit, *after Respondent had already indicated his decision to prescribe controlled substances.*[35] (Tr. 214–15, 246.) The physical examination, such as it was, consisted of asking TFO [JB] to lie on her stomach after which Respondent proceeded to touch her back in several places, ask if it hurt and move her right foot and ankle.[36] (Tr. 215.) As a result of the visit, Respondent prescribed 70

[34] 21 C.F.R. § 1306.04(a) (2010).

[35] Because Respondent had already decided to prescribe controlled substances before he palpitated TFO [JB]'s back, I reject Respondent's argument that Respondent should be credited on the grounds that he did not give TFO [JB] a prescription ''until after the examination . . . .'' (Resp't Br. at 8 ¶ 27.)

[36] There is also evidence relating to a sexual harassment claim against Respondent, (*see, e.g.,* Tr. 62, 67, 217), and Respondent's ''flirting'' and related conduct with patients such as TFO [JB] (*see, e.g.,* Tr. 210, 214–15, 234–36, 246), [JG] (*see* Tr. 188–89, 198) and [LW] (*see* Tr. 217). *See generally* Tr. 264. Respondent and other witnesses testified in substance that Respondent ''flirts'' with many patients, as a ''joke,'' which is how he puts patients ''at ease.'' Inasmuch as this issue was not sufficiently noticed in the OSC/IS, and given its tenuous relevance to the central issues alleged in this case, I do not make any specific factual findings or conclusions with regard to the conflicting testimony. *See, e.g., CBS Wholesale Distribs.,* 74 Fed. Reg. 36,746, 36, 749 (DEA 2009) (discussing notice requirements before relying on given fact in revoking DEA COR).

oxycodone 30 mg tablets. In partial mitigation, Respondent gave TFO [JB] a warning, in an apparent effort to encourage TFO [JB] to protect herself from theft:

these medications . . . there's a high street value for them . . . it's not a good idea for you to tell your friends that you're taking these medications because [even] your mother will take them from you . . . oxycontins . . . go like anywhere from like 40 to 80 dollars a pill . . . So there's a huge street value. People are always stealing them. So be careful. Uh because if you lose your medications, even if you have a police report, can't get em. Once a month is all you can get.

(Gov't Ex. 21 at 147–48.) In addition, Respondent's statement that ''once a month is all you get'' (*Id.*) is evidence that Respondent did take some steps to manage his patients and guide them away from abuse or diversion.

Similar to the testimony of TFO [JB], TFO [BK] testified in substance that he met with Respondent on November 18, 2009, and again on December 23, 2009, posing as patient [BK]. On his initial office visit, which lasted approximately five to ten minutes, TFO [BK] marked zero for pain on an intake form. (Tr. 257.) Additionally, TFO [BK] provided no prior medical records. (Tr. 258.) TFO [BK] further testified that during the visit he received no examination of any kind, and Respondent gave him a prescription for 120 Vicodin 10–325 tablets. (Tr. 256, 258, 267.)

The testimony of TFO [JB] and TFO [BK], as summarized above, was internally consistent, corroborated by objective evidence including recordings and related transcripts, and I find it fully credible.[37] This testimony and evidence is moreover consistent with the opinion testimony of Dr. Borowsky.

Respondent's behavior during the undercover visits bears heavily upon whether his continued registration would be inconsistent with the public interest. Respondent's conduct during the second undercover visit by TFO [BK] tends to show that Respondent recognized it would be improper to issue a prescription to TFO [BK] without proof of injury or past medical records.[38] (*See* Tr. 287, 290; *see also* Gov't Ex. 22 at 162 (transcribing Respondent's statement that TFO [BK] should seek another doctor).) Respondent even offered to refund TFO [BK]'s money, stating that ''I'm not going to write you narcotics knowing that you've already told me that there's nothing wrong with you.'' (Gov't Ex. 23 at 173; Tr. 287–88, 294.) Nevertheless, Respondent issued TFO [BK] a second prescription for controlled substances anyway. The fact that Respondent terminated TFO [BK] as a patient that same day (Tr. 295) evinces Respondent's recognition that he acted improperly in prescribing controlled substances to TFO [BK].

Moreover, the transcript of TFO [BK]'s second visit to Respondent suggests that Respondent's professed concerns regarding proof of injury were motivated less by a desire to prevent the diversion of controlled substances than by his concern that he might lose his license. (Gov't Ex. 23; *see also* Tr. 299.)

At hearing, counsel for Respondent focused on Respondent's apparent concern for TFO [BK]'s wellbeing, indicating the need for a referral to a primary care physician to test for serious medical conditions (*see* Tr. 289–91), and Respondent's statement that Respondent was just ''giving you a chance to get over this pain . . ..'' (Gov't Ex. 22 at 165; *see also* Tr. 289.) Respondent's sincerity, however, is undercut by the fact that he never made any such referrals to TFO [BK]. (Tr. 299–300.)

The evidence at hearing also included a document referred to as the Arizona Medical Board Guidelines for the Use of Controlled Substances for the Treatment of Chronic Pain (Guidelines),[39] as well as a second document entitled Model Policy for the Use of Controlled Substances for the Treatment of Pain (Model Policy). (Gov't Exs. 19 & 20.) Dr. Borowsky testified that he relied on both documents in preparing his written report. The Guidelines reflect a substantive policy statement that is advisory only, developed by the Arizona Medical Board pursuant to Arizona statutory authority. (Gov't Ex. 19 at 1.) The standards reflected in the Guidelines include a pain assessment, treatment plan, ongoing assessment, consultation and documentation, as well as counting and destroying medication, among other guidance. (*Id.*) Additionally, the Guidelines exhort physicians to comply with all applicable laws in the prescribing and dispensing of controlled substances.

Under Arizona law, for instance, grounds for disciplinary action include ''[u]nprofessional conduct'' further defined as ''[f]ailing or refusing to maintain adequate records on a patient'' or ''[p]rescribing, dispensing or furnishing a prescription medication . . . to a person unless the licensee first conducts a physical examination of that person or has previously established a doctor-patient relationship.''[40] Ariz. Rev. Stat. §§ 32–1401(27)(e) & (ss). There is substantial evidence of record that Respondent's prescribing practices during the relevant time periods were contrary to applicable Arizona law.

Respondent's testimony at hearing did not significantly contradict the foregoing evidence. In fact, Respondent concedes in his post-hearing brief that ''his practice documentation and patient screening/compliance monitoring needed improvement'' from September 2009 through early January 2010.[41] Respondent maintains, in essence, that because he acknowledges his past misconduct and has been making improvements to his practice between January 2010 and the date of his immediate suspension, Respondent's DEA registration would not be inconsistent with the public interest.

Respondent testified in substance that he has been practicing medicine for approximately thirty years, working as a family practitioner for someone else. (Tr. 40.) In August 2009, Respondent opened his own solo-family practice, seeing approximately 200–300 patients per month. (Tr. 36, 37.) Respondent further testified that he does not have any training or certifications in pain management. (Tr. 36.) Respondent admitted that there were certain things he did not know about pain

[37] As noted above, I do not assign any weight to TFO [BK]'s assertions that Respondent suggested he go to Simon Med. *See supra* text at notes 14 & 15.

[38] Respondent also failed to require medical records before prescribing controlled substances to TFO [JB]. (Tr. 219, 247.)

[39] At hearing, counsel for Respondent suggested during cross examination that in 2004 the Arizona Medical Board adopted ''not [a] materially, hugely different—but a different set of Guidelines from the one that [the Government] presented . . . .'' (Tr. 474.) But this statement by counsel is not testimony, and in any event, counsel did not produce any alternative version of the Guidelines.

[40] The OSC/IS alleges violations of Ariz. Rev. Stat. §§ 32–1401(27)(a), (q) and (ss). Moreover, the parties addressed the issue of unprofessional conduct at hearing. (*See, e.g.,* Tr. 87, 93; Gov't Ex. 2.) In any event, I take official notice of Ariz. Rev. Stat. § 32–1401(27). Under the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request, to an opportunity to show to the contrary.'' 5 U.S.C. § 556(e); 21 C.F.R. § 1316.59(e); *see, e.g., R & M Sales Co.,* 75 Fed. Reg. 78,734, 78,736 n.7 (DEA 2010). Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Recommended Decision, which shall begin on the date it is mailed. *See, e.g., Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,088 (DEA 2009) (granting Respondent opportunity to dispute officially noticed facts within fifteen days of service).

[41] Resp't Br. 30–31.

management, but once informed of these things, he began making improvements in or around December 2009 to January 2010. (Tr. 51). Respondent further testified that after starting his new practice he began to realize the difficulty of managing pain patients ''finding it difficult to comprehend the deceit of many'' patients. (Tr. 756.) As a result of these efforts, Respondent testified that during a period of from December of '09 until May of 2010, I tried to rid my practice of patients that were potential drug seekers as best I could. And in the process, I discharged 264 patients. The reasons were from selling drugs, using medications that weren't prescribed by me, multiple doctor shopping, using the pharmacy monitoring program, use of illicit drugs and drug screens where they came positive for cocaine or methamphetamine, and tried my best to make sure that my patients were compliant with the treatment plan that they were under.
(Tr. 757.)

The evidence also included the testimony of TFO Baldwin, who credibly testified to an interview with [JG], who admitted that she is addicted to drugs, primarily oxycodone, and sees Respondent on a monthly basis. [JG] also admitted that she and her boyfriend ''do sell their pills to pay their bills, get gas, etcetera.'' (Tr. 187.) On cross examination, TFO Baldwin further testified that he did not specifically ask [JG] if she told Respondent she was selling her medications. When asked if Respondent knew, however, [JG] responded that Respondent ''should know'' because ''half the patients in there are just like me.'' (Tr. 196.) I find the statements attributed to [JG] to be generally credible, because they are consistent in part with other credible evidence, including Respondent's testimony. That said, TFO Baldwin did not elicit a specific time frame during direct or cross examination as to when the statement from [JG] was taken, or the time frame that [JG] interacted with Respondent. TFO Baldwin's testimony regarding [JG] therefore provides some weight, but not full weight, in favor of a finding under Factors Two and Four that Respondent's continued registration would be inconsistent with the public interest.

The Government further presented testimony from IRS Stone relating to an analysis of Respondent's prescribing from August 1, 2009 to March 31, 2009. The evidence of record also includes three charts prepared by IRS Stone summarizing information received from the Board of Pharmacy pertaining to prescriptions for controlled substances issued by Respondent. (Gov't Ex. 14; Tr. 303–04.) The first chart reflects a total number of prescriptions written by Respondent during the stated time period to be 9411, including 5126 prescriptions for oxycodone and 3230 for benzodiazepine. The second chart provided a more detailed breakdown by percentage and tablet count, finding 681,590 tablets of oxycodone prescribed and 208,318 tablets of benzodiazepine prescribed during the relevant eight-month time period. The third chart analyzes the prescription numbers by patients, rather than drugs. (*See generally* Gov't Ex. 14 at 1–3.)

No other testimony or evidence was offered at hearing to provide context for the numbers of prescriptions and tablets issued by Respondent, or any reference point for past prescribing by Respondent; nor did either party offer evidence of comparative prescribing practices of similarly situated pain management practitioners. The evidence does support by substantial evidence the allegation in the OSC/IS that Respondent dispensed ''primarily hydrocodone compounds,'' among others. Beyond that, however, the record evidence does not provide sufficient comparative analysis to support by substantial evidence the allegation in the OSC/IS that Respondent prescribed and dispensed ''inordinate amounts of controlled substances.'' In the absence of a methodology including a base-line or other reliable comparative number, IRS Stone's numbers standing alone do not prove by a preponderance of the evidence that Respondent prescribed and dispensed inordinate amounts of controlled substances. *See Mr. Checkout North Texas,* 75 Fed. Reg. 4418, 4422 (DEA 2010) (finding that an unreliable methodology is not substantial evidence that respondent distributed excessive quantities of listed chemicals); *see also CBS Wholesale Distributors,* 74 Fed. Reg. 36,746, 36,749 (DEA 2009) (rejecting allegation that respondent sold excessive quantities of ephedrine products where Government expert did not provide ''the underlying documentation necessary to support this critical component of his testimony'').

Respondent's conduct during the relevant time period with regard to factors Two and Four weigh heavily in favor of revocation. Respondent's admission that he was not aware of the difficulties relating to pain management, and that once informed, began to take corrective steps, understates the evidence. Dr. Borowsky, the only expert witness to testify in this case, concluded after reviewing two of Respondent's patient files relating to four undercover visits, that Respondent prescribed controlled substances without a legitimate medical purpose. (Tr. 431.) The absence of documentation, including a diagnosis, plan or physical examination, formed in part the basis for Dr. Borowsky's opinion. (Tr. 416, 418–19, 421, 430.) Additionally, the fact that Respondent discharged over 250 patients between December 2009 and May 2010 for reasons such as ''doctor shopping,'' ''selling drugs'' and ''use of illicit drugs,'' among other reasons (*see e.g.,* Tr. 752, 757), is fully consistent with a finding that Respondent's experience in handling controlled substances and compliance with applicable law was substantially deficient on numerous occasions.[42] ''A practitioner's failure to properly supervise her patients to prevent them from personally abusing controlled substances or selling them to others constitutes conduct 'inconsistent with the public interest' and can support the denial of an application or the revocation of an existing registration.'' *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8227 (DEA 2010).

Under agency precedent, in the absence of a credible explanation by the practitioner, as few as two incidents of diversion are sufficient to revoke a registration. *Alan H. Olefsky, M.D.,* 57 Fed. Reg. 928, 929 (DEA 1992). In this case, Respondent maintains he began making changes to his practice in late 2009 and early 2010. Respondent testified that he learned about the PMP from the owners of a pharmacy in late 2009 and began implementing the monitoring in January 2010. (Tr. 768.) He testified that he implemented drug screening in February 2010. (Tr. 805.) Respondent's testimony on cross examination was only partially credible and at times inconsistent. For example, with regard to patient ''[SH]'' Respondent testified that he found the patient ''compliant'' notwithstanding a negative urine test for a prescribed controlled substance. (Resp't Ex. 5 at 34; Tr. 806, 818–19.) Respondent explained that by ''compliant'' one must ''look at it in a different light . . . you do have relapses. It's part of the management of a patient.'' (Tr. 819–19.) Respondent provided no credible explanation for the lack of a subsequent drug screen.

There is additional evidence of record reflecting inconsistencies with regard to Respondent's claim that he made substantial improvements to his practice but further elaboration is unnecessary. The weight of the evidence as a whole demonstrates that under Factors Two

[42] Evidence of diversion by Respondent's patients [MC] (*see* Tr. 137–38, 141–44) and [TR] (*see* Tr. 12, 14; Gov't Ex. 12) bolsters this conclusion.

and Four, Respondent's continued registration would be inconsistent with the public interest.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

As to factor five, ''Respondent's lack of candor and inconsistent explanations'' may serve as a basis for denial of a registration. *John Stanford Noell, M.D.,* 59 Fed. Reg. 47,359, 47,361 (DEA 1994). Additionally, where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 Fed. Reg. 20,727, 20,734 (DEA 2009).[43] Also, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,094 (DEA 2009).

As an initial matter, I find that with the exceptions and inconsistencies noted above,[44] Respondent has displayed at least some degree of candor before this tribunal. For instance, he has acknowledged his failure to update the address of his current practice location with the DEA. (Tr. 760, 795.) Moreover, Respondent at times conceded that his practice documentation and patient compliance monitoring needed improvement.

This degree of candor, however, does not equate to a complete acceptance of responsibility for the full range of his misconduct embraced within the Government's prima facie case. Respondent testified at hearing that he is ''sorry for the shortcomings'' and requests that he be allowed to ''continue with the medical management of uncomplicated pain patients.'' (Tr. 758; *see also* Resp't Br. at 43.) But Respondent's testimony as a whole demonstrates that he does not fully accept responsibility for his actions nor has he demonstrated that he will not engage in future misconduct. Notably, at the time of hearing, due to stated financial difficulty, Respondent was ''in the process'' of putting in place the monitoring program required by the Arizona Medical Board. (Tr. 63; *see* Gov't Ex. 27 at 4.) A more compelling demonstration of acceptance of responsibility might have included a showing that a monitoring program is firmly in place. Instead, the absence of such a program required by order of the Arizona Medical Board, raises concerns that Respondent may engage in future misconduct.

In any event, Respondent's interactions with undercover investigators posing as patients highlight the risks to the public were Respondent's COR to be reinstated. The theme that emerges from these undercover visits is Respondent's awareness of diversion potential coupled with an indifference to diversion. For example, TFO [BK] testified, and a transcript corroborates, that Respondent told TFO [BK] that Respondent has some patients who get drugs off the street, and ''I don't care whether you are [one of them] or not, I have patients that do that . . . .'' (Gov't Ex. 22 at 162.) Even construed in a light most favorable to Respondent, this testimony evinces an indifference to diversion that is fundamentally at odds with the requirements and purpose of the CSA.

The record further reflects that Respondent told TFO [BK] that it is more expensive to buy drugs off the street than at a pharmacy, and that therefore, some of Respondent's patients come to him to be evaluated and obtain prescriptions at a lower price. (Tr. 263.) This statement by Respondent demonstrates an acceptance, if not an outright facilitation, of diversion. Under agency precedent, revocation of an existing registration under the public interest standard of 21 U.S.C. § 823(f) may be founded upon a ''practitioner's failure to properly supervise her patients to prevent them from personally abusing controlled substances or selling them to others . . .'' *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8227 (DEA 2010). Respondent's statements, especially his statement that he did not care if patients bought drugs off the street (Gov't Ex. 22 at 162), constitutes a failure by Respondent ''to properly supervise . . . patients to prevent them from personally abusing controlled substances or selling them to others . . . .'' *Hassman,* 75 Fed. Reg. at 8227. More troubling still is that indications of Respondent's indifference to or outright facilitation of diversion are corroborated by other evidence of record, including statements attributable to [LW] (*see* Tr. 217) (indicating that Respondent never asked patient [LW] for proof of injury before prescribing controlled substances, and that [LW] sent several patients to Respondent to get prescriptions to sell on the street), and [JG] (*see* Tr. 187, 196) (indicating that patient [JG] routinely sells pills on the street, and that ''half the patients in [Respondent's practice] are just like me'').

Moreover, Respondent's interactions with TFO [JB] and TFO [BK] indicate an awareness of and indifference to Respondent's failures to comply with Arizona standards of professional medical practice. For example, TFO [JB] testified that on the second occasion that Respondent prescribed controlled substances to TFO [JB] without requiring proof of injury or patient medical records, Respondent stated that ''if he were to continue to prescribe to me, I would need to get proof of injury because he was in danger of losing his license.'' (Tr. 220; *see* Tr. 244.) Even if I were to fully credit Respondent's testimony that his act of prescribing controlled substances without proof of injury or medical documentation was founded upon Respondent's compassion for his patients, Respondent's conduct would nevertheless constitute a departure from the Arizona standards of practice identified by Dr. Borowsky and supported by documentary evidence.

The record also reflects that during the same undercover visit by TFO [JB], Respondent said he noted that TFO [JB] was taking oxycodone 15 mg. (Tr. 221.) TFO [JB] corrected him and said Respondent had actually given her oxycodone 30 mg on the previous visit. (Tr. 221.) Respondent replied ''Well, I wrote 15 milligrams in the chart, but I sometimes make mistakes.'' (Tr. 221.) In light of the testimony that thirty milligrams is the highest available dosage of oxycodone (Tr. 55), Respondent's candid and cavalier attitude toward prescribing and recordkeeping constitutes a violation of Arizona medical standards in addition to presenting a risk of diversion. *See, e.g.,* Ariz. Rev. Stat. §§ 32–1401(27)(e) & (q).[45] Making matters worse, the unrebutted testimony of DI Linder indicates that as late as May 26, 2010, Respondent was unaware that Xanax, a benzodiazepine and Schedule IV

[43] *See also Hoxie v. DEA,* 419 F.3d 477, 484 (6th Cir. 2005) (decision to revoke registration ''consistent with the DEA's view of the importance of physician candor and cooperation.'')

[44] For example, I found Respondent's testimony regarding the material falsification of his application for renewal of his DEA COR not to be credible. *Supra* Section III.B.

[45] Although the OSC/IS alleged violations of Ariz. Rev. Stat. § 32–1401(27)(a), (q) & (ss), it did not explicitly allege a violation of § 32–1401(27)(e) (''Failing or refusing to maintain adequate records on a patient.''). Nevertheless, the Government's prehearing statement alleged that Respondent violated his standard of care by ''failing to take adequate medical histories or no medical histories [and], by failing to collecting [sic] previous medical records . . . .'' (Gov't PHS at 4.) I find this language adequate to apprise Respondent that this allegation would be litigated and considered. *See CBS Wholesale Distribs.,* 74 Fed. Reg. 36,746, 36,749–50 (DEA 2009). Alternatively, even without considering § 32–1401(27)(e), I would still find that Factor Five favors recommending revocation of Respondent's COR under 21 U.S.C. § 823(f).

depressant,[46] was a controlled substance. (Tr. 178–79 (''He asked me what a controlled substance was, and whether Xanax was a controlled substance.'').) Respondent testified that he commonly prescribes Xanax. (Tr. 778–79.)

There is additional record evidence reflecting Respondent's attitude toward diversion and his course of compliance with Arizona medical standards but further elaboration is unnecessary. As to all of these incidents, Respondent's testimony at hearing that his motivation ''was first and foremost the well-being of my patients,'' (Tr. 757), is availing, to a point. But Respondent's prepared testimony at hearing does not counter the more substantial weight properly given to his candid, un-coached remarks and behaviors toward undercover investigators posing as patients. These remarks and behaviors are telling, and I find substantial evidence that Respondent will engage in future misconduct if allowed to maintain his registration. In sum, Factor Five weighs in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

IV. Conclusion and Recommendation

I find that a balancing of the foregoing public interest factors supports a finding that the Government has established a prima facie case in support of revocation of Respondent's registration, or denial of an application for registration.[47] I conclude by a preponderance of the evidence that the Government has proved independent grounds for revoking Respondent's COR pursuant to 21 U.S.C. § 824(a)(1), and alternatively, that the balance of the other factors in this case weighs heavily in favor of a finding that Respondent's registration would be inconsistent with the public interest under 21 U.S.C. § 823(f).

Once DEA has made its prima facie case for revocation, the burden then shifts to the respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. *Morall v. DEA,* 412 F.3d 165, 174 (D.C. Cir. 2005); *Humphreys v. DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 Fed. Reg. 72,311, 72,311 (DEA 1980).

Additionally, where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 Fed. Reg. 20,727, 20,735 (DEA 2009). Also, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,094 (DEA 2009). An agency's choice of sanction will be upheld unless unwarranted in law or without justification in fact. A sanction must be rationally related to the evidence of record and proportionate to the error committed. *See Morall v. DEA,* 412 F.3d 165, 181 (D.C. Cir. 2005) (sanction will be upheld unless unwarranted in law or without justification in fact). Finally, an ''agency rationally may conclude that past performance is the best predictor of future performance.'' *Alra Laboratories, Inc. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995).

The evidence as a whole demonstrates that Respondent has not credibly accepted responsibility for his actions, or presented evidence that could reasonably support a finding that he will not engage in future misconduct. Accordingly, Respondent has failed to rebut the Government's prima facie case. I therefore recommend that Respondent's DEA COR be revoked and any pending applications for renewal denied.

Dated: January 20, 2011

Timothy D. Wing

Administrative Law Judge

[FR Doc. 2012–14268 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

[46] Alprazolam is a controlled substance. 21 C.F.R. § 1308.14(c) (2010). I take official notice that Xanax is a trade name for alprazolam. Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Recommended Decision, which shall begin on the date it is mailed. *See supra* note 40. *See generally Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,088 (DEA 2009).

[47] Respondent all but concedes as much, arguing that ''Respondent is well aware that the Presiding Administrative Law Judge is likely to determine that the government has made a prima facie case against him. That having been acknowledged, the record supports by a preponderance of the evidence a finding that his continued registration is not inconsistent with the public interest.'' (Resp't Br. 31.)

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 6, 2011, Arizona Department of Corrections, ASPC–Florence, 1305 E. Butte Avenue Florence, Arizona 85132, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Pentobarbital (2270), a basic class of controlled substance listed in schedule II.

The facility intends to import the above listed controlled substance for legitimate use. Supplies of this particular controlled substance are inadequate and are not available in the form needed within the current domestic supply of the United States.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive Springfield, Virginia 22152; and must be filed no later than [insert date 30 days from date of publication].

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: June 4, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–14161 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–44]

Kwan Bo Jin, M.D.; Decision and Order

On October 13, 2011, an agency Administrative Law Judge issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the entire record, I have decided to adopt the ALJ's findings of fact and conclusions of law, except for his discussion of the role of community impact evidence in agency proceedings, *see* ALJ, at 14–16; [1] which is contrary to agency precedent.[2] *See Linda Sue Cheek,* 76 FR 66972, 66973 (2011); *Mark De La Lama,* 76 FR 20011, 20020 n.20 (2011); *Bienvenido Tan,* 76 FR 17673, 17694 n.58 (2011); *Gregory D. Owens,* 74 FR 36571, 36757 & n.22 (2009). Nonetheless, my rejection of the ALJ's discussion of this issue has no effect on the outcome of this matter.

Here, the sole ground for revocation proven on this record was Respondent's having been mandatorily excluded from participating in federal health care programs pursuant to 42 U.S.C. 1320a–7(a). Respondent, however, has credibly accepted responsibility for the misconduct which led to his conviction for health care fraud, *see* 18 U.S.C. 1347, complied with the terms of his sentence, and also demonstrated that he has undertaken remedial measures. Accordingly, I have decided to adopt the ALJ's conclusion that his continued registration would be ''consistent with the public interest.'' ALJ at 20. Therefore, the Order to Show Cause will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I order that the Order to Show Cause issued to Kwan Bo Jin, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: June 4, 2012.

Michele M. Leonhart,

Administrator.

D. Linden Barber, Esq., and *Jonathan P. Novak, Esq.,* for the Government

Glen D. Crick, Esq., and *Lillian Walanka, Esq.,* for the Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Introduction

This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., to determine whether the Drug Enforcement Administration (''DEA'' or ''Government'') should revoke a practitioner's Certificate of Registration (''COR''), and deny any pending applications for renewal or modification. Without this registration, the practitioner, Kwan Bo Jin, M.D. (''Respondent''), of Palatine, Illinois, would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances in the course of his practice.

On March 29, 2011, the Deputy Assistant Administrator, Office of Diversion Control, DEA, issued an Order to Show Cause (''OSC'') to Respondent, giving Respondent notice of an opportunity to show cause why the DEA should not revoke Respondent's DEA COR BJ1801580, pursuant to 21 U.S.C. 823 and 824, and deny Respondent's pending application as a practitioner for registration in Schedules II through V, alleging that Respondent has been excluded from participation in all federal health care programs as defined in 21 U.S.C. 824(a)(5). (ALJ Ex. 1, at 1.) The OSC alleged in substance: (a) Respondent is currently registered with DEA as a practitioner in Schedules II through V under DEA registration number BJ1801580, at 950 West Carolyn Drive, Palatine, Illinois; (b) Respondent's registration expired on December 31, 2009, and Respondent ''submitted a timely renewal on November 6, 2010;'' [1] (c) the United States Department of Health and Human Services (''HHS'') by letter dated April 30, 2010, notified Respondent of his exclusion from participation in all federal health programs based on his October 21, 2009 federal conviction for health care fraud pursuant to 18 U.S.C. 1347; and (d) the exclusion was effective on May 20, 2010, and remains in place until at least May 19, 2015.[2] (*Id.*)

Respondent, through counsel, timely requested a hearing, (ALJ Ex. 2), which

---

[1] All citations to the ALJ's Recommended Decision are to the slip opinion as originally issued.

[2] I also do not adopt the ALJ's statement at page 7 of the slip opinion stating his conclusion ''that the reference in Section 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the factors listed in Section 824(a).'' ALJ at 7 (citing *Kuen H. Chen, M.D.,* 58 FR 65401, 65402 (1993)).

To be sure, the Agency decision in *Chen* stated that ''[t]he administrative law judge has concluded here that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the bases listed in 21 U.S.C. 824(a).'' 58 FR at 65402. However, whether this constitutes a holding or merely dictum, *Chen* is totally devoid of any indication that the traditional tools of statutory construction (*i.e,* text, structure, statutory purpose, and legislative history) were employed in reaching this conclusion. Indeed, while factor five focuses on ''other conduct,'' several of the grounds for revocation are based on a registrant's status and do not require inquiry into the nature of the underlying conduct. *See* 21 U.S.C. 824(a)(3) (authorizing revocation where registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized'' to engage in controlled substance activities or such sanction has been recommended by competent state authority); *id.* 824(a)(5) (authorizing revocation where registrant has been excluded or is subject to exclusion from participating in federal healthcare programs under mandatory exclusion provisions). In addition, construing factor five in this manner renders superfluous factor one, which authorizes the Agency to consider the recommendation of the state licensing board or disciplinary authority, as well as the provision of section 823(f) stating that the ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.''

Finally, it should be noted that since shortly after the CSA's enactment and years before section 823(f) was amended to include the public interest factors, DEA ''has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823 since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next.'' *Serling Drug Co.* v. *Detroit Prescription Wholesaler, Inc.,* 40 FR 11918, 11919 (1975). *See also John R. Amato,* 40 FR 22852 (1975) (Denying application where practitioner's state license had been revoked, holding that section 823(f) ''must logically give the Administrator the authority to deny a registration if the practitioner is not authorized by the State to dispense controlled substances . . . . To hold otherwise would mean that all applications would have to be granted only to be revoked the next day under 21 U.S.C. 824(a)(3). This [A]gency has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823.'').

Indeed, no court has ever questioned the Agency's longstanding and consistent interpretation that it has authority to deny an application on any of the grounds set forth in section 824(a). *Cf. National Muffler Dealers Assn., Inc.,* v. *United States,* 440 U.S. 472, 477 (2011) (''A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.''); *EEOC* v. *Associated Dry Goods Corp.,* 449 U.S. 590, 600 n.17 (1981) (''a contemporaneous construction deserves special deference when it has remained consistent over a long period of time'').

[1] Upon inquiry at hearing, the Government indicated that the date in the OSC was in error and should reflect November 6, 2009.

[2] At hearing, the Government raised an additional issue involving Respondent's prescribing of the Schedule II controlled substance Ritalin to a patient over a two to three month time period in or about 1996.

was held in Chicago, Illinois on August 2, 2011. Both parties called one witness to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

Issue

Whether the record establishes that Respondent's DEA COR BJ1801580 should be revoked pursuant to 21 U.S.C. 824(a)(5) and any pending applications for renewal or modification of that registration should be denied on the grounds that Respondent has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a).

Evidence and Incorporated Findings of Fact [3]

I find, by a preponderance of the evidence, the following facts:

I. Background

Respondent graduated from medical school in Korea and completed his residency in psychiatry at the University of Illinois, prior to becoming licensed in Illinois in or about 1984. (Tr. 49–50.) Respondent is not licensed in any other states. Respondent's DEA registration has never been disciplined. (Tr. 53.) Respondent's medical license has been the subject of disciplinary action in or about 1996 [4] and in 2009. (Tr. 50, 53.) Respondent has specialized training and experience in internal medicine and psychiatry. (Tr. 53.) Respondent is not Board certified in psychiatry but is Board eligible. (*Id.*) Prior to September 2009, Respondent's practice focused mainly on a geriatric patient population, to include covering twelve nursing homes. (Tr. 54.) On September 28, 2009, Respondent pled guilty to ''one count of Health Care Fraud in violation of 18 U.S.C. 1347, in the United States District Court for the Northern District of Illinois, ...'' (Resp't Ex. B, at 1.) Respondent has not actively practiced medicine since his September 2009 conviction. (Tr. 55, 63–64.)

II. The Government's Evidence

In support of the allegations contained in the OSC, the Government presented at hearing the testimony of one witness: DEA Diversion Investigator John Pacella (''DI Pacella''). DI Pacella credibly testified that he has been a diversion investigator for twenty-two years, and was assigned to investigate Respondent in November 2009, following receipt of information from the State of Illinois ''regarding [Respondent's] conviction for Medicaid fraud back in September of 2008.'' [5] (Tr. 21.)

DI Pacella next testified that Respondent's registration is currently active to handle controlled substances in Schedules II through V ''[o]n a day to day basis.'' (Tr. 21–22; Gov't Ex. 1.) DI Pacella further testified that he received a copy of the judgment in Respondent's criminal case from the U.S. Attorney's office. (Tr. 24–25; Gov't Exs. 2, 3.) DI Pacella did not consult with the prosecuting attorney in Respondent's case at any time and his investigation was limited to a review of the records in the case, to include a letter dated April 30, 2010, from the HHS notifying Respondent that he was excluded from participation in federal health care programs for a five-year period. (Tr. 27–28; 33; 42; Gov't Ex. 4.)

During questioning by Respondent's counsel, DI Pacella testified that he was aware that Respondent had been reprimanded by the State of Illinois for not keeping records for the Schedule II controlled substance Ritalin for a particular patient, and overprescribing to that patient, resulting in one year of probation. (Tr. 33–34.) [6]

DI Pacella's testimony also included a general explanation of diversion, to include Congress' intent to create ''basically a closed system of distribution.'' (Tr. 28–29.) DI Pacella further explained that a ''small percentage [of doctors] . . . do end up diverting drugs for[] monetary benefits . . . or even self addiction . . .'' and concluded that ''doctors and/or pharmacies . . . make fraudulent documents to cover up diversion.'' (Tr. 30, 31.) DI Pacella acknowledged that his testimony regarding what a doctor may do with regard to diversion is just speculation insofar as Respondent is concerned, since he did not review any of Respondent's prescribing information and does not know what Respondent is doing. (Tr. 36–37.)

III. Respondent's Evidence

Respondent testified at hearing that in 1996, his Illinois medical license was reprimanded as a result of his over prescribing Ritalin to a patient. (Tr. 50–51.) Respondent explained that the patient had tricked him into prescribing a little more than he intended, but admitted that he prescribed more than he intended and should have been more attentive. (Tr. 51–52.) Respondent further explained that initially his license was revoked because he did not attend the scheduled hearing due to lack of notice, but the revocation was vacated, and following a hearing with Respondent present, his license was reprimanded. (*Id.*)

Respondent next testified that his medical license in Illinois had recently been subject to discipline due to his September 28, 2009, federal health care fraud conviction, and that his medical license was currently under probation. (Tr. 53, 55.) Respondent testified that with regard to the discipline of his medical license, he has completed a four-month suspension, paid a $1,000 fine, and completed a continuing medical education requirement. (Tr. 60–61.) Respondent is in compliance with the terms of his medical license probation. (Tr. 61.)

Respondent testified that he pled guilty to health care fraud ''[b]ecause I did wrong.'' (Tr. 56.) Respondent further explained the nature of the misconduct,[7] stating ''that's what I pled guilty for and I feel very bad about it.'' (Tr. 57.) Since his conviction, Respondent explained that he has paid a fine of $10,000, a $100 assessment, and restitution of $28,349. (Tr. 57–58.) Respondent also successfully completed a four month period of work release at the Salvation Army, along with 250 hours of community service. (Tr. 58–59.) Respondent testified that he has completed all of the terms of his federal probation and sentencing, and his probation was terminated on January 29, 2011, approximately eight months earlier than scheduled. (Tr. 59.)

Discussion and Conclusions

I. The Applicable Statutory and Regulatory Provisions

The Controlled Substances Act (''CSA'') specifies in 21 U.S.C. 824(a) five factors that the Administrator may consider when suspending or revoking

[3] In addition to the evidence discussed in this Section, additional evidence and findings of fact are discussed in later sections of this Recommended Decision.

[4] *See infra* note 18.

[5] The evidence of record reflects that Respondent signed a plea agreement with the United States dated December 9, 2008, and entered a plea of guilty on September 28, 2009. (*Compare* Gov't Ex. 2, *with* Gov't Ex. 3.)

[6] Respondent's counsel did not object to the testimony or raise any issue with regard to lack of notice during hearing, but instead elicited further explanation of the issue from Respondent during Respondent's direct examination.

[7] Respondent testified that the offense conduct for which he pled guilty related to charging Medicare for patients that he had not seen, to include on occasion deceased patients. (Tr. 56–57.) There is no evidence of record to indicate that the offense conduct related to controlled substances.

a DEA registration.[8] Despite the lack of an explicit provision applying these factors to a denial of an application

[t]he agency has consistently held that the Administrator may also apply these bases to the denial of a registration, since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next.[9]

In addition, I conclude that the reference in Section 823(f)(5) to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in Section 824(a).[10]

In an action to revoke a DEA COR, the Government has the burden of proving that the requirements for such revocation are satisfied.[11] Similarly, in an action to deny an application for registration, the Government bears the burden of proving that the requirements for granting such registration are not satisfied.[12] The burden of proof shifts to the respondent once the Government has made its *prima facie* case.[13]

The CSA, 21 U.S.C. 824(a)(5), provides, insofar as pertinent to this proceeding, that the Administrator may revoke or deny a registration if an applicant has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a).

Under Section 1320a–7(a), the Secretary of the HHS is required to exclude from participation in any federal health care program any individual convicted of a criminal offense ''related to the delivery of an item or service under [42 U.S.C. 1395 et. seq.] or under any State health care program,'' 1320a–7(a)(1), as well as any individual convicted ''in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct,'' 1320a–7(a)(3).

I find that Respondent's 2009 health care fraud conviction and subsequent exclusion from all federal health care programs are supported by substantial evidence. The evidence at hearing includes a plea agreement and judgment pertaining to Respondent's conviction for health care fraud, pursuant to 18 U.S.C. 1347. (Gov't Exs. 2, 3.) Additionally, the evidence includes a letter from the HHS dated April 30, 2010, excluding Respondent from all federal health care programs for the minimum statutory period of five years. (Gov't Ex. 4.) Consequently, exclusion from participation in any federal health care programs pursuant to 42 U.S.C. 1320a-7(a) is an independent ground for denying or revoking Respondent's DEA registration. *See Johnnie Melvin Turner, M.D.,* 67 FR 71,203, 71,204 (DEA 2002).

Respondent does not dispute the evidence of conviction or exclusion, but argues, correctly, that revocation of a COR and denial of a pending application for renewal of registration on this ground is a matter of discretion. *See Dinorah Drug Store, Inc.,* 61 FR 15,972, 15,973 (DEA 1996) (denial of registration under Section 824(a)(5) discretionary so long as granting registration not inconsistent with public interest).

Accordingly, on these facts, the Government has met its burden of proving its Section 824(a)(5) claim, *see* 21 CFR 1301.44(d) and (e), placing the burden on Respondent to show that despite his conviction, granting him a COR would not be contrary to the public interest. *See Medicine Shoppe—Jonesborough,* 73 FR at 380 (burden of proof shifts to the respondent once the Government puts on *prima facie* case); *see also Thomas Johnston,* 45 FR at 72,311 (same).

II. The Public Interest Standard

Pursuant to 21 U.S.C. 823(f), the Administrator may deny an application for a DEA registration if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the Administrator is required to consider the following factors:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing or conducting research with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances.

(4) Compliance with applicable state, federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

As a threshold matter, the factors specified in Section 823(f) are to be considered in the disjunctive: the Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. *See David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (DEA 1993); *see also D & S Sales,* 71 FR 37,607, 37,610 (DEA 2006); *Joy's Ideas,* 70 FR 33,195, 33,197 (DEA 2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16,422, 16,424 (DEA 1989).

III. The Factors to Be Considered

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority and Conviction Record under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

As described in the Evidence and Incorporated Findings of Fact Section of this Recommended Decision, Respondent holds a valid state medical license in the State of Illinois, but Respondent's state medical license has been the subject of discipline in the past. In or about 1996, Respondent's medical license was reprimanded for conduct related to prescribing Ritalin, a Schedule II controlled substance.[14] Additionally, as a result of Respondent's September 28, 2009 federal conviction for health care fraud, and pursuant to state law,[15] the State of Illinois suspended Respondent's medical license for a period of four months,[16] imposed a fine of $1,000, and placed Respondent on conditional probation

[8] That subsection provides that a DEA registration may be revoked upon a finding that the registrant: (1) has materially falsified an application for DEA registration; (2) has been convicted of a felony under the CSA or any other federal or state law relating to any controlled substance; (3) has had a state license or registration suspended, revoked or denied and is no longer authorized by state law to handle controlled substances; (4) has committed such acts as would render registration inconsistent with the public interest; or (5) has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a). It should also be noted that Section 824(a) contains a reciprocal reference incorporating the public interest factors from Section 823(f). *See* 21 U.S.C. 824(a)(4).

[9] *Kuen H. Chen, M.D.,* 58 FR 65,401, 65,402 (DEA 1993) (citing *Serling Drug Co. & Detroit Prescription Wholesaler, Inc.,* 40 FR 11918, 11,919 (DEA 1975)); *accord Scott J. Loman, D.D.S.,* 50 FR 18,941 (DEA 1985); *Roger Lee Palmer, D.M.D.,* 49 FR 950 (DEA 1984).

[10] *See Chen,* 58 FR at 65,402.

[11] 21 CFR 1301.44(e) (2011).

[12] 21 CFR 1301.44(d) (2011).

[13] *Medicine Shoppe—Jonesborough,* 73 FR 364, 380 (DEA 2008); *see also Thomas Johnston,* 45 FR 72,311, 72,311 (DEA 1980).

[14] *See* discussion infra.

[15] Disciplinary action against an Illinois licensee may be imposed upon: ''(3) The conviction of a felony in this or any other jurisdiction . . . . (5) Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public.'' 225 Ill. Comp. Stat. 60//222(A)(3), (5).

[16] Respondent's medical license was suspended for four continuous months beginning on December 3, 2009.

for an indefinite period of not less than two years. (Resp't Ex. B.)

The most recent action by the State of Illinois reflects a determination that Respondent, notwithstanding findings of unprofessional conduct, can be entrusted with a medical license subject to probationary terms and conditions. While not dispositive,[17] this action by the State of Illinois does weigh against a finding that Respondent's continued registration would be inconsistent with the public interest under Factor One. *Cf. Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003) (under Factor One, prior suspension of respondent's state medical license held not dispositive where state license currently under no restrictions).

Regarding Factor Three, there is no evidence that Respondent has ever been convicted under any federal or state law relating to the manufacture, distribution or dispensing of controlled substances. I therefore find that this factor, although not dispositive, *see Leslie,* 68 FR at 15,230, weighs against a finding that Respondent's registration would be inconsistent with the public interest.

Factors 2, 4 and 5: Respondent's Experience in Dispensing Controlled Substances; Compliance with Applicable State, Federal or Local Laws Relating to Controlled Substances; and Such Other Conduct Which May Threaten the Public Health and Safety

In this case, there is evidence that Respondent has committed acts inconsistent with the public interest by prescribing a Schedule II controlled substance, Ritalin, to one patient over a two to three month time period in or about 1996.[18] As an initial matter, the issue of Respondent's prescribing was not specifically noticed by the Government in the OSC or prehearing statement, nor was it referenced in any Government exhibits prior to hearing. The issue was first introduced during Respondent's cross-examination of DI Pacella, without objection, and further explained by Respondent during his direct and cross examination. (Tr. 50–53, 68–72.)

To comport with due process requirements, the DEA must ''provide a Respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of [his] registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action.'' *CBS Wholesale Distribs.,* 74 FR 36,746, 36,749 (DEA 2009) (citing *NLRB v. I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998); *Pergament United Sales, Inc., v. NLRB,* 920 F.2d 130, 134 (2d Cir. 1990)). An issue cannot be the basis for a sanction when the Government has failed to ''disclose 'in its prehearing statements or indicate at any time prior to the hearing' that an issue will be litigated.'' *Id.* at 36,750 (citing *Darrell Risner, D.M.D.,* 61 FR 728, 730 (DEA 1996)). The DEA has also previously found, however, that a respondent may waive objection to the admission of evidence not noticed by the Government prior to the hearing when the respondent does not timely object and when the respondent also raises the issue. *Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,755 (DEA 2009).

In accordance with agency precedent, I find in this case that the issue of Respondent's 1996 prescribing of Ritalin to one patient may properly be considered under factors one, two, four, and five, as well as on the issue of sanction, notwithstanding the lack of prehearing notice. Respondent's lack of timely objection to the evidence of the 1996 incident and introduction of additional testimony on the subject effectively waived any notice issue.

The Government did not substantively address the lack of notice in its post-hearing brief, but argues that ''Respondent's version of his prescribing of a schedule II controlled substance to a nurse is *similar* to the facts that the Supreme Court recounted in . . . '' *United States v. Moore,* 423 U.S. 122 (1975). (Gov't Br., at 5 (*emphasis added*)). The issue before the Court in *Moore* involved whether a registered physician can be prosecuted under the CSA when the physician's activities fall outside the usual course of professional practice, which was answered in the affirmative. *Moore,* 423 U.S. at 124. Notably, the facts in *Moore* involved a practitioner's issuance of 11,169 prescriptions for ''some 800,000 methadone tablets,'' which were acknowledged by the practitioner to have been issued without observing ''generally accepted medical practices.'' *Id.* at 126. I find the Government's argument that Respondent's prescribing conduct was similar to *Moore* to be glaringly at odds with the facts.

Additionally, the Government's argument that there ''was no evidence that a physical examination was performed . . . '' by Respondent, to include lack of diagnostic tests or records kept, (Gov't Br., at 6), is wholly unpersuasive. As an initial matter, in an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied.[19] The Government's sole witness first introduced the 1996 issue of Respondent's record-keeping and prescribing misconduct, arguably in response to a question posed by Respondent's counsel, clearly demonstrating the Government was aware of the issue in advance of hearing. Once raised at hearing, the Government did not offer any other relevant evidence, to include such things as the findings of a state regulatory authority or patient records, nor did the Government pursue the matter with DI Pacella or Respondent in any meaningful way. (Tr. 42–47, 70–71.) In fact, Respondent's limited testimony on the topic was consistent with him seeing the patient and making chart entries. ''[O]nce I write the prescription in my chart, you know, on such day that I, I prescribe this, those and this amount and then she comes in after three, four days that oh, I had a problem at home[,]'' further explaining how the patient had misled him to issue another prescription. (Tr. 71.) The only evidence in the record of misconduct due to record-keeping is DI Pacella's testimony that ''[w]e did receive information that back in 1997, 96–97, he was actually reprimanded from the State of Illinois for not keeping records for Schedule II Ritalin for a particular patient, ...'' (Tr. 33–34.) The record is otherwise devoid of any information about Respondent's physical examination of the patient, diagnostic tests, or lack thereof.

In *Calhoun v. Bailar,* 626 F.2d 145 (9th Cir. 1980), the court found that to constitute substantial evidence, the probative value and reliability of hearsay evidence may be analyzed using many factors, such as: a consideration regarding the independence or possible bias of the declarant; the type of hearsay material presented; whether the statements are signed and sworn or anonymous, oral or unsworn; whether the statements are contradicted by direct testimony; whether the declarant is available to testify and, if so, whether the objecting party subpoenas the declarant or whether the declarant is unavailable and no other evidence is available; the credibility of the witness testifying to the hearsay; and whether or not the hearsay is corroborated. *Id.* at 149; *see also Richardson v. Perales,* 402 U.S. 389, 402–06 (1971). The evidence offered by DI Pacella regarding ''not keeping records for Schedule II Ritalin for a particular patient'' is so lacking in

[17] *Mortimer B. Levin, D.O.,* 55 FR 8,209, 8,210 (DEA 1990) (finding DEA maintains separate oversight responsibility and statutory obligation to make independent determination whether to grant registration).

[18] Respondent recalls 1996 or 1997, which was consistent with DI Pacella's limited testimony on the issue. (*Compare* Tr. 33–34, *with* Tr. 68.)

[19] 21 CFR 1301.44(e) (2011).

factual basis, that it simply cannot constitute substantial evidence. Accordingly, I do not find the Government's cited authority to be similar in any material respect to the instant case, nor has the Government sustained its burden with regard to the issue of Respondent's lack of physical examination, diagnostic tests, or record-keeping.

In addition to the foregoing, the Government also elicited opinion testimony, without objection, from DI Pacella to the effect that a small percentage of practitioners divert drugs for monetary gain or self use, to include fraudulent documentation. (Tr. 31.) DI Pacella acknowledged that the foregoing testimony was only speculation insofar as Respondent's past or future prescribing conduct was concerned, since he had no independent evidence of such conduct by Respondent. (Tr. 36–37.) ''Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.'' *White ex rel. Smith v. Apfel,* 167 F.3d 369, 375 (7th Cir. 1999) (citing *Erhardt v. Sec'y, DHS,* 969 F.2d 534, 538 (7th Cir. 1992)). Accordingly, I give absolutely no weight to DI Pacella's opinion testimony pertaining to diversion of controlled substances for monetary gain or related document fraud, since at best it is mere speculation as to what Respondent may or may not do in the future.

While I have carefully considered Respondent's admitted prior conduct with regard to prescribing Ritalin to one patient in or about 1996, I do not find that this single incident, which occurred approximately fifteen years ago, and Respondent's otherwise unblemished prescribing record both before and after, to weigh appreciably against Respondent under any public interest factor. Respondent was fully credible and candid in his explanation of this event and there is no evidence of record to indicate any similar conduct before or after. Moreover, Respondent admitted his misconduct at the time of the incident, explaining that ''I admitted that, you know, I prescribed more than I intended for her.'' (Tr. 51.) In reaching a negotiated reprimand, Respondent further testified that he acknowledged he had done something wrong. ''I should be more attentive . . . I admit, at that time, that I prescribed more than I intended for that particular patient.'' (Tr. 52–53.). The lack of any recurrence for the past fifteen years amply demonstrates that Respondent will not engage in similar misconduct in the future. *Patrick W. Stodola, M.D.,* 74 FR 20,727 (DEA 2009).

Accordingly, I find that Respondent's past experience in dispensing controlled substances, compliance with applicable laws relating to controlled substances and absence of any other conduct relating to controlled substances[20] that may threaten the public interest weighs heavily in favor of finding that Respondent's registration would be fully consistent with the public interest.

IV. Community Impact Evidence

Respondent testified consistent with his prehearing statement, and without objection or rebuttal, that to his knowledge he is the only Korean speaking psychiatrist in the Chicago, Illinois area at this time. (Tr. 55.) Respondent further testified that prior to his conviction in September 2009, his practice focused on twelve nursing homes, six of which were ''small nursing homes'' with geriatric Korean populations. (Tr. 54.) Respondent argues that his plan ''to return to work as a psychiatrist for the underserved geriatric Korean community in the Chicago area'' weighs in favor of registration. (Resp't Br., at 13.)

As a threshold matter, there is some question as to whether this issue is relevant at all in a DEA administrative proceeding regarding the registration of a practitioner. Agency precedent has found community impact testimony and evidence relevant with regard to pharmacies but has also rejected community impact evidence altogether in more recent cases. For example, the Agency has considered and credited a respondent's argument that loss of registration would severely and adversely impact the local community by eliminating one of two pharmacies serving the poor. *Pettigrew Rexall Drugs,* 64 FR 8855, 8859–60 (DEA 1999). In recent cases, the Agency held that ''DEA has never applied [the *Pettigrew*] rule in a subsequent case . . . it would be ill-advised to extend it to the case of a prescribing practitioner.'' *Gregory Owens, D.D.S.,* 74 FR 36,751, 36,757 (DEA 2009); *see also Steven M. Abbadessa, D.O.,* 74 FR 10,077, 10,078 (DEA 2009) (rejecting community impact evidence).

Although not discussed in *Owens,* there are cases since *Pettigrew* that have considered and given weight to community impact evidence, without specifically citing *Pettigrew.* For example, in a 2004 decision the Deputy Administrator explained that ''regardless of any demographic showing as to what proportion of Louisiana's population is medically underserved[,] such information does not detract from the fact that Respondent provides needed medical services to such an area . . . [W]hile this provides some support for maintaining registration under the facts of this case, it also has a negative implication for continued registration.'' *Imran I. Chaudry, M.D.,* 69 FR 62,081, 62,083–84 (DEA 2004).

There are also cases prior to *Pettigrew* that have considered community impact evidence on facts similar to the instant case. For example, the Agency specifically considered community impact in a 1996 decision finding that ''given the needs of the community in which he practices and the action already taken by the [state and HHS] . . . revocation of [respondent's] DEA registration is not appropriate.'' *Anibal P. Herrera, M.D.,* 61 FR 65,075, 65,078 (DEA 1996); *see also Marta I. Blesa, M.D.,* 60 FR 53,434, 53,436 (DEA 1995) (finding relevant to continuing registration practitioner's ''continued contributions to that community'' and community impact). In light of this precedent, I find that community impact evidence as a threshold matter is not an entirely irrelevant evidentiary consideration, to include on the issue of sanction.

Respondent testified that he has not actively practiced medicine since his conviction, explaining that his decision to return to practice will depend on the outcome of the DEA registration decision. (Tr. 63–64.) Respondent further testified that although he is not prohibited from practicing medicine in Illinois, and generally does not prescribe controlled substances, a DEA registration, as a practical matter, is necessary in order to ''work with a hospital or a pharmacy.'' (Tr. 64.) Respondent explained: ''My Illinois license is active and Illinois substance license is also active. So, I can practice if I want, but because of the DEA situation that I cannot maintain the relationship with the hospital that I've been working with before and the pharmacies.'' (Tr. 78.)

Respondent's testimony regarding his future intentions was equivocal, initially testifying that he intends to return to work with six nursing homes he has experience with that currently have a lot of geriatric Korean patients who are not being served now ''because there's no psychiatrist dealing with their mental difficulties.'' (Tr. 65.) On cross-examination, Respondent equivocated on whether he actually intends to return to practice, regardless of the outcome of his DEA registration hearing. (Tr. 74–

[20] *See Terese, Inc., D/B/A Peach Orchard Drugs, Admonition of Registrant,* 76 FR 46,843, 46,848 n.11 (DEA 2011) (with respect to factor five, DEA's case law has generally recognized that misconduct must relate to controlled substances).

75.) On re-direct, Respondent clarified, stating that if the DEA situation can be cleared up, ''I'd like to go back to work. . . . I consider myself as a resource for my community in Chicago, Korean community. And I'd like to do the work no matter whether it's being compensated or not.'' (Tr. 78.)

In light of Respondent's equivocation on future intentions, I give the evidence related to potential community impact little if any weight for purposes of this recommended decision, other than to find that it is not inconsistent with the public interest.

V. Sanction

I find the Government has established by substantial evidence a prima facie case in support of revoking Respondent's DEA COR and denying any pending applications for renewal or modification for registration pursuant to 21 U.S.C. 824(a)(5), which forms the sole basis for the Government's request for revocation of Respondent's registration and denial of any pending applications for renewal. While mandatory exclusion can provide an independent basis for revocation,[21] DEA has often reserved that sanction to cases where ''there were serious questions as to the integrity of the registrant.'' *Anibal P. Herrera, M.D.,* 61 FR 65,075, 65,078 (DEA 1996) (continuation of registration with restriction where respondent fully accepts responsibility and has paid restitution).

The Government cites several cases in its post-hearing brief in support of revocation,[22] although each case is significantly distinguishable from the facts presented in the instant case. *Orlando Ortega-Ortiz, M.D.,* 70 FR 15,122 (DEA 2005) (respondent waived hearing); *Daniel Ortiz-Vargas, M.D.,* 69 FR 62,095 (DEA 2004) (respondent waived hearing);[23] *Johnnie-Melvin Turner, M.D.,* 67 FR 71,203 (DEA 2002) (respondent waived hearing and offense conduct involved fraudulent claims in excess of $100,000 and order to pay restitution of $106,132); *KK Pharmacy,* 64 FR 49,507, 49,510 (DEA 1999) (respondent waived hearing and ''[n]o evidence of explanation or mitigating circumstances was offered'' by interested party on revocation grounds under 21 U.S.C 824(a)(1), (4), and (5)); *Stanley Dubin, D.D.S.,* 61 FR 60,727, 60,728 (DEA 1996) (respondent's testimony at hearing not credited in part and respondent found to have directly violated termination letter, casting substantial doubt on respondent's integrity).

There is other Agency precedent, in addition to *Herrara,* 61 FR at 65,078, refraining from imposing a revocation sanction on facts similar to the instant case where the respondent has fully accepted responsibility, demonstrated remorse, among other positive factors, and in the absence of other evidence that continued registration would be contrary to the public interest. For example, in *Melvin N. Seglin, M.D.,* 63 FR 70,431 (DEA 1998), the respondent's COR was renewed and continued based on a finding that respondent had accepted responsibility for his misconduct which was not likely to recur. *Id.* at 70,433.

Turning to the evidence in this case, the Government's evidence essentially consists of the court records relating to Respondent's federal health care fraud conviction, to include an exclusion letter from HHS. DI Pacella testified that his investigation was limited essentially to a review of those records.[24] (Tr. 33.)

Respondent's evidence included two Consent Orders from the Illinois Department of Financial and Professional Regulation, the most recent bearing an effective date of July 2, 2010, placing Respondent on indefinite probation for a minimum period of two years, effective April 3, 2010, with various conditions of probation. (Resp't Ex. C.) Additionally, Respondent's evidence included a completion certificate documenting his participation in an ''educational activity titled Intensive Course in Medical Ethics, Boundaries & Professionalism . . . on 9/2/2010–9/3/2010 . . . .'' (Resp't Ex. D.)

Respondent also credibly testified at length during hearing, explaining his educational and professional background, along with the circumstances surrounding the allegations in the OSC. Respondent's manner throughout his testimony was serious and deliberate. Respondent testified without reference to notes or other written material, unless specifically directed by counsel, and he was accurately able to recall events with a reasonable level of certainty. Respondent did not display hostility during testimony or other visible mannerisms that adversely impacted his credibility, and unhesitatingly acknowledged and admitted past instances of misconduct. I find Respondent's testimony to be fully credible in that it was internally consistent and consistent with other objective evidence of record.

Standing alone, Respondent's criminal conviction for a federal health care fraud offense, and mandatory exclusion from participation in the Medicare program pursuant to 42 U.S.C. 1320a-7(a) could certainly support a revocation sanction. But that is not the case here. Respondent' s testimony at hearing, which I find to be sincere and credible, demonstrates that revocation is not an appropriate sanction given Respondent's full acceptance of responsibility for past misconduct, demonstration of remorse, and tangible efforts at rehabilitation following conviction. The un-rebutted evidence of record reflects that Respondent timely admitted full responsibility for his criminal conduct,[25] pursuant to a plea agreement, for which he was sentenced to two years' probation, with the first four months ''to be served in [a] work release program with the Salvation Army.'' (Gov't Ex. 2, at 2.) Respondent testified that he pled guilty because he knew he was wrong and expressed remorse for his misconduct. (Tr. 56–57.) Respondent has also met all of the terms and conditions of his sentence, to include payment of a $10,000 fine, a $100 assessment, and restitution of $28,349. (Tr. 57–58; Gov't Ex. 3.) Additionally, Respondent has completed his four-month period of work release with the Salvation Army, along with 250 hours of community service. (Tr. 58–59.) Of significance, Respondent's fully successful completion of the terms of his federal probation resulted in early termination

[21] ''[M]andatory exclusion from participation in the Medicare program constitutes an independent ground for revocation pursuant to 21 U.S.C. [ ]824(a)(5).'' *Gilbert L. Franklin, D.D.S.,* 57 FR 3,441, 3,441 (DEA 1992).

[22] Gov't Br., at 6.

[23] The Government's citation to this case is incorrect.

[24] Contrary to the Government's prehearing statement, DI Pacella offered no testimony factually related to Respondent's criminal conduct, to include an allegation that he ''delivered apparently fictitious medical records in response to a grand jury subpoena.'' (ALJ Ex. 4, at 2.) In fact, DI Pacella's testimony made clear that his investigation was limited solely to a review of court records offered at hearing. (Tr. 32–33.) DI Pacella testified that he did not review or request any of Respondent's state or federal prescribing practice records . (Tr. 35–36.) Nor did he interview Respondent about the details of his criminal conviction. (Tr. 38.) DI Pacella also testified that he did not participate in or consult with the prosecutor at any time during the criminal case, apparently having no role or independent knowledge of Respondent's criminal case. (Tr. 42–44.) Not surprisingly, DI Pacella credibly acknowledged during cross-examination that all of his testimony pertaining to whether a practitioner might improperly profit from prescribing controlled substances was pure speculation, as he had no knowledge of any such conduct by Respondent. (Tr. 37, 41–42.)

[25] ''Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct.'' (Gov't Ex. 3 at 7.)

on January 29, 2011, eight months earlier than scheduled. (Tr. 41, 59.)

In addition to the foregoing, there is no other credible evidence of record that Respondent's registration would be inconsistent with the public interest, to include issues with his prescribing practices, making unnecessary any recommendation that the registration be subject to conditions. The Government's argument that ''Respondent cannot be trusted to tell the truth'' because of his fraud conviction, (Gov't Br., at 6), is inconsistent with the evidence of record. Such an argument might be persuasive in a case where a respondent does not testify at all or testifies untruthfully, but Respondent did credibly testify at length. There is also no evidence that Respondent impeded the criminal investigation or was untruthful at any stage of the sentencing process, which was required by Respondent's plea agreement with the United States. (Gov't Ex. 3 at 10–11.) This is not to minimize the seriousness of Respondent's criminal misconduct, but the Government's argument that Respondent cannot be trusted to tell the truth based solely on his fraud conviction ignores the significant recent positive evidence to the contrary. I find by substantial evidence of record that Respondent's post-offense conduct and testimony at hearing demonstrate that he has been truthful, and can continue to be entrusted to tell the truth.

Respondent has also fulfilled the requirements of discipline related to his Illinois medical license, to include serving a four-month suspension, payment of a $1,000 fine, and completion of a continuing medical education requirement. (Tr. 60–61; Resp't Ex. D.) Respondent is also in compliance with the terms of his medical license probation. (Tr. 61.) In light of the foregoing, and consistent with DEA precedent, I find that revocation of Respondent's registration is not an appropriate sanction in this case.

Conclusion And Recommendation

I recommend continuation of Respondent's DEA COR and approval of any pending applications for renewal or modification on the grounds that Respondent's continued registration would be fully consistent with the public interest as that term is used in 21 U.S.C. 823(f).

Dated: October 13, 2011.

Timothy D. Wing

Administrative Law Judge

[FR Doc. 2012–14319 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Serenity Café; Decision and Order

On December 2, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Serenity Café (Applicant), of Chicago, Illinois. The Show Cause Order proposed the denial of Serenity Café's application for a DEA Certificate of Registration as a Maintenance Narcotic Treatment Program, on the grounds that the Applicant does ''not have authority to handle controlled substances in the state of Illinois,'' and because its registration would be inconsistent with the public interest. Show Cause Order, at 1 (citing 21 U.S.C. 824(a)(3) and 21 U.S.C. 823(f)).

Specifically, the Show Cause Order alleged that on January 26, 2011, Applicant, while doing business as Recovery Café, had voluntarily surrendered its DEA Certificate of Registration for cause. *Id.* at 1. The Order alleged that an investigation of Recovery Café found that it ''failed to maintain the mandatory records required to be kept for controlled substances, had an unexplained shortage of approximately 199,476 mg of methadone, and left controlled substances in an open safe unattended.'' *Id.*

The Show Cause Order further alleged that Applicant had failed to disclose on its application that Recovery Café had voluntarily surrendered for cause its DEA registration. *Id.* at 2 (citing 21 U.S.C. 824(a)(1)). Next, the Order alleged that Applicant does not have a valid Illinois Department of Human Services Alcoholism and Substance Abuse Treatment and Intervention License as required by state law. *Id.* (citing 20 Ill. Comp. Stat. 301/15–5; Ill. Admin. Code tit. 77, 2060.201). Finally, the Order also notified Applicant of its right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedure for doing either, and the consequence for failing to do either. *Id.* (citing 21 CFR 1301.43).

On December 8, 2011, Diversion Investigators (DIs) personally served the Show Cause Order on Mr. Derrick Arna, who, according to the affidavit of a DI, is the Chief Executive Officer and owner of Serenity Café. GX 1, at 3; GX 6. Since the date of service of the Order, thirty days have now passed and neither Applicant, nor anyone purporting to represent it, has requested a hearing or submitted a written statement in lieu of a hearing. I therefore find that Applicant has waived its right to a hearing or to submit a written statement in lieu of a hearing, and issue this Decision and Final Order based on relevant evidence contained in the record submitted by the Government. 21 CFR 1301.43(d) & (e). I make the following findings of fact.

Findings

Serenity Café is owned by Mr. Derrick Arna. GX 1, at 3. Mr. Arna is also the authorized agent of Recovery Café, a former Opioid Treatment Program in Chicago, Illinois, which, on January 26, 2011, voluntarily surrendered its DEA Registration for cause following a January 6, 2001 on-site inspection which found numerous violations. *Id.* at 1; GX 3. More specifically, during the on-site inspection, DEA DIs found that Recovery Café had multiple record-keeping violations. *Id.* at 2. These included, *inter alia,* that it: (1) Failed to record on DEA Form 222s, the date of receipt and quantity of schedule II controlled substances it received; (2) failed to maintain accurate and complete controlled substance records; and (3) failed to maintain dispensing records for the methadone it dispensed, including the date of the dispensing and the name of the patient receiving the drug. *Id.*

In addition, the DIs performed an audit of its handling of methadone hcl (5mg & 40mg) for the period from October 19, 2009 to January 6, 2011. *Id.* The audit found that the clinic was short approximately 199,476 mg of methadone. *Id.* Finally, on January 25, 2011, the DIs found that controlled substances were left unattended in an open safe. *Id.* The next day, Mr. Arna executed a voluntary surrender of Recovery Café's DEA registration.

On February 14, 2011, Mr. Arna filed an application under the name of Serenity Café for registration as a Narcotic Treatment Program—Maintenance, at the proposed address of 110 E. 78th Street, Chicago, Illinois. GX 2, at 1. Mr. Arna sought authorization to handle methadone, a schedule II narcotic controlled substance, and buprenorphine, a schedule III narcotic controlled substance. *Id.*

In Section 4 of the application, Mr. Arna was required to list Applicant's state of licensure, license number and its expiration date. GX 2, at 2. Mr. Arna completed only the state of licensure block, writing ''Illinois'' and the word ''pending.'' *Id.* at 2.

In Section 5 of the application, Mr. Arna was required to answer four liability questions. Among them was question 2, which asked: ''Has the

applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted, or denied, or is any such action pending?'' Mr. Arna marked ''NO,'' and in the area provided for explaining any ''YES'' answer, wrote ''None.'' *Id.*

On February 17, 2012, following a hearing before a state Administrative Law Judge (ALJ), the Secretary of the Illinois Department of Human Services issued a Final Order on Applicant's application for state licensure. *See In the Matter of Serenity Café* at 1, 11 DASA 001 (Ill. Dep't Hum. Servs., Feb. 17, 2012). Adopting the ALJ's findings and report, the Final Order denied Applicant's application for a state license to provide both Level I Adult and Adolescent Outpatient Treatment and Level II Adult and Adolescent Intensive Outpatient Treatment, DUI Evaluation, DUI Risk Education, and Methadone as Adjunct Services. *Id.*

Accordingly, because Applicant does not possess a valid Illinois license to provide substance abuse treatment, I find that Applicant is not currently authorized to dispense controlled substances in the State of Illinois, the State in which it seeks registration. *See* 20 Ill. Comp. Stat. 301/15–5 (it is ''unlawful for any person to provide treatment for alcoholism and other drug abuse or dependency . . . unless the person is licensed to do so by the Department''); Ill. Admin. Code tit. 77, 2060.201 (''Substance abuse treatment and intervention services * * * shall be licensed by the Department.'').

Discussion

Under section 303(g) of the Controlled Substances Act (CSA), ''*practitioners* who dispense narcotic drugs [in schedule II] to individuals for maintenance treatment * * * shall obtain annually a separate registration for that purpose.'' 21 U.S.C. 823(g)(1) (emphasis added). Moreover, this provision imposes as a requirement of registration, that the applicant meet three conditions, including that ''the applicant *is a practitioner* who is determined by the Secretary to be qualified * * * to engage in the treatment with respect to which registration is sought.'' *Id.* 823(g)(1)(A) (emphasis added). Thus, it is clear that in order to obtain a registration authorizing the dispensing of schedule II narcotics such as methadone for maintenance treatment, the applicant must be (among other things), a practitioner within the meaning of the CSA.[1]

The CSA defines the term ''practitioner' to mean ''a physician * * * pharmacy, hospital or other person licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Likewise, in the case of practitioners, the CSA imposes, as a condition of registration, that it be currently authorized to dispense controlled substances under the laws of the State in which it engages in professional practice. *See id.* 823(f) (''The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). Thus, DEA has long held that the possession of authority under state law to dispense controlled substances is an essential condition for obtaining and maintaining a DEA registration. *See David W. Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988).

As found above, the Illinois Department of Human Services has issued a final order denying Applicant's application for the state licenses required to dispense controlled substances for the purpose of providing maintenance treatment. Therefore, Applicant is not a ''practitioner'' within the meaning of the CSA, and thus, it is not entitled to be registered. *See* 21 U.S.C. 802(21); 823(f); 823(g). Accordingly, its application will be denied.[2]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 823(g)(1) & (2), as well as 28 CFR 0.100(b), I order that the application of Serenity Café for a DEA Certificate of Registration as a Narcotic Treatment Program, be, and it hereby is, denied. This Order is effective July 12, 2012.

Dated: June 4, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–14291 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Bill Alexander, M.D.; Decision and Order

On September 22, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order To Show Cause to Bill Alexander, M.D. (Applicant), of Porter, Texas. The Show Cause Order proposed the denial of Applicant's application for a DEA Certificate of Registration as a practitioner in schedules II through V, on the ground that his ''registration would be inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f) and 824(a)(4)).

The Show Cause Order alleged that on December 3, 2010, Applicant applied for a practitioner's registration in schedules II–V at the location of 24420 FM 1314, Suite 101, Porter, Texas. *Id.* The Show Cause Order then alleged that on or about June 18, 2009, Applicant unlawfully possessed 64 kilograms of marijuana, a schedule I controlled substance, in violation of both federal and state law. *Id.* at 2 (citing 21 U.S.C. 841(a)(1) and Texas Health & Safety Code Ann. 481.121(b)(5)).

Next, the Show Cause Order alleged that on or about June 18, 2009, Applicant told law enforcement agents that he was transporting the marijuana for a drug dealer, and that he had transported over a dozen such loads of marijuana in the past. *Id.* The Order further alleged that Applicant told the agents that he was addicted to and used crack cocaine, a schedule I controlled substance.[1] *Id.*

The Show Cause Order also alleged that on or about February 4, 2011, the Texas Medical Board entered a Corrective Order against Applicant's medical license. *Id.* According to the

[1] Likewise, the requirements of section 303(g)(1) ''are waived in the case of the dispensing (including the prescribing), by *a practitioner,* of narcotic drugs in schedule III, IV, or V or combinations of such drugs if *the practitioner* meets the conditions specified in subparagraph (B). 21 U.S.C. 823(g)(2)(A) (emphasis added). This provision requires that the ''the *practitioner* submit to the Secretary [of HHS] a notification of the intent of the *practitioner* to begin dispensing the drugs or combinations for'' maintenance or detoxification treatment, ''as well as to certify that ''[t]he *practitioner* is a qualifying physician,'' that ''the *practitioner* has the capacity to refer the patients for appropriate counseling and other appropriate ancillary services,'' and that ''[t]he total number of such patients of the *practitioner* at any one time will not exceed the applicable number.'' *Id.* 823(g)(2)(B) (emphasis added). Moreover, a practitioner's notification to the Secretary must ''identif[y] the registration issued for the practitioner pursuant to subsection (f) of this section.'' *Id.* 823(g)(2)(D)(i)(II). *See also* 21 CFR 1301.28.

[2] Because it is clear that Applicant is not entitled to be registered, it is not necessary to decide whether denial of its application is warranted under the public interest standard of 21 U.S.C. 823(f).

allegations, the Texas Board found that Applicant prescribed controlled substances to individuals without holding a valid Texas Controlled Substances Registration, in violation of state law. *Id.* (citing Tex. Health & Safety Code Ann. 481.061(a)).

The Show Cause Order further alleged that during various interviews with DEA Investigators, Applicant stated his desire to open a pain management clinic in order to make money. *Id.* According to the allegations, Applicant stated his ''belief that the purpose of a pain management clinic was to give addicts their prescriptions because other doctors won't do it.'' *Id.*

The Show Cause Order, which also notified Applicant of his right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedure for doing either, and the consequence for failing to do either, *id.* at 2 (citing 21 CFR 1301.43), was served on Applicant by registered mail addressed to him at the address he provided on his application. While the return receipt card did not include a delivery date, Applicant subsequently confirmed to Government Counsel that he received the Order on September 26, 2011. GX 4; Request for Final Action, at 2.

Since the date of service of the Order, thirty days have now passed and neither Applicant, nor anyone purporting to represent him, has requested a hearing or submitted a written statement in lieu of a hearing. I therefore find that Applicant has waived his right to a hearing or to submit a written statement in lieu of a hearing, and issue this Decision and Final Order based on relevant evidence contained in the record submitted by the Government. 21 CFR 1301.43(d) and (e). I make the following additional findings of fact.

Findings

Applicant's Licensure and Registration Status

Applicant is a physician licensed by the Texas Medical Board (hereinafter, the Board). GX 6. On February 4, 2011, a Quality Assurance Panel of the Board issued a Corrective Order to Applicant. *Id.* Therein, the Board found that notwithstanding that Applicant had allowed his Texas Controlled Substance Registration to expire on October 31, 2008, he had continued to write prescriptions for controlled substances through October 21, 2009, when his state license was renewed. *Id.* The Order imposed an administrative penalty in the amount of $500 against Applicant. *Id.* at 1–2 (citing Tex. Occ. Code Ann. 164.002(a) and (d), and 164.053(a)(1)).

Applicant previously held DEA Certificate of Registration BA0549177, which authorized him to dispense controlled substances in schedules II through V, as a practitioner, at the registered location of 1406 Wilson Road, Conroe, TX 77304. GX 2. This registration expired by its terms on June 30, 2003. *Id.*

On March 30, 2004, Applicant was granted Certificate of Registration BA8721765, which also authorized him to dispense controlled substances in schedules II through V, as a practitioner, at the registered location of 350 South Adams, Eagle Pass, TX 78852. This registration expired by its terms on June 30, 2010. *Id.*

On December 3, 2010, Applicant submitted a new application for a practitioner's registration in schedules II through V, through the Office of Diversion Control's Web site. It is this application which is at issue in this proceeding.

Evidence Regarding the Substantive Allegations

On June 18, 2009, following a traffic stop, Applicant was arrested by a Texas Highway Patrol Officer for possession of marijuana, a schedule I controlled substance. GX 5. At the time of his arrest, the Trooper conducted a consensual search of Applicant's vehicle, during which he found two large black suitcases which contained marijuana and a small black toiletry bag which contained several homemade smoking pipes. *Id.* at 4–5. Regarding the pipes, which the Trooper identified as drug paraphernalia, the Trooper asked Applicant what he used them for; Applicant stated: ''To smoke.'' *Id.* The Trooper then asked Applicant what he smoked; Applicant replied: ''Crack,'' which is a schedule II controlled substance. *Id.* Respondent was then arrested; however, he was not criminally charged.

On December 6, 2010, a DEA Diversion Investigator (DI) began an investigation of Applicant's December 3, 2010 application for a DEA registration. GX 7 (DI's affidavit). According to the DI's affidavit, because Applicant cooperated with another ongoing law enforcement investigation, he was never criminally charged in connection with his arrest for possession of marijuana on June 18, 2009. *Id.*

The DI stated that during a phone conversation on January 11, 2011, Applicant admitted that at the time of his June 2009 arrest, which he characterized as a mistake, he was transporting marijuana for a drug trafficking organization because he needed the money. *Id.* at 2. Applicant told the DI he planned to open a medical clinic, with other practitioners, which would specialize in orthopedic surgery and pain management. *Id.* He stated that his desire to open a pain management clinic was only because he wanted to make money and that he would ''do anything to make money.'' *Id.*

During a subsequent in-person interview, Applicant told the DIs that he closed his last medical practice, an orthopedic surgery center, in 2008. *Id.* He also admitted that he had abused crack cocaine in the past, but had stopped using crack cocaine in 2009 after having a heart attack. *Id.* However, Applicant never underwent a drug treatment program. *Id.*

Applicant told the DIs that after closing his medical practice in late 2008, he agreed to transport marijuana for a drug organization. *Id.* Applicant admitted to having driven loads of marijuana from Eagle Creek or Del Rio, Texas to either San Antonio or Austin because he was having financial problems and he would '' 'do anything not to lose [his] property.' '' *Id.* He also admitted that he transported such loads approximately every other weekend from the end of 2008 until he was arrested in June 2009, but he was uncertain as to the exact number of loads he had delivered. *Id.* at 2–3. Applicant stated that he was paid $50 per pound, and that he usually received $3,000 to $5,000 per load of marijuana. *Id.* at 3.

Applicant told the DIs that he only wanted to open a pain clinic to share the overhead costs of a medical clinic with other practitioners, that he did not have any formal pain management training, and that he '' 'hated those kinds of patients.' '' *Id.* at 3. Moreover, he then stated that pain management clinics were good because they served individuals who were addicted to pain medication without '' 'bogging down other clinics asking for pain pills.' '' *Id.* When asked by the DIs what he would do when he had twenty patients waiting for their prescriptions, Applicant responded that '' 'if their doctors gave them a prescription and they're hooked, if they're a functioning patient, probably give it to them. What else are you gonna [sic] do with them?' '' *Id.*

Upon being told by the DI that she was recommending the denial of his application based on his previous involvement with transporting large quantities of marijuana and his intention to open a pain clinic, Applicant asked the DI if she thought that '' 'there's a proper way' '' to manage a pain clinic and make sure everything was done correctly. *Id.* When the DI said

that she did not think it was proper to provide prescriptions to addicts, Applicant replied: '' 'What do you think pain management clinics are for? They give addicts their prescriptions because other doctors won't do it!' '' *Id.* at 3–4.

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination in the case of a practitioner, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.*

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether * * * to deny an application.'' *Id.; see also Volkman* v. *DEA,* 567 F.3d 215, 222 (6th Cir. 2009). While I must consider each factor, I am ''not required to make findings as to all of the factors.'' *MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011); *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005).

With respect to a practitioner's registration, the Government has the burden of proving by substantial evidence that granting a registration would be inconsistent with the public interest. *See* 21 CFR 1301.44(d).[2] As no DEA regulation provides that the entry of a default is a consequence of the waiver of the right to a hearing, the Government must therefore support its proposed action with substantial evidence.

In this matter, I have considered all of the factors and conclude that the evidence relevant to Respondent's experience in dispensing controlled substances (factor two), his compliance with applicable laws related to controlled substances (factor four), and his having engaged in other conduct which may threaten the public health and safety (factor five), conclusively establishes that granting his application would be ''inconsistent with the public interest.'' 21 U.S.C. 823(f).

Factors One and Three—The Recommendation of the State Licensing Board and the Applicant's Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

As found above, the Board found that Applicant dispensed controlled substances for nearly a year without the requisite State controlled substance registration. However, the Board took no action against Applicant's medical license other than to impose a $500 administrative penalty and he thus retains an active State medical license. Also, Applicant apparently still holds a valid Texas Controlled Substance Registration.

However, while the CSA makes holding authority to dispense controlled substances a condition of obtaining a DEA registration, it is not dispositive of the public interest inquiry. Rather, in enacting the public interest amendments to the CSA, Congress vested this Agency with ''a separate oversight responsibility [apart from that which exists in State authorities] with respect to the handling of controlled substances.'' *Mortimer B. Levin*, 55 FR 8209, 8210 (1990). DEA has therefore long recognized that it has ''a statutory obligation to make its independent determination as to whether the granting of [a registration] would be in the public interest.'' *Id.* Accordingly, ''DEA has long held * * * that a State's failure to take action against an Applicant's medical license [or State controlled substance registration] is not dispositive in determining whether the continuation of a registration is in the public interest.'' *Jayam Krishna-Iyer*, 74 FR 459, 461 (2009); see also *Levin,* 55 FR at 8210 (holding that practitioner's reinstatement by state board ''is not dispositive'' in public interest inquiry). Thus, that neither the Texas Medical Board nor Texas Department of Public Safety has suspended or revoked Applicant's medical license or controlled substance registration is of no consequence in determining whether his continued registration is consistent with the public interest.

Likewise, the fact that Applicant has not been convicted of an offense falling within factor three, notwithstanding his arrest and admission that on numerous occasions he transported large quantities of marijuana for a drug trafficking organization, is not dispositive. As previously explained, and as this case demonstrates, there are a variety of reasons why a person who has engaged in criminal conduct may not have been convicted, let alone charged with a criminal offense. *See Dewey C. MacKay,* 75 FR 49956, 49973 (2010). Accordingly, I find that factor three is not dispositive of whether granting Applicant's application would be consistent with the public interest.

Factors Two and Four—Applicant's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws

The Texas Board found that Applicant allowed his Texas Controlled Substance Registration to expire on October 31, 2008, and yet continued to write controlled substance prescriptions in violation of Texas law until he renewed his license on October 21, 2009. GX 6, at 1–2. This was also a violation of federal law.

Under a DEA regulation, ''[a] prescription for a controlled substance may be issued only by an individual practitioner who is * * * authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession.'' 21 CFR 1306.03(a)(1). By issuing prescriptions when he did not possess state authority, Respondent thus violated the CSA as well. *See* 21 U.S.C. 841(a)(1) (''Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally * * * to * * * dispense * * * a controlled substance[.]'').

In addition, Applicant admitted to the DIs that on numerous occasions, he illegally transported large quantities of marijuana for a drug trafficking organization and was paid to do so. GX 7, at 2–3. This conduct also violated 21 U.S.C. 841(a)(1), which prohibits both the knowing or intentional distribution of a controlled substance, as well as the possession of a controlled substance with the intent to distribute.

Finally, Applicant admitted that he abused crack cocaine. GX 7, at 2. This conduct violated 21 U.S.C. 844(a), which makes it ''unlawful for any person knowingly or intentionally to possess a controlled substances unless

[2] As found above, Applicant neither requested a hearing nor submitted a written statement explaining his position on the matters of fact and law asserted. By contrast, in a contested case, where the Government satisfies its *prima facie* burden, as for example, by showing that an applicant has committed acts which are inconsistent with the public interest, the burden then shifts to the Applicant to demonstrate why he can be entrusted with a registration. *Medicine Shoppe-Jonesborough,* 73 FR 363, 387 (2008).

such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as authorized by'' the CSA or the Controlled Substances Import Export Act. In addition, Respondent's conduct violated various provisions of state law. *See* Tex. Health & Safety Code 481.115(a) and 481.121(b)(5). Thus, the evidence with respect to factors two and four provides ample reason to deny Applicant's application.[3]

Factor Five—Such Other Conduct Which May Threaten the Public Health and Safety

As found above, during the consensual search of Applicant's vehicle, a Texas Highway Patrol Officer found several home-made pipes, and upon being questioned as to what he used them for, Applicant admitted that he smoked crack cocaine. Also, Applicant admitted to DEA Investigators that he had previously abused crack cocaine. While Applicant later claimed that he had stopped using crack after suffering a heart attack, he also stated that he never underwent drug rehabilitation treatment.

DEA has ''long held that a practitioner's self-abuse of a controlled substance can be considered under Factor Five even if there is no evidence that [he] abused his prescription-writing authority or otherwise engaged in an unlawful distribution to others.'' *See Scott D. Fedosky,* 76 FR 71375, 71378 (2011). *See also Tony T. Bui,* 75 FR 49979, 49989–90 (2010) (collecting cases); *David E. Trawick,* 53 FR 5326, 5327 (1988). Thus, even if there was no other evidence of misconduct on the part of Applicant, his self-abuse of crack cocaine would by, itself, constitute conduct which threatens public health and safety and renders his proposed registration ''inconsistent with the public interest.'' *Id.* 823(f).

Conclusion

Based on Applicant's misconduct in issuing prescriptions without the requisite state authority, *see* 21 CFR 1306.03(a), his admitted transportation of marijuana for a drug trafficking organization, *see* 21 U.S.C. 841(a)(1), and his self-abuse of crack cocaine, I conclude that Applicant's registration would be ''inconsistent with the public interest.'' *Id.* 823(f). Accordingly, his application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Bill Alexander, M.D., for a DEA Certificate of Registration, be, and it hereby is, denied. This Order is effective immediately.

Dated: June 2, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–14316 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

[3] As evidence of his likely non-compliance with applicable laws related to controlled substances, I note that during his interviews with DEA Investigators regarding the purpose of his proposed registration, Applicant stated that he wanted to open a pain clinic ''only because he wanted to make money, and that he would do anything to make money.'' *Id.* at 2. Moreover, Applicant expressed the view that pain clinics were good because they served individuals who were addicted to pain medication without ''bogging down other clinics asking for pain pills.'' GX 7, at 3. Subsequently, Applicant stated ''what do you think pain management clinics are for? They give addicts their prescriptions because other doctors won't do it!'' *Id.* at 3–4. Putting aside the misconduct proven on this record, Applicant's comments do not inspire confidence that he would comply with federal requirements such as 21 CFR 1306.04(a), which requires that a prescription for a controlled substance be issued only for a legitimate medical purpose by a practitioner acting in the usual course of professional practice.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–51]

4 OTC, Inc.; Decision and Order

On September 22, 2011, Administrative Law Judge (ALJ) Gail A. Randall issued the attached Recommended Decision. Therein, the ALJ recommended that I deny Respondent's application for a Certificate of Registration as an importer of ephedrine, a list I chemical. Neither party filed exceptions to the decision.[1]

Having considered the record as a whole, including the parties' briefs, I have decided to adopt the ALJ's findings of fact and conclusions of law except as explained below. Because I agree with the ALJ's conclusion that Respondent has failed to prove that the proposed importation of its combination ephedrine products is ''necessary to provide for medical, scientific, or other legitimate purposes'' and thus, it is not entitled to the issuance of a rule under 21 U.S.C. 952(a)(1) authorizing the importation of such products, this alone is reason to adopt the ALJ's recommendation. ALJ at 54–57. I further agree with the ALJ's ultimate conclusion that Respondent's registration would be ''inconsistent with the public interest.'' 21 U.S.C. 958(c)(2)(A); ALJ at 80–81. Accordingly, Respondent's application will be denied.

The Section 952 Analysis

As the ALJ noted, in 2006, Congress enacted the Combat Methamphetamine Epidemic Act of 2005 (CMEA), Public Law 109–177, 120 Stat. 256. Among the CMEA's provisions was section 715, 120 Stat. 264–65, which amended 21 U.S.C. 952(a) by adding the listed chemicals ephedrine, pseudoephedrine, and phenylpropanolamine to those substances (*i.e.,* narcotic raw materials and coca leaves) for which importation is not authorized unless the Attorney General finds the amount ''to be necessary to provide for medical, scientific, or other legitimate purposes.'' 21 U.S.C. 952(a)(1). Upon such a finding, the controlled substance or listed chemical ''may be so imported under such regulations as the Attorney General shall prescribe.'' *Id.* 952(a).

In multiple cases involving applications for a registration to import a substance subject to section 952(a)(1), DEA has held that an applicant ''cannot be registered as an importer of [such substance] unless the [Agency] finds that [it] will be allowed to import [the substance] pursuant to 21 U.S.C. 952(a)(1).'' *Johnson Matthey, Inc.,* 67 FR 39041, 39042 (2002); *see also Chattem Chemicals, Inc.,* 71 FR 9834, 9835 (2006); *Penick Corp., Inc.,* 68 FR 6947, 6948 (2003). As previously explained, a finding that the proposed importation complies with section 952(a) is ''a prerequisite to [an applicant's] registration as an importer'' of a substance subject to this provision. *Roxane Laboratories, Inc.,* 63 FR 55891, 55892 (1998). Moreover, it is settled that because the applicant is the proponent of the rule authorizing a proposed importation of a substance subject to section 952(a)(1), ''it must establish by a preponderance of the evidence that such a rule can be issued.'' *Johnson Matthey,* 67 FR at 39042; *see also Chattem,* 71 FR at 9835; *Penick,* 68 FR at 6948.

As the ALJ concluded, Respondent failed to establish by a preponderance of the evidence that its proposed importation of its combination ephedrine/guaifenesin product is ''necessary to provide for medical, scientific, or other legitimate purposes.''

[1] The ALJ initially issued a decision on July 22, 2011, to which both parties filed exceptions. However, after the record was forwarded to this Office, the ALJ requested that the record be returned. Subsequently, the ALJ re-issued her decision. Neither party filed exceptions to this decision. However, I have considered the exceptions which the parties submitted following the ALJ's issuance of her first opinion.

All citations to the ALJ's decision are to the slip opinion as originally issued by her which includes a cover page and table of contents.

ALJ at 56–57. Indeed, Respondent offered no evidence that importation of its combination product is necessary to provide for any legitimate purpose.

In its post-hearing brief, Respondent asserts that its ''product will be strictly marketed for bronchial and asthma related conditions as per the Food and Drug Administration [FDA] monograph for over-the-counter bronchodilator drugs'' and that ''[t]he FDA monograph allows for the use of ephedrine for bronchial and asthma related conditions.'' Resp. Proposed Findings of Fact, Conclusions of Law, and Argument, at 1 & nn.1–2 (citing Cold, Cough, Allergy, Bronchodilator Products, and Antiasthmatic Drug Products for Over-The-Counter Human Use; Final Monograph for OTC Bronchodilator Products, 51 FR 35,326 (1986) (codified at 21 CFR part 341)). Respondent further asserts that ''[t]here exists a strong market for [its] ephedrine product, allowing asthma suffers [sic] an option to obtain relief without having to obtain a prescription. Individuals without medical insurance or the ability to visit a physician immediately will be able to obtain cost-effective relief from the comfort of their home,'' presumably because Respondent will sell its product over the internet. *Id.* at 2.

However, the fact that the FDA approved combination ephedrine/guaifenesin products for OTC use years ago does not establish that there is a continuing need for these products to treat any of the conditions for which these products may be lawfully marketed under the Federal Food, Drug Cosmetic Act, 21 U.S.C. 301–399d. Moreover, as the ALJ observed, Respondent produced no evidence establishing that there is a continuing need for combination ephedrine/guaifenesin products to treat any of the conditions for which they may be lawfully marketed. *See* ALJ at 55–56; *see also Johnson Matthey,* 67 FR at 39042–43 (discussing testimony of a physician and expert in pharmacology that ''derivatives manufactured from narcotic raw materials are necessary to the United States medical community, as there are medical demands that cannot be met by non-opiate narcotics'' and that ''the medical community continues to rely upon opium-derived alkaloids rather than synthetic opiate analgesics'').[2] Nor did Respondent produce any evidence showing that these products have any accepted medical use (*i.e.,* per a doctor's recommendation) beyond those for which they can be lawfully marketed,[3] or produce any evidence that these products are ''necessary to provide for * * * scientific[] or other legitimate purposes.'' 21 U.S.C. 952(a)(1).

The ALJ nonetheless observed that some ''DEA publications * * * may demonstrate some need for ephedrine in the United States for the purpose for which the Respondent proposes to import.'' ALJ at 56 n.21 (citing Final Rule, Registration Requirement for Importers and Manufacturers of Prescription Drug Products Containing Ephedrine, Pseudoephedrine, or Phenylpropanolamine, 75 FR 4973 (2010), and Established Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2011, 75 FR 79407 (2010)). The ALJ thus suggested that I may wish to take official notice of these documents.

However, Respondent did not file exceptions nor otherwise request that I re-open the record to consider these documents. Moreover, even were I do so, neither document establishes that the importation of combination ephedrine/guaifenesin products (as opposed to ephedrine itself) is necessary to provide for medical purposes. For example, while the Assessment of Annual Needs lists several yearly figures for ephedrine sales by registered manufacturers, it does not establish whether any of these sales were for combination ephedrine/guaifenesin products. *See* 75 FR at 79409. As for the Final Rule on the Registration of Importers and Manufacturers of Ephedrine, Pseudoephedrine, and Phenylpropanolamine, while it observes that all three chemicals ''are used to produce drug products lawfully marketed under the'' FDCA, including both prescription and non-prescription drugs, it provides no information as to the need for combination ephedrine/guaifenesin products to provide for medical purposes. 75 FR at 4973–74.

Accordingly, I adopt the ALJ's conclusion that Respondent has failed to establish that its proposed importation is ''necessary to provide for medical, scientific, or other legitimate purposes.'' 21 U.S.C. 952(a)(1). And because establishing its entitlement to a rule authorizing the importation is a prerequisite for Respondent's registration as an importer of ephedrine, its application can be denied on this basis alone.

The Public Interest Factors

The ALJ also found that ''Respondent's registration would be inconsistent with the public interest due to its current inability to comply with state and FDA law, its lack of candor, and its attitude towards diversion.'' ALJ at 80–81. While I agree with the ALJ's ultimate conclusion that Respondent's registration would be inconsistent with the public interest, I disagree with several of her subsidiary conclusions.

The ALJ found that ''the Government has established a clear violation by the Respondent of the FDA's misbranding provisions.'' ALJ at 72. The basis for this finding was the ALJ's conclusion that under the OTC monograph, the label on Respondent's product is required to contain ''under the heading 'indications' '' the following statement: '' 'For temporary relief of shortness of breath, tightness of chest, and wheezing due to bronchial asthma.' '' ALJ at 72–73 (quoting 21 CFR 341.76(b) & (b)(1)). However, Respondent's proposed label does not. *See* RX 5. While this label does not comply with FDA's requirements, and its product would be deemed misbranded if it was introduced into interstate commerce, 21 U.S.C. 331(b), there is no evidence that Respondent has introduced this product into interstate commerce. Thus, Respondent has not violated the FDCA yet.

In its Exceptions (to the ALJ's first decision), Respondent asserted that these were minor deficiencies which ''are easily rectifiable and will be corrected prior to marketing.'' Resp. Exceptions at 1. While I accept this assertion and conclude that by itself, this would not be ground to deny the application, when considered with

[2] Subsequent to *Johnson Matthey,* other Agency decisions involving narcotic raw materials found, without recounting any medical evidence, that the proposed importations were necessary within the meaning of section 952(a)(1). *See Chattem,* 71 FR at 9835; *Penick,* 68 FR at 6948. However, these cases did not involve show cause proceedings brought by the Agency but rather challenges brought by manufacturers who sought to block the applicant's entrance into the market. *See Chattem,* 71 FR at 9834; *Penick,* 68 FR at 6947. Given that many of these entities were themselves importers of the same narcotic raw materials which the respective applicant sought authority to import, they could hardly claim that the importation of these substances was not necessary for legitimate medical uses and thus did not dispute this proposition. *See Chattem,* 71 FR at 9834; *Penick,* 68 FR at 6949. The same does not hold here.

[3] Noting that in 2004, the FDA banned the marketing of ephedrine as a dietary supplement, the Government equates the statutory term ''medical purposes'' with those indications for which FDA has approved a drug product for marketing. *See* Gov. Exceptions at 5; Gov. Prop. Findings at 6–11 (''DEA law precludes any importation of ephedrine for other than legitimate medical needs and ephedrine is limited to asthma treatment.''). To make clear, this is too narrow a view of what constitutes a valid medical purpose as there may be bona fide medical evidence supporting a product's use, under a physician's supervision, for other than its FDA-approved indications. However, Respondent had the burden of proof on the issue of showing what medical purpose its product would serve and steadfastly maintained that it would serve only the bronchodilator market.

other evidence such as that Respondent's standard operating procedures (SOPs) had numerous inconsistencies with various States' laws, *see* ALJ at 75–77, I conclude that it calls into question its ability to properly comply with applicable Federal and State laws. *See* 21 U.S.C. 823(h)(2).

The ALJ further asserted that ''[d]espite numerous assertions to the contrary, there is substantial evidence that the Respondent would market its product [in a manner] similar to its stated competitor Vasapro,'' an entity, which, the ALJ found markets its product in a manner ''rais[ing] serious misbranding concerns.'' ALJ at 74–75 (citing FoF 91, 92, 102, 111, 124, & 143(d)(vi)).[4] However, in the cited findings, the ALJ noted that Respondent's standard operating procedures required it to market its product only in compliance with the FDCA and the FDA's regulations; that its principal owner testified that it ''would not sell its product for any other purpose than as a bronchodilator''; and that it would not be sold through a Web site (4 Ever Fit USA) its principals own which markets fitness-related products, such as supplements, protein powders and weight-management products. *See* ALJ at 28 (FoF 102); 30 (FoF 111); 33 (FoF 124); and 41 (FoF 143(d)(i)). Given that the ALJ made these findings, several of which were based on the testimony of Respondent's principals and that there is no finding that she found this testimony incredible, it is unclear why the findings provide substantial evidence that Respondent would market its products in violation of the FDCA.

In its brief, the Government argues that Vasapro (as well as Kaizen, a Canadian competitor) marketed ephedrine products for weight loss. *See* Gov. Br. 38. No further explanation was offered as to why Vasapro's conduct is probative of whether Respondent would violate the FDCA, and I conclude that it is completely irrelevant.

The Government also points to the Web sites of two Canadian firms (Kaizen and Gorilla Jack) which it maintains sold ephedrine at retail for non-lawful purposes. *Id.* While the Government maintains that the Kaizen Web site sold ephedrine manufactured by 4 Ever Fit, a firm owned by Respondent's owner, the exhibit it cites as support for this assertion is actually that of an entity known as ''Supplement Source'' and not Kaizen. *See* GX 8. Most significantly, regarding this Web site, an Agency witness testified that: ''and if it works the same as it worked on the other sites that I was on, you would click on [the product category] and then you could pull up the 4 Ever Fit or whatever, they are naming all the brand names and 4 Ever Fit is one of them.'' Tr. 148. However, even ignoring the equivocal nature of this testimony, which strongly suggests that she did not even visit the Web site, none of the eleven ephedrine products shown on the printout include products of 4 Ever Fit. *See* GX 8.

Likewise Government Exhibit 9 (the printout of the GorillaJack.com Web pages) establishes only that this business was selling Kaizen Ephedrine HCL (and not Respondent's or its related firm's product) for its metabolic boosting properties. *See* GX 9, at 8. Thus, the evidence pertaining to the marketing of ephedrine products by these two entities is not relevant in assessing whether Respondent would market its product in violation of the FDCA. I therefore reject as unsupported by substantial evidence the conclusion that Respondent intends to market its product in violation of the FDCA.[5]

This is not to say that the conduct of an applicant's customers (which does not involve diversion of the product into the illicit manufacture of methamphetamine[6]) would never be relevant in assessing its likely compliance with applicable laws related to listed chemicals. *See* 21 U.S.C. 823(h)(2). For example, proof that an entity sold products to a firm when it either knew or had reason to know that the firm was unlawfully marketing the product (*i.e.,* for unapproved purposes) would be relevant in assessing its likely future compliance with applicable laws and the CSA. So too, proof that an entity continued to sell its product to a firm after it knew that the latter had engaged in illegal acts is also relevant in determining the public interest. *See* 21 U.S.C. 823(h)(4) & (5) (authorizing Agency to consider applicant's ''past experience'' in distributing chemicals, as well as ''other factors as are relevant to and consistent with the public health and safety'').

Here, for example, the ALJ found that one of the entities to which a related firm of Respondent[7] distributed ephedrine was Better Bodies Nutrition, a Canadian firm which unlawfully shipped these products to three stores in Arizona in violation of both U.S. and Canadian law because it lacked both a DEA Importer's Registration and a Canadian Dealer's License and Export Permit. *See* ALJ at 22–23; *see also id.* at 68 n.26 (citing 21 U.S.C. 957 and Health Canada, Precursor Control Regulations § 6, 7, 32). The shipments were seized by U.S. Customs and Board Patrol agents at Seattle International Airport, Washington. ALJ at 21–22.

Regarding this incident, Mr. Richard Pierce, Respondent's principal owner (and the CEO of the related companies) testified that he had no knowledge that Better Bodies was selling his firm's ephedrine product to U.S. customers. Tr. 276. However, when asked by the ALJ what his business had done to address this incident, Mr. Pierce testified:

> Well, we have no control over them buying the product from us and shipping it without our knowledge. The regulatory body in Canada has been informed of that, and obviously, Better Bodies is now—my understanding, has dealt with Health Canada in some form or fashion to ensure them that they're not going to do that and understand the repercussions if they do.

Tr. 362.

Notably, Mr. Pierce did not testify that his firms had discontinued supplying Better Bodies with ephedrine products or even that his firms had threatened to cut off Better Bodies if they did so again in the future. Indeed, in its Exceptions, Respondent acknowledges as much, stating that: ''Mr. Pierce iterated that he did still do business with Better Bodies in Canada.'' Resp. Exceptions at 6. While Respondent then asserts that Mr. Pierce simply ''expressed that he had no control over this specific illegal shipment at question,'' *id.,* this misses the point. As the ALJ explained:

> GFR does have control over to whom it sells its product, and GFR's decision to continue to supply a company that has illegally handled its product reflects a general apathy towards diversion * * *. [T]his factor raises a concern that he would similarly turn a blind eye to the misuse of the Respondent's product in the United States.

ALJ at 80.

[4] The correct citation appears to be to FOF 143(d)(vi). *See* ALJ at 41.

[5] In its Exceptions, the Government requests that I ''make a specific finding that [Respondent's] ephedrine market would be consumers who would purchase the ephedrine in violation of the Federal Food, Drug and Cosmetic Act.'' Gov. Exceptions at 1. However, the Government cites no authority for the proposition that a consumer violates the FDCA if he/she purchases an OTC drug product with the intent to use that product for a non-approved (but otherwise legal) use. Accordingly, I decline the Government's request.

[6] Such conduct is always relevant in assessing whether a registrant/applicant has effective controls against diversion. *See* 21 CFR 1309.71(a).

[7] The ALJ found that the product was manufactured by GFR Pharma, and distributed through 4 Ever Fit, Ltd., to Better Bodies Nutrition, the firm which sold the ephedrine to the three Arizona stores. ALJ at 22. There is no dispute that GFR Pharma; 4 Ever Fit, Ltd.; and 4 OTC are related entities, and that Mr. Richard Pierce is the President and CEO of all three entities. RX 4; *see also* ALJ at 18, 24, 25, 27.

Indeed, this Agency has previously revoked a list I distributor's registration based, in part, on similar testimony from its principal. *See D & S Sales,* 71 FR 37607, 37610 (2006) (holding ''fundamentally inconsistent with the obligations of a DEA registrant'' testimony of business owner that ''I could care less about who buys [my products] or who, you know, I have no control over the retail end of those sales. I drop them off to the store and I'm done''). *See also R & M Sales Company, Inc.,* 75 FR 78734, 78745 (2010) (citing testimony of firm's owner that ''I've guess I've taken the attitude that I have no control on what the retail public does with the product'' as evidence of firm's indifference to its obligations to comply with the law).

In its Exceptions, Respondent further argues that the ALJ ''unfairly note[d] Mr. Pierce's attitude towards diversion as one that would be inconsistent with the public interest'' and that ''[t]his factor alone cannot qualify as the preponderance of the evidence that is needed to justify a denial of [its application], when all other factors weigh in favor of granting'' it a registration. Resp. Exceptions at 8.

However, all other factors do not support granting Respondent's application (even ignoring the threshold question of whether it is entitled to a rule authorizing the importation), and in any event, it is settled that findings under a single factor can be sufficient to support the denial of an application. *See Dewey C. Mackay,* 75 FR 49956, 49973 (2010), *pet. for rev. denied* 664 F.3d 808 (10th Cir. 2011). Moreover, there is additional evidence to support the denial of Respondent's application.

Here, the evidence shows that Respondent is a closely-held corporation and that one of its shareholders is Kevin McIsaac, who was a principal and President of McIsaac Distribution Ltd., a firm based in KeLowna Bridge, British Columbia, which sold various products including a single entity ephedrine product under the brand of ''4 Ever Fit.'' Tr. 32, 34, 82; GX 20, at 23. Mr. McIsaac was also President of Respondent and submitted its application for a DEA registration. *Id.* at 34; GX 20, at 24.

On May 27 through 29, 2008, Inspectors from Health Canada conducted an inspection of McIsaac Distribution during which they found various violations. GX 20, at 24–28. Most significantly, Health Canada found that McIsaac had engaged in multiple suspicious transactions involving ephedrine when the firm had ''reasonable grounds to suspect that the transaction is related to the diversion of a precursor to an illicit market or use.'' *Id.* at 26.

These included: (1) a transaction in which McIsaac sent more than 15,000 bottles of ephedrine (6.048 kg) to an individual in Montreal ''representing his business as Liquidation Depot'' while the invoice indicated that the shipment was to be sent to ''Bella Labs'' at an address in Vancouver, B.C., and (2) a shipment of 51,840 bottles of ephedrine (20.74 kg) which was also ''sent on behalf Liquidation Depot'' but ''was sent to the attention of Bella Labs'' at a different Vancouver address. *Id.* at 26. In addition, on two separate dates less than a week apart, McIsaac shipped 2,016 bottles (.8 kg) and 10,080 bottles (4.032 kg) to a post office box in a Mail Boxes Etc. store in Richmond Hill, Ontario; however, the latter shipment was subsequently re-routed to a residential address in the same city. *Id.*

Finally, Health Canada found that between October 8, 2007 and March 25, 2008, McIsaac made ten sales to Liquidation Depot for a total of 137.1 kg of ephedrine; the shipments ranged in size from 15,120 to 51,480 bottles and several involved ''large cash deposits and related bank charges.'' *Id.* at 27. Moreover, some of the shipments occurred either on the same day or within days of previous shipments. For example, on December 21, 2007, McIsaac filled invoices for 34,560 and 34,416 bottles, and on February 28 and 29, as well as March 3, 2008, McIsaac filled invoices for 40,992; 51,480; and again 51,480 bottles respectively. *Id.* at 27. Health Canada ''noted that the quantities of ephedrine * * * sold to Liquidation Depot during this period far exceeded the quantities purchased by all other clients.'' *Id.*

Health Canada further advised McIsaac ''that as a licensed dealer,'' his firm was not permitted to ''sell a Class A precursor to a person for any licensed activity (export, produce, package, sell and provide), unless that person holds the appropriate license or is exempted under section 5'' of its Precursor Control Regulations. Health Canada also expressed its ''concerns about [McIsaac's] capacity to comply with the regulatory requirement to detect and record suspicious transactions.'' *Id.*[8] While Health Canada directed Kevin McIsaac to submit a written corrective action plan, McIsaac notified Health Canada that he was cancelling his Canadian Chemical Precursor license and that he had sold his business to GFR Pharma, Ltd. *Id.* at 29–30. However, according to Richard Pierce, McIsaac had sold only the assets of 4 Ever Fit to GFR Pharma. Tr. 260.

At the hearing, Mr. Pierce asserted that neither Kevin McIsaac nor his brother are involved in the day-to-day operation of GFR Pharma and do not own any part of this business. Tr. 273. However, Mr. Pierce subsequently acknowledged that Kevin McIsaac owns ten percent of Respondent but then denied that he is involved in its day-to-day operations.[9] *Id.* at 284. Mr. Pierce further testified that he owns sixty percent of Respondent through his ownership of 4 Pharma, LLC. *Id.* at 364. While other testimony establishes that fifteen percent of Respondent is owned by one Mike Schiefelbein, the President of 4 EF, Inc. (another firm owned by Richard Pierce through his ownership of 4 Pharma, LLC, and which does business as 4 Ever Fit USA, *id.* at 280–81, 373), this only accounts for eighty-five percent of Respondent's ownership.

While noting that she was ''troubled by Mr. McIsaac's violations of Canada's regulations'' which she found ''to be more significant than GFR's,'' the ALJ was ''persuaded by the fact that Mr. Schiefelbein will oversee the day-to-day operations of the company and that Mr. McIsaac will have no participation in that operation.'' ALJ at 70. Unlike the ALJ, I find that Mr. McIsaac's ownership interest in Respondent (without regard to whether he will be involved in its day-to-day operations) provides ample reason to warrant the denial of its application.

As found above, the findings set forth in the Health Canada letter support the conclusion that these products were likely diverted into the illicit manufacture of methamphetamine. As the Canadian authorities found with respect to the transactions, there were ''reasonable grounds to suspect that the transaction[s] [were] related to the diversion of a precursor to an illicit market or use.'' GX 20, at 25 (citing Precursor Control Regulation 86). In short, given the quantities involved and the circumstances (such as cash payments, different billing and shipping addresses, frequency of the transactions, shipping to a P.O. Box and/or re-routing the shipment to a residence, and shipping large quantities to non-licensed entities), there is substantial evidence that McIsaac sold ephedrine to customers who were likely diverting it

[8] Apparently, under Canadian regulations, a licensed dealer is only ''required to record'' and not report ''any suspicious transaction.'' GX 20, at 25 (citing Health Canada, Precursor Control Regulations 86). Under U.S. law, a regulated person must report suspicious transactions. *See* 21 U.S.C. 830(b)(1)(A).

[9] An Agency DI contended that Mr. McIsaac actually owns 70% of Respondent. Tr. 34–35.

into the illicit manufacture of methamphetamine.[10]

In a long line of cases, ''DEA has consistently held that the registration of a corporate registrant may be revoked upon a finding that a natural person who is an owner, officer, or key employee, or who has some responsibility for the operation of the registrant's controlled substance business, has been convicted of a felony offense relating to controlled substances.'' *Absecon Pharmacy;* 55 FR 9029, 9030 (1990) (citing cases). Likewise, the Agency has applied this rule in other cases where there is proof that a corporate applicant's owner, officer, or key employee has engaged in diversion or otherwise violated applicable laws. *See Orlando Wholesale, L.L.C.,* 71 FR 71555, 71557 (2006) (denying application noting evidence that ''one of Respondent's managing members had previously operated a business which distributed List I chemicals without a valid registration and [that Respondent] fail[ed] to provide any documentation that this individual no longer has a management or *ownership interest* in it'') (emphasis added); *City Drug Co.,* 64 FR 59212, 59214 (1999) (holding, where former owner had diverted controlled substances, that the Agency ''may look to who exerts influence over the registrant; sometimes the bonds linking the former owner to the new owner are too close to ensure that the former owner will have no influence over the operation of the'' registrant).

While Respondent maintains that Mr. McIsaac will have no involvement in its day-to-day operations, given his ownership interest in Respondent, which is a closely held corporation, it strains credulity to suggest that he will not have some influence over its business and policies. In any event, in making the public interest determination, DEA is authorized to consider an applicant's ''past experience * * * in the distribution of chemicals'' as well as ''other factors [that] are relevant to and consistent with the public health and safety.'' 21 U.S.C. 823(h)(4) & (5). When an applicant's ownership group includes a person who clearly diverted either listed chemicals or controlled substances, that conduct is properly considered against the applicant as ground to deny the application.[11]

Moreover, even crediting Respondent's evidence as to the respective ownership interests of Mssrs. Pierce, Schiefelbein, and McIsaac, it has offered no evidence as to who owns the remaining fifteen percent of it. As noted above, DEA has long held that misconduct committed by an entity's officers or key employees is ground to deny an application. Thus, in addition to Mr. McIsaac's involvement, because Respondent has not disclosed who the remaining owners are, there are further grounds to deny the application.

Finally, Respondent contends that it has ''demonstrated a strong understanding for regulations that govern the * * * sale of ephedrine within the United States'' and that Mssrs. Pierce and Schiefelbein have expressed their intent and commitment to remaining compliant with both federal and state laws.'' Resp. Exceptions, at 4. Yet at the hearing, the Government established multiple instances in which Respondent's standard operating procedures were inconsistent with various state laws applicable to the sale of ephedrine products. *See* ALJ at 36–39. Moreover, while some States have made ephedrine a scheduled drug, Mr. Pierce stated that he was ''unfamiliar'' with drug schedules. Tr. 345. Also, while Respondent seeks registration to operate in Arizona, at the time of the hearing, it did not have an Arizona Board of Pharmacy ephedrine wholesaler's license to import ephedrine into the State and Mr. Pierce was unaware that Respondent needed this license until it was pointed out to him by Government counsel on cross-examination. Tr. 371, 443.

In its Exceptions, Respondent argues that it ''recognize[s] the need to remain abreast of regulations and [has] expressed its intent to continuously work with regulatory counsel * * * to remain knowledgeable on key changes in state laws.'' Resp. Exceptions at 5. However, it is not too much to expect that an applicant seeking to show its intent to comply with applicable state laws, would produce SOPs which were not riddled with misstatements of those laws and which correctly reflected those States where its proposed method of operation would be unlawful. Accordingly, I find Respondent's exception unpersuasive.

In conclusion, I hold that the Government's contention that Respondent would market its product in violation of the FDCA to be unsupported by substantial evidence. I also conclude that there is no basis in law for the Government's contention that a consumer violates the FDCA if he/she purchases an ephedrine product with the intent to use it for a purpose which has not been approved by the FDA.[12]

Nonetheless, I find that substantial evidence supports the denial of Respondent's application for registration. This evidence includes: (1) Mr. Pierce's continuing to sell ephedrine products to Better Bodies, notwithstanding that it had unlawfully exported ephedrine to three stores in Arizona, and his insistence at the hearing that he has no control over what his customers do with his products; (2) that on multiple occasions, Mr. McIsaac, who has a substantial ownership interest in Respondent, sold ephedrine under circumstances which provided reason to believe that the ephedrine would be diverted into the illicit manufacture of methamphetamine; (3) that even crediting Mr. Pierce's testimony regarding the respective ownership interests in Respondent, he did not account for the remaining fifteen percent; and (4) that even as of the date of the hearing, Respondent's SOPs still did not accurately reflect various State laws prohibiting its proposed method of distribution. Accordingly, I also adopt the ALJ's ultimate conclusion that Respondent's registration would be

[10] Even though this conduct occurred in Canada and thus cannot be considered under factor two, it is actionable under either factor four, which authorizes the consideration of ''any past experience of the applicant in the * * * distribution of chemicals,'' or factor five, which authorizes the consideration of ''such other factors as are relevant to and consistent with the public health and safety.'' 21 U.S.C. 823(h). It should be further noted that had McIsaac committed this conduct in the United States, he would have committed a felony offense. *See* 21 U.S.C. 841(c) (providing that ''[a]ny person who knowingly or intentionally * * * possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by'' the CSA ''shall be fined in accordance with Title 18 or imprisoned not more than 20 years'').

[11] I do not find it persuasive that Mr. McIsaac owns only ten percent of Respondent. In other contexts, an ownership interest of five percent by a person who has engaged in misconduct has been deemed sufficient to bar the entity from participating in a federal program. *See* 42 U.S.C. 1320A–7(b)(8) (authorizing exclusion from participation in federal health care programs of an entity controlled by a sanctioned individual ''who has a direct or indirect ownership or control interest of 5 percent or more in the entity''); *see also id.* 1320A–3(a)(3) (defining ''the term 'person with an ownership or control interest' '' to include ''a person who * * * has directly or indirectly * * * an ownership interest of 5 per centum or more in the entity''). This is not to suggest that if Mr. McIsaac owned less than five percent of Respondent, his ownership interest would not bar granting Respondent's application.

[12] However, under the CSA, ''[a]ny person who knowingly or intentionally * * * possesses a listed chemical [such as ephedrine] with intent to manufacture a controlled substance except as authorized by'' the CSA, or who ''possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by'' the CSA, commits a felony offense. 21 U.S.C. 841(c)(1) & (2).

''inconsistent with the public interest.'' 21 U.S.C. 823(h).

Because Respondent has not established that it is entitled to a rule authorizing the importation of its combination ephedrine products and the Government has established that Respondent's registration would be ''inconsistent with the public interest,'' *id.,* I will adopt the ALJ's recommended order. ALJ at 81. Respondent's application will therefore be denied.[13]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(h) and 958(c), as well as 28 CFR 0.100(b), I order that the application of 4 OTC Inc., for a DEA Certificate of Registration as an Importer of List I chemicals, be, and it hereby is, denied. This Order is effective July 12, 2012.

Dated: June 4, 2012.

Michele M. Leonhart,

Administrator.

Brian Bayly, Esq., for the Government
Ashish Talati, Esq., for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Procedural Background

Administrative Law Judge Gail A. Randall. On April 6, 2010, the Deputy Assistant Administrator, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause (''Order'') proposing to deny (1) the application of 4 OTC, Inc., (''Respondent'' or ''4 OTC'') to import the list I chemical ephedrine pursuant to 21 U.S.C. § 958(c)(2) and 958(d)(2), because 4 OTC's import registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(h); (2) 4 OTC's two applications to distribute the list I chemical ephedrine pursuant to 21 U.S.C. 823(h), because 4 OTC's distribution registrations would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(h); and (3) 4 OTC's application to export the list I chemical ephedrine pursuant to 21 U.S.C. § 958(c)(2) and 958(d)(2), because 4 OTC's export registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(h). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1].

The Order asserted that 4 OTC is a company that currently sells over-the-counter nutritional supplements to customers who solicit such products over 4 OTC's website, for health and fitness. 4 OTC plans to import finished form, combination ephedrine from a Canadian company and sell the product via the internet to ultimate consumers in the U.S. and other countries.

Further the Order asserted that 4 OTC's application to import should be denied on the basis that it did not identify its customer in the United States, either retail or mail order, and 4 OTC was not familiar with DEA laws pertaining to domestic distribution sales limits as well as other application laws. [Order at 2 (citing 21 U.S.C. § 823(h)(1), (h)(2), and (h)(5))].

In addition, the Order stated that the Respondent's applications should be denied based on its common ownership with McIsaac Distribution, which merged with GFR in 2008. The Order provided that GFR would be the Respondent's supplier and that Health Canada cited both McIsaac and GFR for failure to report to Health Canada suspicious sales of ephedrine products, for shipping ephedrine products to unverified addresses and for a shortage of .008 kilograms of ephedrine based upon an accountability audit. [*Id.*].

The Order further alleges that GFR and McIsaac's ephedrine sales records reveal other suspicious sales of ephedrine that were not cited by Health Canada but that would be violations of 21 U.S.C. 830(b)(1)(A) because such sales involved an extraordinary quantity or were made to retail outlets that do not normally sell ephedrine products, such as gymnasiums. [*Id.* (citing § 823(h)(1), h(4), and (h)(5))].

The Order alleged that although the Respondent's personnel stated that 4OTC's product, labeled ''4 Ever Fit,'' would be marked only as an OTC medication to treat asthma, 4 OTC's present customers and product lines are not consistent with this professed intent, and that the product would be imported for other than a legitimate medical purpose. [*Id.* (citing § 823(h)(1), (h)(2), (h)(5) and 952(a)(1))].

Last, the Order alleged that the Respondent's applications should be denied on the basis that 4 OTC's ephedrine brand product, ''4 Ever Fit,'' was seized at the Canadian borders when Better Bodies Nutrition attempted to ship it illegally into the U.S. to stores who plan to market the product as a weight loss product, and hence, the company has failed to maintain effective controls against diversion. [*Id.* at 3 (citing 823(h)(1))].

On May 7, 2010, the Respondent, through counsel, timely filed a letter requesting a hearing in the above-captioned matter. [ALJ Exhibit Exh. 3].

On May 24, 2010, the Government filed a Motion For Summary Judgment And To Stay The Dates For The Parties To Submit Prehearing Statements (''Motion for Summary Judgment''). [ALJ Exh. 4]. Therein, the Government moved for summary judgment on the basis that the Respondent lacked a bona fide registered address. The Government stated that it unsuccessfully attempted to serve the Respondent with the Order to Show Cause at the address listed in its application as its registered address, 8160 Blakeland Dr., Littleton, Colorado 80125. In addition, the Government stated that the DEA later visited that location and discovered that the Respondent was not located at that address. [*Id.* at 1–2].

In a letter dated June 10, 2010, the Respondent requested to amend its application by changing its proposed registered address from 8160 Blakeland Drive, Littleton, Colorado 80125, to Freeport Logistics, 431 N. 47th Avenue, Phoenix, Arizona 85043. [ALJ Exh. 15].

On June 14, 2010, the Respondent filed its response to the Government's Motion for Summary Judgment. Therein, the Respondent stated that it had moved to a new location in Phoenix, Arizona, and that the Respondent's counsel had spoken with the Government's counsel, and the Government's counsel had no objection to it amending its application to include a new registered address. The Respondent stated that it had already begun the process to amend its applications. [ALJ Exh. 5 at 1–3].

In a letter dated November 10, 2010, the Respondent sought to withdraw its applications to export ephedrine, to distribute ephedrine, and to distribute ephedrine at retail. [ALJ Exh. 17 at 5].

Because those requests were issued after the Order to Show Cause, the Respondent was required to request permission to amend its application and withdraw three of its application. [ALJ Exh. 17 at 3 (citing 21 CFR 1301.16(a))].

The Deputy Assistant Administrator granted both requests on April 13, 2011. [*Id.* at 3].

The hearing was held on January 19, 2011, at DEA Headquarters in Arlington, VA. It continued on March 9, 2011, in Phoenix, Arizona. [ALJ Exh. 14, 16].

[13] Because there are ample grounds to deny the application, I conclude that it is not necessary to decide the question of whether the Agency can require an applicant for an Importer's registration to provide a customer list as a condition of granting its application. *See* ALJ at 78–79. I therefore do not adopt the ALJ's discussion, which suggests that because neither the Combat Methamphetamine Epidemic Act nor Agency regulations require that an importer produce a customer list at the time it seeks registration, the Agency cannot require such. *See id.; but see* 21 U.S.C. 823(h)(1) (directing Agency to consider whether an applicant will maintain effective controls against diversion); 21 CFR 1309.35 (authorizing Agency to ''require an applicant to submit such documents or written statements of fact relevant to the application as [it] deems necessary to determine whether the application should be granted'').

II. Issue

The remaining issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should deny 4OTC's application for a DEA Certificate of Registration to import the list I chemical ephedrine into the United States because to grant the Respondent's application would be inconsistent with the public interest pursuant to 21 U.S.C. § 823(h), 958(c)(2), and 958(d)(2). [Tr. 5–7].

III. Findings of Fact

A. Stipulated Facts

1. Ephedrine is a list I chemical. [21 CFR 1310.02(a)(3)].

2. Ephedrine is also classified as a Scheduled Listed Chemical Product (''SLCP'') under the Combat Methamphetamine Epidemic Act of 2005 (''CMEA''). 21 U.S.C. 802(45)(A); 21 CFR 1300.02(34)(i).[1] [ALJ Exh. 15].

B. Background

1. Ephedrine

3. The CMEA aimed to enhance controls of chemicals and equipment that are used in the clandestine manufacture of methamphetamine and other illegal substances. [Tr. 27, 242].

4. Ma Huang and Ephedra are ephedrine products. [Tr. 94, 141].

a. Sale and Use of Ephedrine as a Dietary Supplement

5. In 2003, the Administrator of the Department of Health and Human Services (''DHHS'') pulled ephedrine off of the market as a dietary supplement. [Tr. 141]. The ban went into effect in 2004. [Tr. 148].

6. Ma Huang may be sold as a dietary supplement in Canada, however. [*See* Tr. 161].

7. Using ephedrine as a dietary supplement poses serious health risks. According to an article introduced by the Government, ''the FDA has on record over 80 deaths and 1400 adverse-effect complaints, including strokes, coronaries, and seizures.'' [Govt. Exh. 17 at 2]. Further, the article notes that ''nearly all the deaths and complications from the use of ephedra are the result of gross abuse of the product . . ..'' [*Id.*].

8. The DEA has not promulgated regulations restricting or prohibiting the importation of ephedrine into the United States for the purpose of weight loss. [Tr. 168]. In addition, the DEA does not currently prohibit the sale of ephedrine products for weight loss. [Tr. 244]. However, since 2004, the Food and Drug Administration (''FDA'') has banned the sale of an ephedrine product as a dietary supplement. [Tr. 148; *see also* 69 FR 6788 (2004)].

b. Product Trends

9. John Kronebusch is a program analyst at DEA. [Tr. 53]. He has worked in that capacity since 1990. [Tr. 54].[2]

10. Mr. Kronebusch credibly testified that there are substantially more mail order reports for pseudoephedrine products than ephedrine products. [Tr. 60].

11. Mr. Kronebusch testified that most of the pseudoephedrine and ephedrine reports are submitted by well-known national companies such as CVS, Drugstore Pharmacy, or Eckerd. [Tr. 61].

12. Mr. Kronebusch testified that there has been a significant decline in ephedrine transactions since 2008. [Tr. 61–2]. Two companies, who had prior to 2009 reported significant numbers of mail order sales of ephedrine, closed their mail order business in 2009. [*Id.*].

2. DEA's Retailer Requirements

a. Retail Sales Limit

13. The DEA does not require mail order distributors[3] of ephedrine products to register with the DEA. [Tr. 57]. However, the DEA imposes daily and monthly sales limits on the amounts retailers may sell to one person and requires that they report their sales on the 15th of every month to the DEA. [Tr. 35–36, 54–55]. The reports required by DEA must identify the purchaser of the List I chemical product. [Tr. 56–57]. A government ID or driver's license would satisfy this requirement. [Tr. 57].

14. The retail sales limit for ephedrine used to be 24 grams per month but is now 3.6 grams per day per person, and 7.5 grams per month. [Tr. 35–36].

15. The retailer is also required to keep a record of all ephedrine sales. [Tr. 36, 51–2, 432].

b. Self-Certification

16. The owner of a retail distributor of list I chemicals must become self-certified with the DEA. [Tr. 229–230]. To do so, the owner must go online and follow several steps, including: teaching his employees who have the ability to sell the product over the counter about the thresholds for daily and monthly purchases and developing a logbook for sales. [Tr. 230]. The retailer must then display its retail self-certification in its store prior to selling the product. [Tr. 230]

3. DEA's Importer Requirements

17. The DEA requires an importer to obtain an importer registration to import list I chemicals into the United States, and to fill out a Form 486, 15 days prior to any importation, notifying the DEA of an upcoming import. [Tr. 231–233].

a. Requirement of Providing a Customer List

18. According to Marian Klett, a program analyst in the Office of Diversion Control at DEA,[4] the DEA requires applicants for importer registrations, even those who have yet to go into business, to include in their application a list of proposed customers. This requirement began as DEA policy pursuant to a mandate by the Department of Justice that the DEA establish protocols to better regulate precursors to methamphetamine production. [Tr. 170–71; 445–9].

19. Ms. Klett testified that as of 2000, the DEA will not grant a DEA registration if an applicant does not have a customer list, because the agency cannot determine whether the product will be diverted. [Tr. 446]. This is not, however, a requirement for domestic mail order sales, i.e. retail distributors. [Tr. 446].

20. After the applicant provides a list of customers, the DEA will then verify those customers. [Tr. 447–8]. Ms. Klett testified that when Congress passed the CMEA, it put specific language in the act that mandated the DEA to ask for downstream customers from the proposed importer. The DEA does so for importers on its Form 486A. [Tr. 448–9].

21. As for start-up companies, Ms. Klett testified that how the company ascertains its downstream customers is up to them. [Tr. 450].

22. Ms. Klett testified that the DEA has never before entertained an importer application for a company that wished to sell strictly retail. [Tr. 453]. In addition, she testified that the form 486 requires a customer list, which is a form that the registrant fills out prior to the

[1] The remaining stipulated facts repeat the procedural history of this case. [ALJ Exh. 15].

[2] Mr. Kronebusch manages a database that contains firms that handle List I or List II chemicals. [Tr. 54]. Since 2007, he has also been assigned oversight of mail order firms. [Tr. 54].

[3] Retail distributors sell to non-regulated persons, i.e. persons that will use rather than redistribute the ephedrine product. [Tr. 55, 57]

[4] Ms. Klett has been in that position since 1997 and has been with DEA since 1995. Ms. Klett conducts a preliminary review of incoming List I chemical pre-registration packages. The preregistration package contains all documents that are forwarded by the applicable field office to the DEA when a company applies for a DEA registration. Ms. Klett is familiar with the Combat Methamphetamine Act. [Tr. 119–120]. Prior to working as a Program Analyst, Ms. Klett was an Intel Research Specialist from 1988–1997. In addition, from January 2000 to February 2003, Ms. Klett was an Intel Analyst in the Office of Diversion Control for an LSD investigation. [Tr. 122].

actual importation, and post registration. [Tr. 452–53].

b. Canadian Regulation of Ephedrine

23. Diversion Investigator David Hargroder[5] (''DI Hargroder'') testified about information he obtained from Health Canada, the Canadian agency that regulates listed chemicals. [Tr. 84]. DI Hargroder testified that Canada's regulation of List I Chemicals is similar to the DEA's. [Tr. 80]. He testified that Health Canada requires entities to obtain Class A Licenses. [Tr. 80].

C. The Respondent

24. The Respondent, 4 OTC, Inc. (''4 OTC'') is a company seeking to import finished form ephedrine products into the United States and to sell it to retail customers via the internet. [Tr. 33, 393].

25. The Respondent intends to store the listed chemical products in a warehouse in Phoenix, Arizona. [Tr. 337]. 4 OTC is ready for operation but not yet up and running. [Tr. 255].

26. The Respondent first applied for a DEA registration on August 14, 2007. [Respt. Exh. 1].

27. Richard Pierce, who testified on behalf of the Respondent, stated that 4 OTC would only sell its ephedrine product as a bronchodilator. [Tr. 277].

1. Initial Investigation

28. In January of 2008, Richard Quintero, a Diversion Investigator for the DEA in the Denver Colorado division,[6] traveled to the Respondent's proposed location at 8160 Blakeland Drive, Unit H, Littleton, Colorado 80125. [Tr. 27–28].

29. During that visit, DI Quintero met with the Respondent's Vice President, Mike Schiefelbein. DI Quintero asked Mr. Schiefelbein basic information about 4 OTC, including the company from whom the Respondent intended to import ephedrine, the person who would maintain record-keeping and security, and the Respondent's intended customers. [Tr. 28–29].

30. In July of 2008, DI Quintero returned to the Respondent's proposed location, at 8160 Blakeland Drive, to conduct a second investigation of 4 OTC. [Tr. 29]. On that visit, DI Quintero was accompanied by Dan McCormick, another Diversion Investigator from the Denver, Colorado field division. [Tr. 30].

31. However, on that visit the Respondent was no longer located in Unit H; it was then located in Unit C of the same address. [Tr. 29]. The Respondent was renting a small part of this warehouse from Allison Medical Supply on a month to month basis per an oral agreement. [Govt. Exh. 12 at 1–2]. The Respondent had advised the DEA of the new address via telephone yet had not submitted a written request for an address modification. [Govt. Exh. 12 at 1].

32. On May 12, 2010, DIs Quintero and McCormick returned to Unit C. [Tr. 39]. The receptionist told the DIs that 4 OTC was no longer at that location. The receptionist stated that the Respondent had moved to Arizona and not left a forwarding address. [Tr. 39]. The local post office also had no record of a forwarding address for 4 OTC. [Tr. 40; Govt. Exh. 12 at 2]. The Respondent had not advised the DEA of the new address. [Govt. Exh. 12].

2. Current Location

33. Respondent is currently located at Freeport Distribution's Warehouse, 431 N. 47th Avenue, Phoenix, AZ 85043. [Resp. Exh. 9 at 1]. The warehouse is also occupied by other tenants. [Tr. 396–97].

34. Mr. Pierce testified that the Respondent's facility was inspected by the DEA and that, to his knowledge, the agency did not have any issues with the security. [Tr. 285]. In addition, the Respondent hired a consultant, John Mudri,[7] who inspected the facility and testified he observed where the ephedrine product would be located, whether there were alarm transceivers, the doors, gating, and who had access. [Tr. 410–11]. He testified that the Respondent's security features are ones that an entity would consider if securing Schedules III through V controlled substances and thus are greater than that required for scheduled listed chemicals. [Tr. 410–412].

35. Respondent introduced a document from Freeport Distribution which describes the security and building features of the warehouse. [Resp. Exh. 9]. Mr. Mudri testified that this document accurately reflects the Respondent's warehouse security. [Tr. 410–412]. Among those listed, the Respondent stated that all warehouse employees undergo background checks, including screens for substance abuse, that the warehouse is guarded by two guards during non-operational hours but guards do not have keys or access to the facility, that there are cameras in place, and that the facility is completely fenced with an 8 foot fence topped with razor wire. [Respt. Exh. 9 at 1]. The document further states that ''all Freeport contractors for hire must show proof of background checks for anyone entering'' the facility. [Resp. Exh. 9 at 1].

3. Respondent's Source

a. McIsaac Distribution

36. The Respondent originally listed McIsaac Distribution as the source from which it would import ephedrine. [Govt. Exh. 11]. McIsaac Distribution is a Canadian distributor of sports nutrition products such as protein powders, and other natural health products. [Govt. Exh. 20 at 17]. It used to sell a product called 4 Ever Fit, a single-entity ephedrine product. It sold 4 Ever Fit as a muscle building and weight loss product in Canada to mostly retail locations such as gyms and health and fitness stores. [Tr. 122–129; Govt. Exh. 20 at 6–8].

37. McIsaac Distribution is located in KeLowna Bridge, Columbia in Canada. [Tr. 32, 82].

38. Kevin McIsaac is the president of McIsaac Distributions. [Tr. 34, 82; Government Exhibit (''Govt. Exh.'') 12 at 1]. He was also the original signee on the Respondent's importation application. [Tr. 34].

39. McIsaac Distribution possessed a Class A precursor license in Canada, that it later withdrew. [*See* Govt. Exh. 10].[8] McIsaac Distribution relinquished its Class A precursor license because it was ''no longer able to sell ephedrine.'' [Tr. 260].

[5] David Hargroder is a Diversion Investigator at DEA Headquarters. [Tr. 77]. DI Hargroder conducts chemical investigations involving ephedrine, pseudoephedrine, and methamphetamine. [Tr. 77]. DI Hargroder started his law enforcement career at DEA in 1980, prior to which he served as an investigator in various territories and worked for the New Orleans Police Department. [Tr. 77]. He currently serves as a staff coordinator for the pharmaceutical section of the Office of Divergence and Synthetic Chemicals (''ODS'') at DEA. He was transferred to that section only three days prior to the hearing, before which he served for the chemical section of ODS. [Tr. 78–79]. There, he was responsible for reviewing pre-registration investigations involving appeal. [Tr. 79].

[6] [Tr. 25; Govt. Exh. 12 at 1]. DI Quintero has worked in that capacity for 12 years. [Tr. 26]. DI Quintero was assigned to investigate the List I chemical applications of the Respondent. [Tr. 27].

[7] [Tr. 380, 398]. Mr. Mudri began working for DEA as a Diversion Investigator in 1972 in the Cleveland, Ohio branch. He then served as a Senior Investigator for that branch from 1974–1979. From 1979 to 1986, he served as an Investigative Supervisor in the Detroit, Michigan branch and later served in the same capacity in Tampa, Florida. He became a Staff Coordinator for the Diversion Policy Section of DEA in 1993, and held that same position in the Diversion Liaison Section from 1995–1996. From 1996–1998, he was the Chief of the DEA's Domestic Chemical Operations section. He then became a Senior Investigator again in 1998 for the Tampa, Florida branch, after which he left DEA in 2001. [Respt. Exh. 11 at 2]. In addition to consulting, as well as other professional activities, he currently teaches a course called Controlled Substances Laws in the University of Florida graduate pharmacy program. [Tr. 401–2].

[8] On its precursor license application, the company stated that it intended to purchase ephedrine, ''MaHuang,'' from GFR and Biopark Ltd. [Govt. Exh. 20 at 19].

40. In 2008, McIsaac Distribution sold certain assets, including the 4 Ever Fit product, to GFR Pharma. [Tr. 33, 106, 258, 262, 294; Respt. Exh. 8; Govt. Exh. 20 at 30, 46–47].

41. GFR Pharma Ltd. (''GFR'') is a company located in Maple Ridge, British Columbia, Canada. [Tr. 33; 252]. The company used to be named GFR Nutritionals Ltd. [Govt. Exh. 20 at 5]. Prior to its purchase of assets from McIsaac Distribution, GFR Pharma manufactured and sold 4 Ever Fit to McIsaac Distribution. [Tr. 294–5].

42. Prior to the sale of certain assets to GFR Pharma, McIsaac Distribution was inspected by Health Canada. [Govt. Exh. 20 at 24]. Health Canada noted several concerns. First, it noted that McIsaac Distribution had failed to obtain the Minister's approval prior to making changes of its internal protocols as cited in its initial application. Specifically, in contrast to what was stated on its application, McIsaac failed to lock the drawer that contained the key to the Class A precursor cage. In addition, McIsaac failed to keep an ephedrine movement log. Next, Health Canada noted McIsaac's recordkeeping violations, including failing to record cage ephedrine movements and failing to record the full name of person(s) accessing the cage. Last, Health Canada noted several ''suspicious transactions'' that the company failed to record. A suspicious transaction is one where ''there are reasonable grounds to suspect that the transaction is related to the diversion of a precursor to an illicit market for use.'' Some of the factors that Health Canada lists as to being indicative of diversion are: (1) delivery by dubious route; (2) Using a private house or post office box number as the address from which the order is made; and (3) irregular order and quantities. The agency found two transactions that were delivered by dubious route, where a combined total of 66,960 bottles of hydrochloride ephedrine (26.778 Kg) were sent from McIsaac Distribution via Liquidation Depot to Bella Labs. Each shipment listed a separate address for Bella Labs, and the first shipment's address for Bella Labs was deemed not a legal address. Next, the agency found two instances where a combined total of 12,096 bottles of ephedrine chloride (4.832 Kg) were shipped to a post-office box in a Mail Boxes, Etc., of which the second shipment was rerouted to a residential address. The agency then found that McIsaac Distribution's largest sales between April 27, 2007, and May 27, 2008, were to Liquidation Depot (a total of 341,952 bottles of hydrochloride ephedrine were sold) and ''these transactions were * * * suspicious because they were triggered by large cash deposits and related bank charges.'' Health Canada noted that in light of the foregoing it had ''strong concerns about [McIsaac Distribution's] capacity to comply with the regulatory requirement to detect and record suspicious transactions.'' [Govt. Exh. 20 at 24–27].[9]

43. In response to those suspicious transactions, on November 19, 2008, Health Canada ordered McIsaac Distribution to submit a ''written corrective action plan'' to it by December 19, 2008. [Govt. Exh. 20 at 28; Tr. 159]. Prior to that order, however, on November 17, 2008, McIsaac Distribution notified Health Canada, by email, of its sale to GFR. On November 19, 2008, Health Canada received an email from McIsaac Distribution reflecting its desire to close its Class A Precursor License. [Govt. Exh. 10]. On December 3, 2008, McIsaac Distribution faxed Health Canada a document regarding the closure of its Class A Precursor License. [Govt. Exh. 20 at 30].

44. A review of the 4 Ever Fits sales list, while that product was sold by McIsaac Distributions, revealed an internet sale of 10 bottles of ephedrine hydrocholoride 8 mg to Marcy LeBlanc, whose address could not be confirmed, and a sale of 96 bottles of ephedrine hydrochloride 8 mgs to Body FX, whose address also could not be confirmed. [Tr. 139–140; Govt. Exh. 20 at 48].

45. In addition, many of 4 Ever Fit's customers as of 2007 were health and fitness stores. [*See* Gov't. Exh. 20 at 6–15]. A few of those customers contained on that list had addresses in the United States. [*See id.* at 6, 15 (listing 12 locations for Bally Total Fitness in Chicago, Illinois and one location for Vitamin World in New York)]. However, a second report documenting actual ephedrine sales for January of 2007, fails to record any sales of the 4 Ever Fit product to U.S. companies. [*Id.* at 41–44].

b. GFR Pharma, Ltd.

46. The Respondent maintains that it will purchase its ephedrine product from GFR Pharma (''GFR'') and not McIsaac Distribution. [Tr. Govt. Exh. 11 at 2].

47. Richard Pierce is the President and CEO of GFR. [Tr. 252]. As President and CEO of GFR, Richard Pierce runs the day-to-day operations of the corporation, including overseeing quality control, purchasing, sales, and marketing. [Tr. 252]. He has dealt with the sale of ephedrine since 2004. [Tr. 252].

48. According to Mr. Pierce, Kevin McIsaac has no role at GFR Pharma. [Tr. 259].

49. GFR currently has its own Canadian precursor license. [Resp. Exh. 8; Tr. 102]. ''As a holder of this license, GFR is authorized to produce, package, sell, import, and export precursor substances such as ephedrine (both ephedrine salt and Ma Huang).'' [Govt. Exh. 11 at 2].

50. GFR manufactures ephedrine by purchasing the raw material from a registered supplier with a precursor license. The quantities of that purchase are verified by the Canadian government. The raw material is then immediately put in a holding cage that is locked and monitored by camera. The ephedrine is then quality-control inspected and released for manufacturing. The ephedrine is then blended with the proper ingredients. The raw material is placed back into the holding cage. The product is once again removed and placed in a tablet press, placed back into the cage, and then sent to be packaged, after which it is once again placed in the cage. [Tr. 256–57].

51. GFR manufactures approximately 200 kilograms of ephedrine per year. [Tr. 253].

52. GFR converts that ephedrine into 25 million tablets. [Tr. 253–254, 257].

53. The brand of ephedrine product that GFR markets in Canada is 4 Ever Fit. [Tr. 254]. Richard Pierce testified that the product is used as a decongestant in Canada. [Tr. 254]. However, 4 Ever Fit's customer list suggests that product is sold as a dietary supplement in Canada. [*See* Govt. 20 at 42–44 (listing the purchase of 4 Ever Fit by numerous health food stores and gyms)].[10]

54. Mr. Pierce testified that he has never sold this product to a U.S. based company because that would be illegal. [Tr. 254]. Mr. Pierce testified that in Canada ''we can sell it to health food stores * * * to sports nutrition stores, a wide variety [of stores].'' [Tr. 254].

55. The DEA obtained information from Health Canada regarding GFR Pharma. including any and all audits, photos, copies of registration forms, product distribution lists, copies of all Canadian licenses, formal letters between Health Canada and the

[9] Ms. Klett found it most noteworthy that Health Canada believed there were ''suspicious transactions'' between McIsaac and its purchasers that McIsaac failed to report to Health Canada. Ms. Klett testified that the DEA finds any kind of cash transaction, above the retail level, suspicious. [Tr. 136].

[10] In addition, I do not find this statement of Mr. Pierce's credible, as it is unreasonable that persons would purchase a product labeled ''4 EverFit'' as a nasal decongestant. In addition, he is not qualified to testify as to how his product is actually used by GFR's customers. T

company, export documents, documents regarding the sale of McIsaac Distribution to GFR Pharma, documents regarding the transfer of products from McIsaac to GFR Pharma, and documents regarding common ownership of the GFR and McIsaac Distribution. The DEA also obtained the FDA's records regarding the two companies. [Govt. Exh. 20 at 1–3; Tr. 90–91]. All of the records that the DEA obtained related to the ephedrine and pseudoephedrine products. [Tr. 91].

56. In 2010, GFR had a shortage of 79,000 tablets. [Tr. 257]. They reported this shortage to Health Canada. [Tr. 258]. Health Canada did not cite GFR Pharma, however, they did make a recommendation on how the company could account for the loss. [Tr. 258]. Mr. Pierce stated that the loss was just a ''manufacturing loss.'' [Tr. 260].

57. On an unspecified date, Health Canada inspected GFR Pharma and noted the following concerns: (1) ''although only two GFR designated employees have access to raw bulk ephedrine (possess the physical keys), all 61 employees conceivably have access to ephedrine at other stages of production (i.e. blending, bulk tableting, packaging, as well as shipping);'' (2) record could not be found for certain inbound transportation shipments; (3) no records exist to quantify past destruction; and (4) there are conflicts between processing stages in GFR's records, namely the actual yield is less than the projected yield; and (5) ''GFR does not maintain a precursor access log. No record exists tracking personnel accessing stock either within the precursor cage, or within the overall warehouse.'' [Govt. Exh. 20 at 22].

58. Mr. Pierce testified that Health Canada would not renew its license if it found serious violations. [Tr. 271].

59. In Mr. Pierce's experience, he has dealt with Health Canada regarding licensure and inspection, including surprise inspection. [Tr. 252–53]. GFR has been inspected by Health Canada on three occasions. [Tr. 253]. GFR must re-apply for its licensure yearly and its license has been renewed by Health Canada every year. [Tr. 252–253]. The DEA was not informed of any citations by Health Canada of GFR. [Tr. 164].

60. The DEA reviewed Health Canada's records on the sale of the precursor product, 4 Ever Fit-Ephedrine Hydrochloride 8 mgs by GFR to various companies from January 6, 2009 to January 29, 2009. [Tr. 129; Govt. Exh. 20 at 42–44]. None of the companies listed in that report had addresses in the United States. [Govt. Exh. 20 at 42–44]. The DEA did not obtain any evidence that GFR Pharma marketed 4 Ever Fit as a weight loss product and sold it as such into the United States. [Tr. 173].

(1) Customs Seizure

61. During its investigation, the DEA found evidence that GFR Pharma was the source of ephedrine that a third party had purchased and attempted to ship illegally into the United States. [Tr. 86–87]

62. On or about January 27, 2010, U.S. Customs and Border Patrol seized three packages with suspicious labels at Seattle International Airport, Washington. [Tr. 86, 212]. The packages were en route to Phoenix, Arizona. [Tr. 86]. The sender listed on the packages was Better Bodies Nutrition. [Tr. 87, 217–18; Govt. Exh. 15 at 2; Govt. Exh. 20 at 6].

63. Better Bodies Nutrition is a company that sells nutritional supplements via the internet. [Govt. Exh. 15]. Better Bodies Nutrition Web site markets ephedrine and advertises the sale of the 4 Ever Fit Product. [Govt. Exh. 15; Tr.144]. Specifically, they have purchased the 8 mg ephedrine hydrochloride product. [*See* Tr. 143–44].

64. The products originated from GFR Pharma. [Tr. 87]. While, Better Bodies Nutrition is not a direct customer of GFR Pharma, GFR supplies to 4 Ever Fit, Ltd. who then sells to Better Bodies. [Tr. 275, 368]. Regardless, GFR has knowledge of where 4 Ever Fit sells its product. [Tr. 368].

65. The products were destined for a company called One Stop Nutrition in Phoenix, Arizona. [Tr. 113].

66. The shipping labels indicated that the packages contained ''vitamins.'' [Govt. Exh. 14; *see also* Tr. 214].

67. After customs observed the suspicious shipping labels, they opened the packages to confirm the contents. [Tr. 212–13]. Each box contained 48 bottles, labeled ''4 Ever Fit.'' [Tr. 215]. Each bottle contained 50/8 mg ephedrine tablets. [Tr. 215].

68. On February 4, 2010, DI Morgan, U.S. Postal Services, and a member of the Arizona Board of Pharmacy visited all three addresses listed on the seized packages and discovered all three were One Stop Nutrition Stores, which sold health and body supplements and vitamins. [Tr. 220–221]. In addition, all three stores shared parking lots with fitness clubs. [Tr. 221–222]. Each store had ordered one box, containing 48 bottles, of the 4 Ever Fit product. [Tr. 240].

69. The One Stop Nutrition stores were located in Scottsdale, Tempe, and Phoenix, AZ. [Tr. 222, 224, 225]. DI Morgan spoke with each of those store's owners, respectively, Justin Denis, Brian Kerry, and Matt Denis [Tr. 223, 224, 225]. Each of those individuals stated that they purchased the 4 Ever Fit product to replace a product called Vasapro, which was no longer available. [Tr. 223, 224, 226]. Each owner intended to sell 4 Ever Fit as a weight loss product. [Tr. 223, 225, 228].

70. While the Tempe and Phoenix One Stop Nutrition Stores were self-certified with DEA, Justin Denis had not self-certified his location in Scottsdale. [Tr. 231].

71. In addition, none of the One Stop Nutrition stores that DI Morgan visited had importer registrations nor did they fill out a Form 486 prior to their orders of 4 Ever Fit from Better Bodies Nutrition. [Tr. 232–233].

72. Similarly, Better Bodies Nutrition did not have a Canadian export license. [Tr. 115–16].

73. Mr. Pierce testified that he had no knowledge of Better Bodies Nutrition selling or trying to sell 4 Ever Fit into the United States. [Tr. 276]. When questioned whether GFR had done anything about its relationship with Better Bodies Nutrition to ensure that the improper shipment doesn't occur again, Mr. Pierce testified ''[w]e have no control over them buying the product from us and shipping it without our knowledge. [Health Canada] . . . has been informed'' and it is his understanding that they have dealt with Better Bodies to ensure that they don't attempt to ship into the United States and are familiar with the repercussions of that. [Tr. 362].

D. Other Entities

1. 4 Ever Health Distribution Ltd.

74. 4 Ever Heath Distribution Ltd. is a Canadian company owned by Richard Pierce. [Tr. 280].

75. 4 Ever Health Distribution distributes the 4 Ever Fit product in Canada. [Tr. 280].

2. 4 Ever Fit Companies

76. There are two 4 Ever Fit companies: 4 Ever Fit 2008 Ltd. (''4 Ever Fit''), a Canadian company, and 4EF Inc. d/b/a 4 Ever Fit USA (''4EF USA''), a United States company. [Respt. Exh. 4; Tr. 280–81].

3. 4 Ever Fit—Canada

77. Richard Pierce is also the President and CEO of 4 Ever Fit. [Tr. 252].

78. 4 Ever Fit sells sport supplement style products such as proteins as well as the 4 Ever Fit product. [Tr. 255, 280].

79. Mr. Pierce testified that he does not sell ephedrine products directly into the United States. [Tr. 268].

4. 4 Ever Fit—USA

80. 4EF Inc., d/b/a 4 Ever Fit USA (''4EF USA'') is a United States company. [Tr. 280–81].

81. It is owned by Richard Pierce, through a company called 4 Pharma, LLC. [Tr. 280].

82. Mike Schiefelbein is the president of 4EF USA. [Tr. 373]. It is currently based in Peoria, Arizona. [Tr. 373].

83. Mr. Schiefelbein has been in the sports nutrition supplement business for approximately 13 years. He has prior experience selling ephedrine as a dietary supplement when it was legal to do so in the United States. [Tr. 374–5].

84. 4 Ever Fit USA does not sell ephedrine products. [Tr. 374]. It only sells supplements, nutritional products, protein powders, amino acids, weight gainers, weight-management products to health stores and fitness facilities in the United States. [Tr. 281, 365, 374].

85. A small percentage of 4EF USA's business is end users. Most of their customers are brick-and-mortar retailers and distributors. [Tr. 374, 389]. Approximately 10–15% of its business is internet sales. [Tr. 391].

86. 4EF USA's products will be kept in the same warehouse as 4 OTC's products, however, the 4 OTC product will be kept separate in a cage. [Tr. 395]. In addition, 4OTC will have separate access logs and inventory logs than 4EF USA. [Tr. 395–6].

5. 4 Pharma, LLC

87. Richard Pierce owns 4 Pharma, LLC (''4 Pharma''). [Tr. 363].

88. 4 Pharma owns 4EF USA. [Tr. 280].

89. 4 Pharma also owns 60% of 4 OTC. [Tr. 364].

90. 4 Pharma will not be part of the distribution chain of ephedrine from GFR to 4 OTC, Inc. [Tr. 363].

6. Vasapro

Megapro is a U.S. company that sells Vasapro, an ephedrine HCL product. Megapro markets Vasapro as a bronchodilator expectorant. [Govt. Exh. 5; Tr. 144–45]. Specifically, Megapro's Web site states that the product is ''taken for the temporary respite of shortness of breathing, accumulation in the chest and wheezing because of bronchial asthma . . . [and it] also helps slime relaxation and empowers thin bronchial secretions to draining out bronchial tubes.'' [Govt. Exh. 5 at 1]. However, that Web site is also titled in large font ''Ephedrine Weight Loss Products.'' [*Id.*]. In addition, the left hand side of the page has links for other ''ephedrine weight loss products.'' [*Id.*]. The right hand side of the Web site contains the following statements:

c. ''Using Ephedrine To Burn Fat, Increase Strength and Muscle.''

d. ''Ephedrine Effects on Fat Loss and Muscle Growth . . . When administered, ephedrine noticeably stimulates the central nervous system, increasing the heart rate and has an overall heat producing (thermic) effect on most tissues in the body—this includes muscle and fat tissue, helping the user burn more body fat, as well as having stimulatory effect on other target cells.''

e. ''Ephedrine Protects Lean Tissue (Muscle) . . . Researches show that Ephedrine plus Caffeine combo protects lean tissue (muscle) while on reduced calorie diets.'' [*Id.*].

91. Mr. Pierce testified that Vasapro is the only competitor that he could think of for 4 OTC as he is not familiar with other companies selling ''the combinations.'' [Tr. 314].

7. Other Retail Sellers of Ephedrine Product

92. SupplementSource is a Canadian company that sells the 4 EverFit product via the internet. [Tr. 147–8; Govt. Exh. 8 at 1].

93. There are other companies that market ephedrine bronchodilators similar to how Megapro markets Vasapro. GorillaJack.com (''Gorilla Jack'') is a company that sells Kaizen Ephedrine HCL 8 mg via the internet. [Govt. Exh. 9 at 8]. Its Web site states that it will ship any of its products anywhere in the world as it is impossible for them ''to keep up with all the regulations/laws in every country.'' [Tr. 150; Govt. Exh. 9 at 4]. Gorilla Jack markets the Kaizen ephedrine product as an oral and decongestant yet also notes that the drug ''has strong metabolic boosting properties . . . [and] [d]espite its effectiveness as a . . . body fat reduction product, it can only be officially sold as an oral nasal decongestant.'' [Govt. Exh. 9 at 18]. There is no relationship between Gorilla Jack and GFR Pharma. [Tr. 163–4]. To the best of Mr. Pierce's knowledge, GFR Pharma does not sell to this company. [Tr. 279].

E. Respondent's Ownership and Operation

94. Kevin McIsaac signed 4 OTC's DEA applications. [Tr. 34].

95. Richard Pierce is the President and CEO of 4 OTC. [Tr. 252]. Mr. Pierce also testified that he is the majority owner of 4 OTC. [Tr. 279, 284]. He testified that he owns 4 OTC, Inc. through 4 Pharma LLC. [Tr. 364].

96. Mr. Schiefelbein owns fifteen percent (15%) of 4 OTC. [Tr. 35, 376].

Mr. Schiefelbein testified that he fully intends to comply with all state, local and federal regulations. [Tr. 380]. He also testified that he has no prior convictions. [Tr. 380]. Mr. Schiefelbein testified that he will oversee the day-to-day duties of 4OTC. [Tr. 392–3].

97. According to DI Quintero's investigation, Kevin McIsaac owns seventy percent (70%) of 4 OTC. [Tr. 34–35]. However, according to Mr. Pierce's testimony, Kevin McIsaac only owns ten percent (10%) of 4 OTC and Mr. McIsaac is not involved in the day-to-day operations. [Tr. 284]. If in fact, Kevin McIsaac only owns 10% of 4 OTC, then that leaves 15% of 4 OTC unaccounted for. [*See* FOF 103 (Mr. Schiefelbein owns 15%); FOF 102, 95 (Mr. Pierce owns 60% of the Respondent through 4 Pharma)]. Accordingly, I will not make a finding as to the actual ownership interest of Kevin McIsaac in the Respondent.

98. Mr. Schiefelbein informed DEA Diversion Investigators that 4 OTC intended to procure the ephedrine from McIsaac Distribution. [Tr. 31]. At the hearing, however, Mr. Pierce testified that GFR Pharma is the supplier of ephedrine for the Respondent. [Tr. 289].

99. Mr. Pierce testified that Kevin McIsaac will have ''nothing to do with the company,'' as he will be located in Canada and not in Phoenix. He also testified that he, Mr. Schiefelbein, and ''[their] quality control . . . office in Canada'' will be in charge of shipping the ephedrine from GFR Pharma down to Phoenix. [Tr. 296].

100. Mr. Schiefelbein stated that his sale of ephedrine would be conducted 100% via the internet. [Tr. 33].

101. Mr. Pierce testified that 4 OTC would not sell its product for any other purpose other than as a bronchodilator. [Tr. 277]. 4 OTC only intends to sell its product on a retail level to end users. [Tr. 393].

102. 4 OTC is kept separate from 4EF USA to avoid ''comingling of products and product categories.'' [Tr. 375].

F. The 4 OTC Product

103. The 4 OTC product will be sold as a combination of ephedrine and guaifenesin. [Tr. 302; Resp. Exh. 5]. The product will come in a 12.5 mg ephedrine/200 mg guaifenesin formula, a 25 mg ephedrine/400 mg guaifenesin formula, and a 12.5 mg ephedrine/400 mg guaifenesin formula. [Tr. 306–07]. Mr. Pierce is not familiar with any other company selling a 12.5 ephedrine/400 mg guaifenesin combination product in the United States. [Tr. 308].

104. Mr. Pierce testified that he inherited these formulas and that his understanding of the reasons for having

the different kinds was so that there was a regular and an extra strength product. [Tr. 306–7]. His consultant testified that he has mostly seen a 12.5/200 ephedrine/guaifenesin product and less a 25/400 mg combination product. [Tr. 423]. He has never seen a 12.5/400 mg product. [Tr. 423–4].

105. Neither the Respondent nor its owners have any experience in dealing with guaifenesin. [Tr. 305]. GFR Pharma currently produces a single entity product in Canada. [Tr. 303–4].

106. Mr. Pierce believes his quality-control department contacted the FDA about bringing this product into the United States.[11] [Tr. 307].

107. Mr. Pierce testified that he believes that these products meet the FDA's criteria as far as quantities of listed chemical products allowed based on Mr. McIsaac's representation to him that that was the case when he purchased the company. [Tr. 309–11].

108. GFR will manufacture the ephedrine/guaifenesin product in the same facility that it manufactures the 4 Ever Fit product. [Tr. 311–2].

109. To make the 4 OTC product GFR must increase the size of the tool that currently makes its single entity ephedrine product to account for the additional excipient, guaifenesin. It must also add more binders and fillers to hold that product together. GFR will then quality control that product. [Tr. 312–14].

G. Marketing and Sale of the Respondent's Product

110. Throughout the hearing, representatives of the Respondent maintained that it would only sell its product as a bronchodilator in the United States. Indeed, Mr. Pierce testified that 4 OTC would not sell it for any other purpose. [Tr. 277, 290–91]. Mr. Pierce testified that the guaifenesin is intended to bring up the mucous in the body and help loosen it up. [Tr. 304].

111. During his initial interview with DIs Quintero and McCormick in July of 2008, Mr. Schiefelbein gave the DI's Standard Operating Procedures (''SOPs'') for the Respondent. [Tr. 29, 33]. Those SOPs included a brand label for the 4 Ever Fit product. [Tr. 34]. The Respondents current SOPs contain the same label without the words ''4 Ever Fit.'' [Tr. 47–48; Respt. Exh. 5].

112. The label that Respondent intends to use for its product reads ''eases breathing for asthma patients by reducing spasms of bronchial muscles. For the temporary relief of bronchial asthma.'' [Resp. Exh. 5 at 1; Tr. 290].

113. Mr. Pierce testified that 4 OTC had yet to devise a ''brand name'' that would go on the actual labels. He stated that the company did not intend to place the 4 Ever Fit logo on the package of the 4 OTC product. He stated that ''we're just going to sell it as the name ephedrine hydrochloride.'' [Tr. 299–301].

114. Mr. Schiefelbein testified that 4 OTC will not use the customer base of 4 Ever Fit to sell the ephedrine product. [Tr. 377]. However, when DI Quintero asked Mr. Schiefelbein for a customer list, he was unable to provide one. [Tr. 28–29].

115. Mr. Pierce testified that he did not conduct any market research, investigating the potential customer base for the 4 OTC product, prior to his purchasing of his interest in 4 OTC. He also testified that while he believes Mr. McIsaac conducted such research, he has not seen any of that research. [Tr. 324–5]. When asked how he knew that customers would need ephedrine to be treated for asthma and would be inclined to purchase that product over the internet, he responded ''Well, considering the statistics on how many people buy off the Internet, it seems that more people are interested, especially if people are looking for these type [sic] of products, to order them off the Internet. It's a very convenient method.'' [Tr. 326–7]. He later testified that because 4 OTC has not done market projections, they don't know the quota that they would seek from the DEA. [Tr. 366–7].

116. Mr. Pierce testified that there is a need for an ephedrine bronchodilator in the United States. [Tr. 282]. He stated that need is the helping of people with asthma. [Tr. 282].

117. Mr. Pierce also testified that certain persons may want to buy this product through the internet, as opposed to going to a pharmacy or convenience store, because it is more convenient to do so. [Tr. 282].

118. Mr. Schiefelbein testified that he was a party to the decision to initially move forward with the 4 OTC venture. [Tr. 384]. He testified that the decision was made because ''there may be a gap and a need in terms of . . . the asthma-related conditions.'' [Tr. 384–85]. When asked why an individual would chose to treat their asthma with the 4 OTC product versus a prescription medication, Mr. Schiefelbein testified that the 4 OTC product would serve various markets where individuals may not be able to afford medication for an asthma condition. [Tr. 380]. However, Mr. Schiefelbein did not calculate that there was an under-supply of ephedrine in the U.S. market. [Tr. 386].

119. When Mr. Pierce was asked whether the intended market for the 4OTC product was ''anyone who wishes to buy ephedrine products on the Internet'' he responded ''well . . . I guess it is to people who will use for a bronchial dilator, but yes.'' He then stated that 4 OTC has no mechanism by which to know whether, in fact, the product will be used for that purpose. [Tr. 365]. He stated that he would just market it to people who need it directly as a bronchodilator for bronchial asthma. [Tr. 302].

120. Mr. Pierce also stated that he doesn't anticipate any of the customers who purchase his dietary supplements would also purchase the 4 OTC ''unless they have a condition that requires the product.'' [Tr. 327].[12]

121. When asked whether it would be better to market a single entity ephedrine product, Mr. Pierce testified that the combination was that which he ''inherited with the company . . . [He] didn't want to change the direction of what [they were] doing.'' [Tr. 328].

122. When asked about other bronchodilators, Mr. Pierce was unaware. For example, he was unaware of the products Primatene and Bronkaid. [Tr. 334]. In addition, Mr. Pierce was unaware that ephedrine products are sold to convenience stores in the United States. [Tr. 334].

1. Website

123. Mr. Pierce testified that 4 OTC does not currently have a Web site. [Tr. 289]. However, he also testified that 4 OTC does not plan to market its product on the 4 Ever Fit Web site. [Tr. 293]. His testimony indicates that the company has not yet finalized how they will advertise the product. [*See* Tr. 329 (stating that the product could be located by Google search or elsewhere depending on ''where we could advertise the product. We'd have to confirm that'')]. Mr. Pierce did testify that at some point, 4 OTC will have a Web site separate from the 4 Ever Fit Web site. [Tr. 364]. 4 OTC will also not advertise 4 EF USA's products on its Web site. [Tr. 379].

124. Mr. Pierce testified that the product will be marketed as a hard tablet, and not a gel cap. [Tr. 301].

[11] The record contains no further information about this contact.

[12] Given Mr. Pierce's prior testimony about the lack of research he reviewed or conducted regarding the use of ephedrine as a bronchodilator in the United States, I find most, if not all, of his testimony as to why the Respondent's product would be purchased and used unfounded and incredible.

2. Packaging, Labeling, and Sale of the 4 OTC product

125. Mr. Pierce correctly identified and testified that he is aware of the retail daily and monthly sales limits for ephedrine in the United States. [Tr. 291].[13] He stated that 4 OTC plans to sell twenty-four (24) tablets in one carton. [Tr. 292]. Therefore, to exceed the daily limit, a person would have to purchase twelve boxes. He testified that that is a large order and that he doesn't anticipate someone ordering that amount. [Tr. 292].

He testified that the product would be sold as a hard tablet in blister packs in a box. [Tr. 301]. The products packages will be labeled as follows:

a. On the Front Cover:

i. EPHEDRINE HYDROCHOLORIDE (24 tablets)

ii. Eases Breathing For Asthma Patients By Reducing Spasms Of Bronchial Muscles for the Temporary Relief of Bronchial Asthma.

iii. Contains: Ephedrine HCl ____mg, Guaifenesin ____mg per tablet

b. On the Back Cover:

i. Under Drug Facts

1. Active Ingredients

a. Ephedrine HCl____mg……..bronchodilator

b. Guaifensin____mg……expectorant

2. Uses

a. For temporary relief of bronchial asthma

b. Eases breathing for asthma patients by reducing spasms of bronchial muscles

c. Helps loosen phlem [sic] (mucus) and thin bronchial secretions to make coughs more productive.

3. Warnings

a. Do not use this product unless a diagnosis of asthma has been made by a doctor. Do not use this product if you have heart disease, high blood pressure, thyroid disease, diabetes, or difficulty in urination due to enlargement of the prostrate gland unless directed by a doctor. Do not use this product if you have ever been hospitalized for asthma or if you are taking any prescription drugs for asthma unless directed by a doctor. Do not continue to use this product, but seek medical assistance immediately if symptoms are not relieved within 1 hour or become worse. Some users of this product may experience nervousness, tremor, sleeplessness, nausea, and loss of appetite. If these symptoms persist or become worse, consult your doctor. A persistent cough may be a sign of a serious condition. If cough persists for more than one week, tends to recur, or is accompanied by a fever, rash or persistent headache, consult your doctor. DRUG INTERACTION PRECAUTION: Do not use if you are now taking a monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric, or emotional conditions, or Parkinson's' disease) or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor before taking this product.

c. On the top cover:

i. Directions

a. Adults and children 21 years of age and over: oral dosage is 1 tablet every 4 hours, not to exceed 4 tablets in 24 hours, or as directed by a doctor. Do not exceed recommended dose unless directed by a doctor.

Children under 21 years of age: Consult a doctor. [Resp. Exh. 5].

H. Respondent's SOPs

126. The SOPs that the Respondent introduced at the hearing are distinct from those that the Respondent first gave to the DEA. The Respondent revised its SOPs after the Order to Show Cause was issued in this proceeding. [Tr. 298].

1. SOPs Regarding State Laws

127. Some states regulate ephedrine more stringently than the federal government. [Tr. 63]. For example, some states have scheduled ephedrine and, therefore, a firm would need a registration, certificate, or a license to sell an ephedrine product in that state. [Tr. 63]. In some cases—a state will send a ''cease and desist'' letter to a firm selling ephedrine via the mail. [Tr. 69].

128. In its SOPs, the Respondent via chart addresses various state requirements, including the maximum number of grams/packages permitted to be sold per transaction, day, week, and month;[14] whether there are limitations on the combinations of ephedrine/guaifenesin that may be sold; how long the entity must keep records; the minimum age for the purchaser; and whether ID, signature, employee training, and state licensure are required. [Respt. Exh. 10 at 27].

129. In addition, the SOPs address in bullet format each state's requirements. [Resp. Exh. 10 at 20–26]. For example, the SOPs state that in Alabama a purchaser must ''sign special electronic or paper register maintained for two years. These records must be maintained for at least 180 days.'' [Resp. Exh. 10 at 20].

130. Under the bulleted outline for New Hampshire, the SOPs only state ''comply with federal regulations.'' [Resp. Exh. 10 at 23]. When Mr. Pierce was questioned about this SOP he agreed that he could be pretty certain that New Hampshire would allow 4 OTC to sell ephedrine into the state, so long as they were compliant with federal regulations. [Tr. 340]. Later in the SOPs, however, on the chart for state requirements, there is a ''Y'' under the column marked ''state license'' corresponding to the state of New Hampshire. [Resp. Exh. 10 at 29].

131. In addition, there are several states where the Respondent is not likely to get licensed. [*See* Govt. Exh. 19C (Arizona); Govt. Exh. 19D (Arkansas); Govt. Exh. 19M (Iowa); Govt. Exh. 19J (Kansas); and Govt. Exh. 19N (Louisiana)]. However, that likelihood is not included in the Respondent's SOPs. [Tr. 341–3; Resp. Exh. 10]. Mr. Pierce agreed that state law restrictions would preclude 4 OTC from lawfully handling ephedrine products in Montana, New Mexico, Michigan, North Carolina, and Louisiana. [Tr. 341–46].

132. With respect to the requirements for the State of Michigan, the Respondent's SOPs indicate that state license is required, the maximum number of packages that may be sold per transaction is 2, the maximum number of grams of the 4 OTC product that can be sold per month is 9 and cannot exceed a 25/400 ephedrine/guaifenesin combination, the Respondent must keep records for 6 months, the minimum age for purchase is 18, and both photo ID and signature are required. [Resp. Exh. 10 at 28]. However, the Respondent's SOPs overlook the fact that Michigan expressly prohibits the internet sale of ephedrine into its territory. [Govt. Exh. 19–P at 5].

133. With regard to additional state regulations, not contained in the Respondent's SOPs, Mr. Pierce testified that ''we are relying on our attorney's to complete our due diligence on that, once we move to the next level.'' [Tr. 347–8].

134. He also stated that SOPs are always a ''work in progress.'' [Tr. 357]. Although some states made ephedrine products Schedule IV or V controlled substances, Mr. Pierce was unfamiliar with the concept of scheduled substances. [*See* Govt. Exh. 19S

[13] However, the initial 4 OTC SOPs incorrectly recounted the sales limitations. [Tr. 35–36]. The current SOPs correctly note the sales limits to retail (i.e. mail order) customers. [Resp. Exh. 10 at 16].

[14] In describing the permissible number of packages that may be sold, however, the Respondent does not identify what combination ephedrine/guaifenesin product it is referring to, i.e. 12.5/200, 25/400, or 12.5/400. [*See* Respt. Exh. 10 at 27].

(Missouri; Govt. Exh. 19AA (Oklahoma); Govt. Exh. 19Z (Ohio); Tr. 345].

135. At the hearing, Mr. Pierce appeared unaware of an Arizona Board of Pharmacy requirement that the Respondent obtain a state license as an ephedrine wholesaler prior to importing ephedrine into the state, until the Government's counsel pointed the need for it on cross-examination. [Tr. 371].

136. At the time of the hearing, the Respondent did not have such a license. [Tr. 443]. Mr. Mudri, the Respondent's expert later testified that there seems to be some confusion as to whether that is in fact required. [Tr. 424]. The Respondent later acquired that license. [Resp. Exh. 12].

137. Mr. Mudri testified that he cannot speak for the accuracy of the Respondent's SOPs regarding state laws. [Tr. 426].

138. In light of the various state regulations, Mr. Pierce agreed that he is not certain how many states the Respondent will be able to obtain licensure in. [Tr. 351–52]. In addition, Mr. Pierce has not projected in which states there would be the most potential to sell. [Tr. 352].

139. He also stated that his decision to sell via the internet may be affected by state licensure requirements. [Tr. 369].

2. 4 OTC's SOPs Regarding DEAs Regulations

140. When the Respondent first presented its SOPs to DI Quintero, those SOPs stated that the ephedrine retail sales limit was 24 grams and the ephedrine limit for record-keeping was 1 kilogram. [Tr. 35–36].

Currently, the Respondent's SOPs state the following with regard to complying with the DEA's regulations:

a. Warehouse Security

i. All Schedule listed chemicals will be stored in a caged area that is locked and will have limited access to designated employees [15] of the company.

ii. The doors to the cage will be self-locking, self-closing doors.

iii. Access to the cage will be recorded in an access log.

iv. In working hours—the caged area is protected by surveillance and guard station, and in non-working hours by a central station alarm service with a duty to respond and notify local law enforcement to respond.

v. All schedule listed chemical products ''are immediately placed within the storage area upon receipt or returned to the storage area when not being transported.'' [Resp. Exh. 10 at 2–3].

b. Employee Hiring:

i. That the company will only hire employees without a criminal or drug related criminal background.

ii. Backgrounds and drug tests will be conducted initially and then randomly afterwards.

iii. Employees will be trained in all facets of dealing with list I chemicals, including self-certification and downstream distribution requirements for the company's customers.

iv. The company has established a reporting procedure similar to 21 CFR 1301.91 for reporting diversion. [Resp. Exh. 10 at 5–6].

c. Importation

i. The company must apply for an importation quota annually via Form 250 (included in SOPs).

ii. The company must either provide information to establish a ''regular business relationship'' with its Canadian supplier or notify the DEA 15 days prior to any importation via form 486 (included in SOPs). [Resp. Exh. 10 at 8].

d. Marketing Sales and Shipping

i. The company must identify the party who is receiving the product, such as a driver's license, and verify the existence and validity of the customer.

ii. In addition, the company will obtain a second form of identification from the customer that corroborates the driver's license.

iii. The company will adhere to state by state restrictions regarding the sale of the ephedrine chemical drug product.

iv. The company will ship by U.S. Mail or other common carrier.

v. ''While temporarily stored in preparation for shipment outside of the caged area within Freeport Logistics, the product will be under constant observation by employees of the company and shipping containers will be unmarked, not indicated [sic] they contain [schedule listed chemicals] to guard against in-transit losses.''

vi. The company shall comply with FDA and FTC regulations regarding the advertising of over the counter drugs. The advertising will be truthful and non-misleading. [Resp. Exh. 10 at 15–18].

e. Recordkeeping

i. To keep reports, inventories and sales of schedule listed chemical products consistent with Part 1310 of the Code of Federal Regulations. [Resp. Exh. 10 at 31].

141. When Mr. Pierce was questioned about how he intended to comply with the DEA's 486 Form requirement that the Respondent inform DEA who the product is going to be sold to before importation, the Respondent answered ''One of the ways, we could presell the product and take orders, showing that we have orders from customers, and then bring the product in.'' [Tr. 359]. He also testified that they could do ''auto ship, if people wished to sign up for a monthly shipment.'' [Tr. 360].

142. Throughout the hearing, Mr. Pierce and Mr. Schiefelbein stated their intent to comply with all state and federal regulations that govern the Respondent's practice. [Tr. 293, 358, 359, 372, 380, 395–96].

143. Mr. Mudri testified the Respondent's SOPs adequately address the DEA's recordkeeping requirements. [Tr. 430–1].

144. Mr. Mudri testified that he believes that 4 OTC's management has an understanding of DEA regulations and that the company's SOPs ''are a good start with regards to operations.'' He clarified, ''I think that maybe down the road there may have to be some things added.'' [Tr. 413].

145. Mr. Mudri was unfamiliar with the DEA's requirement that any person who desires to sell ephedrine via the internet must self-certify. [Tr. 435–6].[16]

I. Letter from Respondent to DEA Regarding its DEA Application.

146. On February 19, 2009, the Respondent, through counsel, sent a letter to DEA Diversion Group Supervisor Helen Kaupang. Therein, the Respondent identified as the Government's primary concerns the internet sale of ephedrine and the lack of proper identification of its customers. [Govt. Exh. 11 at 1].

147. The Respondent explained that it had developed SOPs to ensure full compliance with federal and state laws, and that all of the employees and management of both the Respondent and the Respondent's affiliate, 4 Ever Fit, are familiar with the SOPs. [Govt. Exh. 11 at 2].

148. The Respondent stated ''[o]ther companies are selling and distributing ephedrine products on the Internet. These companies such as Mega-Pro and their Vasapro product-obtained

[15] The term employee is defined in the SOP as ''all persons that perform any business related activity at the facility or regarding the ephedrine chemical drug product.'' [Respt. Exh. 10 at 2].

[16] To keep apprised of DEA regulations, which Mr. Mudri admits is a ''difficult task,'' he does his best to read the laws that have changed, including the Combat Meth Act, monitors show cause hearing, and keeps up with what's going on within DEA and the community. [Tr. 402]. Mr. Mudri admitted that there have been several changes to the list I chemical laws since he served as Chief of the Domestic Chemical Operations and since he left DEA in 2001. [Tr. 407]. He has served as a consultant for businesses that handle listed chemicals, although his practice consulting importers has been somewhat limited. [Tr. 403].

controlled substance licenses which included Internet sales and have had these licenses renewed.'' [Govt. Exh. 11 at 2].

149. The Respondent then stated that ''[b]ecause these other internet companies exist, the DEA must be satisfied that there are ways to properly identify customers and comply with Federal and State controlled substance laws.'' [Govt. Exh. 11 at 2].

150. With regard to the Respondent's prior experience in handling controlled substances, the letter states ''4OTC has operated a business in Canada under the name of 4 EverFit since 2001. 4 OTC's management owned McIsaac Distribution, Ltd., who was the distributor of their products both in Canada and internationally until 4OTC formed a partnership with GFR Pharma Ltd.'' [Govt. Exh. 11 at 2].

151. Respondent stated that ''4OTC formed a partnership with GFR Pharma Ltd. in 2008 . . . [and] GFR will be the exclusive manufacturer of products distributed by 4OTC in the United States.'' [Govt. Exh. 11 at 2]. The Respondent further explained that ''[k]ey personnel involved in handling precursor substances for GFR Pharma include Richard Pierce the CEO of GFR . . . [and] Maribel Aloria [who] is Vice President, Quality Control/Research & Development for GFR.'' [Govt. Exh. 11 at 2].

152. With regard to the list of potential customers, the Respondent provided that ''4OTC does not currently have any customer list. 4 OTC will be happy to provide a customer list after approval of their applications as such information becomes available.'' [Govt. Exh. 11 at 3].

IV. Statement of Law and Discussion

A. Position of the Parties

1. Government's Position

The Government asserts that the Respondent's application should be denied on the following basis: (1) that there has been a drop in the ephedrine market; (2) 4 OTC's Canadian affiliate and potential competitors sell ephedrine for non-legitimate purposes; (3) 4 OTC has not established any basis to show a legitimate ephedrine market in the United States; (4) 4 OTC's Canadian companies lack relevant experience; (5) 4 Ever Fit ephedrine is sold to convenience stores in the United States; (6) the Respondent has failed to consider the state laws pertaining to ephedrine; (7) 4 OTC's Canadian companies have violated Canadian regulatory provisions; (8) 4 OTC's decision to change its logo after the OTSC indicates that if the Respondent's registration had been granted it would have been marketed in a name that implied ephedrine's illicit use; and (9) Respondent's failure to notify DEA of its proposed address and failure to obtain a lease and proper security for a new lease indicates the Respondent's application is fraught with problems. [Government' Proposed Findings of Fact and Conclusions of Law ''(Govt. Brief) at ii; 44].

Specifically, the Government argues that ephedrine sales have substantially declined in both the overall over-the-counter market and particularly for mail orders. The Government thus questions why the Respondent would enter a market that is clearly declining. [Govt. Brief at 37]. Likewise, the Government avers that the market for 25/400 mg ephedrine product that 4 OTC seeks to market is declining, the pseudoephedrine market is significantly higher than the ephedrine market, and that the 12.5/400mg ephedrine product that 4 OTC seeks to market does not even exist in the U.S. market. [Govt. Brief at 37–38].

The Government argues that 4 OTC's competitors, Vasapro and Kaizen, sell ephedrine for other than a legitimate medical purpose. The Government alleges that the Respondent does not dispute it intends to compete with Vasapro and that Vasapro clearly markets its product ''to increase strength and muscle.'' [Govt. Brief at 38].

The Government then asserts that Kaizen was one of the 4 Ever Fit's competitors in Canada, and that company advertised ephedrine as a ''supplement source.'' [*Id.*].

The Government thus argues that there is a market for illegitimate uses of ephedrine, i.e. as a dietary supplement. [*Id.* at 39]. The Government further asserts that those facts in addition to the fact that the Respondent was unaware of two other brands of ephedrine, Primatene and Bronkaid, indicate the Respondent's product is not destined for any legitimate market. [*Id.* at 40].

Next, the Government asserts that the Respondent only speculates as to who would purchase the product, and hence has no idea what its quota would be. Indeed, the company never calculated whether there was an undersupply of ephedrine in the United States. [*Id.* at 39–40].

The Government then argues that GFR Pharma has never produced an OTC product for medical use and thus lacks the requisite experience to be 4 OTC's supplier. [*Id.* at 40–41]. The Government states that it is very apparent that the Canadian company's customer base is not composed of those who purchase ephedrine for asthma treatment. [*Id.* at 41].

Next, the Government argues that GFR does not have control over its customers, specifically 4 EverFit, and that it should have taken steps, including refusal to sell ephedrine to Better Bodies Nutrition as a result of that company's attempted illegal shipment into the United States. [*Id.* at 41–42]. The Government asserts that the Respondent ''gives DEA no assurance that 4 OTC would be responsible for its customers.'' [*Id.* at 42].

In addition, the Government argues that the Respondent is unfamiliar with the state laws that would govern its practice. Specifically, it asserts the Respondent's SOPs fail to note that the Respondent would be unable to obtain licenses in states where ephedrine is a controlled substance or required to be sold only by a pharmacy, and that Washington has a number of restrictions for retail stores that sell ephedrine that may preclude the Respondent from acquiring an ephedrine license. [*Id.* at 42–43]. The Government concludes that the Respondent's lack of awareness of state requirements renders it unable to even ''guestimate'' as to its actual customer base. [*Id.* at 43].

Next, the DEA argues that both McIsaac Distribution and GFR violated various Canadian laws, including McIsaac's selling of ephedrine to customers whose addresses could not be confirmed, and failure to report suspicious sales. The DEA argues that despite Health Canada never taking any civil or criminal action against GFR, 4 OTC's supplier, these past actions should be considered as negative experience in distributing List I chemicals. [*Id.*].

The Government also finds it significant that the Respondent amended its SOPs to correct errors regarding DEA's requirements, specifically an outdated sales limit of 24 grams and a confusion of recordkeeping versus sales limits. [*Id.* at 44].

The Government then argues that the Respondent's decision to changes its ephedrine package label to remove the ''4 Ever Fit'' logo after the Order to Show Cause was issued indicates that if the Respondent's registration had been granted then the Respondent would have been marketing ephedrine under a brand name ''that implied ephedrine's illicit use and had no relation to legitimate use.'' [*Id.*].

The Government further argues that the Respondent's changing of its registered address and failure to obtain a lease and security for a new lease reflects that its ''application process

continues to be fraught with problems and unresolved issues.'' [*Id.*].

The Government concludes by stating the Respondent has not provided any evidence justifying its reason for entering the ephedrine market in the U.S., which the Government argues is declining. It argues all evidence indicates that the Respondent's ephedrine is destined for customers who use it for weight loss and energy and other ''illicit purposes.'' [*Id.* at 45].

The Government argues that the Respondent's experience is much too involved with marketing ephedrine for illicit uses and consequently its lack of experience in the U.S. market, exacerbated by this negative experience in Canada, forms a basis for denying its application. [*Id.* at 46]. ''4 OTC is not prepared to market ephedrine legally and has not established that its customers would purchase ephedrine for legitimate medical reasons.'' [*Id.* at 47].

2. Respondent's Position

The Respondent argues that granting its importation application is ''well within the public's interest.'' [4 OTC's Proposed Findings Of Fact, Conclusions Of Law, And Argument (''Resp. Brief'') at 2].

First, the Respondent argues that ''there exists a strong market'' for its ephedrine product, ''allowing asthma sufferers an option to obtain relief without having to obtain a prescription.'' [*Id.* at 2]. The Respondent cites to the FDA monograph that permits the use of ephedrine for bronchial and asthma related conditions. [*Id.* at 1 (citing Cold, Cough, Allergy, Bronchodilator Products, and Antiasthmatic Drug Products for Over-The-Counter Human Use; Final Monograph for OTC Bronchodilator Products, 51 FR 35,326 (1986) (codified at 21 CFR Part 341)].

The Respondent then argues that it has effective controls against diversion so as to render its registration in the public's interest. [Resp. Brief at 7–8]. Specifically, it states that its facility has adequate security, as DI Gary Linder, ''said it was okay.'' [*Id.* at 8 (citing Tr. 207)]. In addition, Mr. Mudri, the Respondent's consultant, agreed that those security measures were more than adequate. [*Id.* at 8]. The Respondent then states that it has adequate systems for monitoring the receipt, distribution, and disposition, of List I chemicals in its operations'' as outlined in its SOPs, which also evidence the ''sophistication and effectiveness of 4 OTC's security and anti diversion systems.'' [*Id.*].

In this same discussion, the Respondent addresses Canada's citations of McIsaac Distribution, and states that ''its principals and its employees have not been involved in excessive or suspicious sales of ephedrine products.'' [*Id.*]. To support this argument, the Respondent argues that these transactions were legal transactions and made before Mr. Pierce acquired assets of McIsaac. [*Id.* at 8–9]. The Respondent also argues that GFR had no knowledge of the shipment by Better Bodies of 4 Ever Fit into the United States and has not been cited by Health Canada, that the DEA is concerned about mere observations [17] by that agency. [*Id.* at 9–10].

Next, the Respondent argues that it is in compliance with federal and state laws and has demonstrated that it will continue to comply with those laws. [*Id.* at 10]. Specifically, it states that it has yet to import ephedrine, or market its proposed ephedrine products, and regularly consults with regulatory counsel and an expert in DEA regulations. [*Id.*].

The Respondent asserts that it has developed a formula and label that is fully compliant with the FDA's requirements for over-the-counter products. In addition, the Respondent emphasizes that ''the 4 OTC ephedrine product would *not* be used for weight loss or body building.'' [*Id.* at 12 (emphasis in original)''].

As for compliance with state laws, the Respondent states that it has obtained an Arizona Non-Prescription Drug Permit and its SOPS ''contain a comprehensive summary of state variations, evidencing [its] intent to comply with all state and local laws.'' [*Id.* at 13]. It further states that ''it will work with its attorneys and expert consultant to update its SOPs to include any changes to state regulations that may have occurred in the interim.'' [*Id.* at 13].

Next, the Respondent notes that none of its officers or employees have any prior convictions relating to ephedrine or any other controlled substance or chemical and that this factor weights in favor of the Respondent's registration. [*Id.* at 14]. The Respondent also points out its stringent hiring policy which will screen future employees to determine whether any such convictions exist. [*Id.*].

The Respondent emphasizes Mr. Pierce's experience in handling ephedrine as weighing in favor of its registration. The Respondent states that Mr. Pierce has ''*extensive* experience in dealing with ephedrine having manufactured ephedrine since 2004 . . . as well as retail experience sufficient to warrant registration in the United States.'' [*Id.* (emphasis in original)]. The Respondent also emphasizes GFR's separate Quality Control department and the fact that it has no significant violations of Canadian law pertaining to the manufacture and sale of ephedrine. [*Id.* at 14–15].

Last, the Respondent argues that there is a legitimate need for its product in the United States, as the FDA recognizes its use as an OTC bronchodilator. [*Id.* at 15–16]. Further, the Respondent argues that the amount of due diligence it has put forth thus far justify its registration. [*Id.* at 16].

The Respondent then addresses the DEA's diversion concerns, and states ''the Government did not proffer any specific statistics, data or evidence, nor did it present an expert witness, to show that the type of ephedrine combination product that 4 OTC intends to use can readily be used in the production of methamphetamine . . . or that this specific combination-ingredient product actually does show up in clandestine labs.'' [*Id.* at 16]. In addition, the Respondent argues that the Government failed to demonstrate that products marketed for off label uses, i.e. for mental alertness and weight loss, are diverted for methamphetamine production. The Respondent adds that off-label marketing is within the jurisdiction of the FDA and not the DEA. [*Id.* at 17]. ''The Government did not show that ephedrine products marketed for weight loss appear in 'illicit traffic in the United States.' '' [*Id.*].

Next, the Respondent addresses its failure to produce a customer list at the time of application. It states that such is not required by law but instead is only required to be produced 15 days prior to importation. The Respondent then argues that if the DEA desired to impose a requirement on applicants that they provide a customer list at the time of application, it would have to use notice and comment rulemaking to do so. [*Id.* at 18–20]. In addition, the Respondent argues that the reason it did not provide such a list is because it was non-operational at the time of application, and viewed soliciting sales of a DEA regulated product without proper registration as possibly illegal. [*Id.* at 20]. The Respondent assures, however, that it will provide a list of customers on its DEA 486 form as well as in the monthly sales reports that it provides to DEA. [*Id.* at 21].

The Respondent thus concludes that based on its arguments and the findings

[17] The Respondent argues that an observation report ''simply recommends improvements and is not considered a citation.'' [*Id.* at 10].

of its expert, that its registration would be consistent with the public interest. [*Id.* at 22–23].

B. Statement of Law and Analysis

1. Rulemaking

In 2006, via the Combat Methamphetamine Epidemic Act (''CMEA''), Congress amended 21 United States Code section 952(a)(1) to read, ''it shall be unlawful to import into the United States . . . ephedrine, pseudoephedrine, and phenylpropanolamine . . . except such amounts . . . as the Attorney General finds necessary to provide for medical, scientific, or other legitimate purposes.'' [21 U.S.C. 952(a)(1) (2006)].

Subsequently, the DEA promulgated regulations pursuant to the new statutory amendments. In a 2010 preamble to its final rule, the agency stated that via 952(a)(1), ''Congress essentially imposed the same requirements for importation of ephedrine, pseudoephedrine, and phenylpropanolamine as are imposed on narcotic raw materials—crude opium, poppy straw, concentrate of poppy straw and coca leaves.'' [75 FR 4,973 (DEA 2011)].

Accordingly, pursuant to DEA precedent as to the registration of importers of crude opium and poppy straw under 952(a)(1), there is a rulemaking aspect to this proceeding that shall be addressed. Specifically, to permit the Respondent's importation, the DEA must issue a rule finding that the Respondent's product is necessary to provide for medical, scientific, or other legitimate purposes in the United States. [See 5 U.S.C. § 556(d); Johnson Matthey, Inc., 67 FR 39,401, 39,401 (DEA 2002)]. Because the Respondent is the proponent of such rule, it bears the burden of proof. [*Johnson Matthey,* 67 FR at 39,402; *see also* Penick Corporation, 68 FR 6947, 6948 (DEA 2003)].

a. Medical, Scientific, or Other Legitimate Purpose

The Controlled Substances Act (''CSA'') does not define ''medical, scientific, or other legitimate purposes'' as that phrase is used in 952(a)(1). Instead, the statute gives authority to the Attorney General to find whether an import is necessary for those purposes. [21 U.S.C. 958(a)(1)]. The Attorney General delegated that authority to the Administrator of the DEA, who delegated the authority to the Deputy Administrator of the DEA.[18] Therefore, on its face, the statute grants significant deference to the DEA in determining not only what those purposes are, but also, whether an import would satisfy those purposes. [Zuber v. Allen, 90 S. Ct. 314 (1969) (finding that ''defining of a particular statutory term is a function that should, in the first instance, be left to the appropriate administrative body'')].

While the DEA has not formally defined how 952(a)(1) shall be interpreted in the context of the importation of ephedrine, in its final rule issued in 2010 removing the recordkeeping thresholds for the List I chemicals pseudoephedrine and phenylpropanolamine, the agency described some of ephedrine's licit purposes. It stated, ''ephedrine, pseudoephedrine, and phenylpropanolamine all have therapeutic uses in both over-the-counter and prescription drug products. Ephedrine is lawfully marketed under the Federal Food, Drug, and Cosmetic Act as an ingredient in nonprescription (''over-the-counter'' (OTC)) drugs as a bronchodilator for the treatment of asthma. Ephedrine is also available as a nonprescription product in combination with the active ingredient guaifenesin, which is an expectorant.'' [75 FR 38,915]. The DEA also described some of the illicit purposes for ephedrine. None of those purposes, however, included the use of an ephedrine product as a dietary supplement. The purpose for which 4 OTC, Inc. intends to import ephedrine into the United States was a highly contested issue in this proceeding. The Respondent maintains that it intends to import finished form ephedrine, specifically a guaifenesin/ephedrine combination product, into the United States for use as a bronchodilator. As indicated by recent DEA publications, this purpose is a legitimate one. [See 75 FR 38,915 (DEA 2010)]. However, the Government argues that the Respondent instead intends to serve the dietary supplement market with its combination product, despite its assurances that its product will be lawfully marketed in accordance with FDA law.

Nevertheless, it is the Respondent that bears the burden of proving the purpose for its proposed import. Here, the Respondent has failed to meet this burden. Although the Respondent's representatives made assurances throughout the hearing that it intends to import ephedrine for use as a bronchodilator, the evidence in this record is inconsistent with that intent.

Specifically, the Respondent was generally unfamiliar with the bronchodilator ephedrine market. Indeed, Mr. Pierce testified that he conducted no market research on the use of an ephedrine/gauifenisen as a bronchodilator in the United States. [FOF 116].[19] Yet, he speculated that ''there is a need for an ephedrine bronchodilator in the United States . . . and that need is helping people with asthma.'' [FOF 92; *see also* 117]. As a result of Mr. Pierce's failure to research the basis for that conclusion, I found that most if not all of his testimony regarding why the Respondent's product would be purchased and used speculative. [FOF 121, n. 13].

Further, while Mr. Schiefelbein testified that the decision was made for the Respondent to sell its product because ''there may be a gap and a need in terms of . . . the asthma-related conditions,'' he otherwise offered no evidence as to the basis for his inference that such a gap may exist. [FOF 119]. In addition, despite Mr. Pierce's assertion that the bronchodilator marketplace was where the Respondent intended to enter, he could only name one competitor. [FOF 123]. Thus he demonstrated his lack of knowledge concerning the bronchodilator market. [*Id.*].

In total, such speculative conduct is not tantamount to substantial evidence that the Respondent is one who seeks to sell its product as a bronchodilator in the United States. [*See* Alvin Darby, M.D., 75 FR 26,993, 26,999 (DEA 2010) (citing NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) (''under the substantial evidence test, the evidence must do more than create a suspicion of the existence of the fact to be established.'')]. Accordingly, I find the Respondent has failed to establish that its product would be imported to provide for medical, scientific, or other legitimate purpose. Therefore the Respondent failed to carry its burden of proof under 952(a)(1).

b. Necessity

The Respondent has similarly failed to satisfy the second prong of the CSA's standard: that its product is necessary to meet the stated purpose. While the DEA has clarified that the term ''necessary'' is not meant to limit competition in a valid marketplace, the proponent must still establish such need exists. [*See Johnson Matthey,* 67 FR at 39,043]. Again, the Respondent has failed to meet that burden. Even assuming the Respondent had demonstrated that the intended purpose for its product was medical, use as a bronchodilator, it introduced no evidence as to the need

[18] 28 CFR 0.100 and 0.104.

[19] Although later in this decision I find Mr. Pierce's testimony regarding his failure to conduct market research incredible, to clarify, I do find credible his testimony that he failed to conduct such research on the bronchodilator market.

for any ephedrine/guaifenesin combination product in the United States for such use.[20] Indeed, it only speculated that persons would purchase its product for that purpose. [FOF 116, 117, 119, 120, 121, 123]. Similarly, despite the Respondent's recognition that a 12.5 mg ephedrine/400 mg guaifenisen OTC product is not currently available in the United States, it speculated that that product was necessary as an ''extra strength'' formula. [FOF 104, 105]. Such speculation, however, is not substantial evidence of need. [*See Darby,* 75 FR at 26,999].

Accordingly, this case is starkly different from earlier DEA rulemakings under 952(a)(1). In *Johnson Matthey,* 67 FR at 39,041, the Respondent introduced extensive expert testimony as to the need for narcotic raw materials (''NRMs'') in the United States. The expert concluded that NRMs are ''necessary to the United States medical community, as there are medical demands that cannot be met by non-opiate narcotics'' He clarified, ''opiate pharmaceuticals have a long history of medical use and the medical community continues to rely upon opium-derived alkaloids rather than synthetic opiate analgesics. These alkaloids and their semi-synthetic derivatives such as hydromorphone, hydrocodone, and oxycdone are critical therapeutic agents today.'' He concluded, ''that morphine, codeine, hydromorphone, hydrocodone and oxycodone are necessary to the United States medical community.'' [*Id.* at 39,042–3].

Here, the Respondent failed to present such evidence of need for its product. Therefore, based on this record, the DEA cannot similarly conclude that Respondent's import is necessary in the United States.[21]

Accordingly, as the Respondent has failed to prove by a preponderance of the evidence that its importation of an ephedrine/guaifenesin product is necessary for medical, scientific, or other legitimate purposes in the United States, it is my recommendation that the DEA not initiate rulemaking proceedings to permit such importation based on this record.

2. Adjudication

Consistent with 21 U.S.C. 958(c)(2)(A) ''The Attorney General shall register an applicant to import . . . a list I chemical unless the Attorney General determines that registration of the applicant is inconsistent with the public interest.'' [21 U.S.C. 958(c)(2)(A)]. Likewise, the public interest shall be determined consistent with the provisions in section 823(h). [21 U.S.C. 958(c)(2)(B)]. In making this determination, Congress directed that the Administrator consider the following:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance by the applicant with applicable Federal, State and local law;

(3) Any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) Such other factors as are relevant to and consistent with the public health and safety.

[21 U.S.C. 823(h)].

''These factors are considered in the disjunctive.'' [Joy's Ideas, 70 FR 33,195, 33,197 (DEA 2005)]. The Administrator may rely on any one or a combination of factors, and may give each factor the weight she deems appropriate in determining whether an application for registration should be denied. [*See e.g.,* David M. Starr, 71 FR 39,367 (DEA 2006); Energy Outlet, 64 FR 14269 (DEA 1999); Morall v. DEA, 412 F.3d. 165, 173–4 (DC Cir. 2005)]. The Administrator bears the burden of proof with regard to this adjudication. [21 C.FR. 1301.44].

a. 4 OTC's maintenance of effective controls against diversion into other than legitimate channels.

In line with DEA precedent, ''this factor encompasses a variety of considerations including, inter alia, the adequacy of physical security, the adequacy of recordkeeping, and whether a registrant is selling excessive quantities of the products.'' [CBS Wholesale Distributors, 74 FR 36,746, 36,749 (DEA 2009)]. In addition, under this factor, the DEA will consider whether the Respondent is serving an illegitimate market based on whether the sale of ephedrine products is inconsistent with the known legitimate market and known end-user demand for products of this type. [*See e.g.* Hilmes Distributing, Inc., 75 FR 49,951 (DEA 2010); Gregg & Sons Distributors, 74 FR 17,517 (DEA 2009)].

(1) Illegitimate Market

The illegitimate market that the Government purports to exist in this case, is distinct from that contemplated in other list I chemical cases. In prior cases, the DEA has expressed its concern about the sale of ephedrine into the ''grey market,'' i.e. to convenience stores and gas stations, as individuals seeking to convert ephedrine into methamphetamine typically seek out these retailers versus their larger national chain competitors. [Joys Ideas, 70 FR 33,195, 33,196 (DEA 2005) (describing the grey versus traditional market); *Gregg & Sons,* 74 FR at 17,523 (clarifying that such distribution is a factor and not a per se rule precluding a respondent's registration)]. The agency's concerns about grey market distribution are best summarized as follows: ''the illegal manufacture and abuse of methamphetamine pose a grave threat to this Nation. . . . Methamphetamine abuse has destroyed numerous lives and families, and has had a devastating impact on many communities. Moreover, because of the toxic nature of the chemicals used in making the drug, illicit methamphetamine laboratories create serious environmental harms.'' [*CBS Wholesale,* 74 FR at 36,747].

Here, the Government argues that the illegitimate market that the Respondent would serve is the market for ephedrine as a dietary supplement. [*See* Govt. Brief at 40 (stating that the Respondent's product is not ''destined for a legitimate market'')] [*Id.* at 44 (stating the Respondents marketing ''implied ephedrine's illicit use'')]. The FDA banned the sale of an ephedrine product as a dietary supplement in 2004, finding that such a product is ''adulterated.'' The FDA prohibits the adulteration of a drug as well as the introduction, delivery, or the receipt of an adulterated product in interstate commerce. 21 U.S.C. 331 (a)–(c). [*See* 69 FR 6,788 (FDA 2003); 21 C.F.R 119.1 (2010)]. The FDA further prohibits the marketing of a bronchodilator as a dietary supplement as such constitutes misbranding. [21 U.S.C. 331(b)]. Consequently, the dietary supplement

[20] Although, I recognize the Respondent's emphasis that the FDA approves marketing products similar to the Respondents' as bronchodilators in the United States, such is not evidence of actual need for that type of product.

[21] However, in the event that the Deputy Administrator wishes to take official notice of DEA publications regarding the importation of ephedrine then those publications may demonstrate some need for ephedrine in the United States for the purpose for which the Respondent proposes its import. [*See* 75 FR 4973, 4973–4 (DEA 2010) (stating ''ephedrine, pseudoephedrine, and phenylpropanolamine are used to produce drug products lawfully marketed under the Federal Food, Drug and Cosmetic Act (FFD&CA), many of which are prescription drugs . . . . These chemicals are also used in over-the-counter (OTC) drug products (lawfully marketed and distributed under the FFD&CA as a non-prescription drug''); 75 FR 79,407 (DEA 2010) (setting forth the established assessment of annual needs for 2011 for ephedrine in the United States)].

market for an ephedrine product remains an illegitimate market.[22]

The Government has provided no evidence of the actual legitimate market for ephedrine as a bronchodilator, other than general information as to market trends. [*See* FOF 9–12]. These generally downward market trends for ephedrine as an asthma medication, however, lend credence to the possibility that the Respondents in fact intend to sell its product as a dietary supplement. Yet, as it is impossible to ascertain whether the Respondent's importation would exceed legitimate demand, I cannot find on this record that the Respondent's product is thus likely to be diverted for such sale or for another illicit purpose, such as the conversion of it into methamphetamine. I am similarly unmoved to find the evidence in this record of market trend analysis weighs in favor of denying the application. [*See Greg & Sons,* 74 FR at 17,520; *CBS Wholesale,* 74 FR at 36,748].

(2) Security Measures

Whether the Respondent has adopted adequate controls against the diversion of its product for illicit use, i.e. its conversion into methamphetamine, in accordance with DEA regulation is also relevant to the ultimate issue of whether its registration is in the public's interest.

In 1995, DEA promulgated 21 C.F.R 1309.71(a), which directed that ''[a]ll applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of list I chemicals.'' This regulation, which remains in effect, further explained that ''[i]n evaluating the effectiveness of security controls and procedures, the Administrator shall consider:

(1) the type, form, and quantity of list I chemical handled;

(2) the location of the premises and the relationship such location bears on the security needs;

(3) the type of building construction comprising the facility and the general characteristics of the building or buildings;

(4) the availability of electronic detection and alarm systems;

(5) the extent of unsupervised public access to the facility;

(6) the adequacy of supervision over employees having access to List I chemicals;

(7) the procedures for handling business guests, visitors, maintenance personnel, and nonemployee service personnel in areas where List I chemicals are processed or stored; and

(8) the adequacy of the registrant's or applicant's systems for monitoring the receipt, distribution, and disposition of List I chemicals in its operations.''

[*Id.*].

The Government does not address the Respondent's security measures at its new location. The Government only refers to the Respondent's initial location and its failure to have proper security for the assertion that the Respondent's application has been ''fraught with problems.'' [Govt. Brief at 44].

The Respondent, however, argues that its security exceeds that required by the DEA for the storage of list I chemicals and therefore adequately protects against diversion. [*Id.* at 7–8].

i. Type, Form, and Quantity of Ephedrine

The Respondent intends to handle finished form combination ephedrine. The Respondent's proposed combinations include a 12.5 mg ephedrine/200 mg guaifenesin formula, a 25 mg ephedrine/400 mg guaifenesin formula, and a 12.5 mg ephedrine/400 mg guaifenesin formula. [FOF 104]. Although the Government argues that the Respondent's 12.5/400 mg guaifenesin formula is unprecedented, it does not argue nor has it produced any evidence that the Respondent's product includes an atypical or excessive amount of ephedrine. Accordingly, the Respondent's security measures do not merit a finding that it has inadequate diversion controls under this provision.

ii. Location of the Premises

Next, the Respondent's proposed location is in Phoenix, Arizona. [FOF 33]. The Respondent proposes to store the chemical in a large warehouse where other companies store their products. Due to this location, increased security measures may be required. However, the Respondent's procurement of a locked cage with limited access that is guard monitored during the day and alarm monitored with law enforcement notification at night, addresses these concerns. [FOF 143(a)].

iii. Building

The Respondent's building is secured by an eight foot fence topped with razor wire, as well as surveyed by guards during normal business hours. The Government has provided no evidence that such is inadequate security. [FOF 35].

iv. Availability of Electronic Detention and Alarm Systems

The Respondent's SOPs as well as the security document by Freeport Logistics demonstrate that the Respondent has electronic detection and alarm systems that are active at night and triggered to notify authorities in the event of a break-in. [FOF 35; 143(a)]. Once again, there is no evidence that such inadequately protects against diversion.

v. Extent of Unsupervised Public Access

Although the Respondent's chemicals would be stored in a warehouse where other companies could conceivably have access, the products are not otherwise accessible by the public. In addition, other companies' access to those products is prevented by the Respondent's SOP that those chemicals be stored in a locked cage to which only the Respondent's employees have access. [FOF 142(a)].

vi. Adequacy of Supervision Over Employees Having Access to Ephedrine

Although the Respondent has stated in its SOPs that only designated employees will have access to this cage, the Respondent's definition of employees is unusually broad. [*See* FOF 143(a) n. 16 (defining employees as ''all persons that perform *any* business related activity at the facility *or* regarding the ephedrine chemical drug product'')]. This concern is somewhat exacerbated by the fact that GFR was noted by Health Canada for a similar issue. [*See* FOF 57 (stating ''although only two GFR designated employees have access to raw bulk ephedrine (posses the physical keys), all 61 employees conceivably have access to ephedrine at other stages of the production (blending, bulk, tableting, packaging, as well as shipping)'')]. However, the Respondent will screen those employees by conducting background investigations and drug testing. The Respondent also will only allow designated employees access to the cage. There being no evidence to the contrary, the Respondent's security measures appear adequate under this provision. [FOF 143(a), (b)].

vii. Procedures For Handling Business Guests and Visitors

It is the warehouse's policy that ''all Freeport contractors for hire must show proof of background checks for anyone entering'' the facility. [FOF 35]. While neither the SOPs nor Freeport's security document address the Respondent's handling of other non-employees that enter the premises, the Respondent's policy to disallow non-designated employees access to the ephedrine cage

[22] It is important to note, however, that contrary to the Government's assertion, it is the sale, and not the use, of an ephedrine product as a dietary supplement that makes this market an illegitimate one. [*See* Govt. Brief at 39].

adequately addresses any concerns that may arise under this provision. [*See* FOF 143].

viii. Adequacy Of Systems For Monitoring The Receipt, Distribution And Disposition Of List I Chemicals In Its Operation.

As for the Respondent's measures under this provision, the Respondent's SOPs state that all schedule listed chemical products ''are immediately placed within the storage area upon receipt or returned to the storage area when not being transported.'' [FOF 143(a)(v)]. In addition, the SOPs state ''when temporarily stored in preparation for shipment outside of the caged area within Freeport Logistics, the product will be under constant observation by employees of the company and shipping containers will be unmarked, not indicated [sic] they contain [schedule listed chemicals] to guard against in-transit losses.'' [FOF 143(d)(v)]. Although the Respondent does not address its policy on disposition, the Government does not argue such warrants an adverse finding under this provision.

Therefore, the Government has not introduced any evidence that the Respondent has inadequate security at its current location. In addition, Mr. Mudri credibly testified that the Respondent's security measures are adequate to store controlled substances and thus exceed that required to store list I chemical products. [FOF 34, 35]. Although, as discussed *infra,* while I give less weight to other portions of Mr. Mudri's testimony, based on the remoteness in time of his most recent tenure at DEA, as well as the scope of his work for this agency, I find that his experience renders him more than qualified to testify as to the Respondent's compliance with security regulations that have been in effect, in relevant part, since 1995. [*See* 21 CFR 1309.71 (1995), FOF 34, n.8].

In addition, the relevant inquiry is whether the Respondent's current measures [23] are adequate, so that if it were granted a registration today, such would be consistent with the public's interest. [*See Mr. Checkout,* 75 FR 4,418 (DEA 2010) (finding that where the Government has only met its burden of proof regarding allegations that Respondent violated storage regulations for List I chemicals, and Respondent, after notification of violation, quickly corrected the infraction, the Respondent's registration is consistent with the public interest)].

Therefore, I find that factor I weighs in favor of granting the Respondent's application.

b. 4 OTC's Experience in Handling List I Chemicals and Compliance with Applicable Federal, State, and Local Law.

Under factor two, the agency will consider the Respondent's past compliance with applicable federal, state, and local law as well as the Respondent's experience in handling list I chemicals. It has been this agency's longstanding principle that past performance is the best indicator of future compliance. [*See* Alra Labs v. DEA, 54 F.3d 450, 452 (7th Cir. 1995)]. Therefore, where the Respondent has negative experience in handling list I chemicals, the agency will find this factor weighs in favor of revocation or denial of an application. [ATF Fitness Products, Inc., 72 FR 9,967, 9,968–9 (DEA 2007)]. In addition, where the Respondent has no experience in handling list I chemicals and cannot otherwise demonstrate compliance, the agency has denied the Respondent's registration. [Express Wholesale, 69 FR 62,086, 62,089 (DEA 2004) (lack of experience plus absence of an adequate business plan is significant); *Joys Ideas,* 70 FR at 33,198; (likewise); Matthew D. Graham, 67 FR 10,229, 10,230 (DEA 2002)].

(1) Respondent's Compliance With DEA Law.

i. Past Experience of Richard Pierce and Kevin McIsaac in Handling Ephedrine

Here, the Respondent is a new company and therefore has no experience in importing, handling, or distributing list I chemicals in the United States. [FOF 25]. Two of the Respondents owners, Kevin McIsaac and Richard Pierce, however, have held Canadian Class A Precursor Licenses. [FOF 39, 40, 47, 49, 96, 98]. The DEA has previously held that actions of a company's owners must be imputed to the company itself. [*See e.g.* Jacqueline Lee Pierson Energy Outlet, 64 FR 14,269, 14,271 (DEA 1999) (stating ''DEA has consistently held that a retail store operates under the controls of its owners, stockholders, or other employees, and therefore the conduct of these individuals is relevant in evaluating the fitness of an applicant for registration.'']. Therefore, to the extent that Canada's regulation of list I chemicals mirror the DEA's requirements, these individuals' track record of compliance with Canadian law is helpful in determining whether the Respondent could or would similarly comply with DEA law. [*See* FOF 23].

The Government has proven several violations of Canadian law by Kevin McIsaac. Specifically, McIsaac failed to lock the drawer that contained the key to the Class A precursor cage, failed to keep an ephedrine movement log, and failed to record cage ephedrine movements and the full name of person(s) accessing the cage. In addition, the agency found several ''suspicious transactions'' that McIsaac failed to record. [FOF 42]. The Government has provided circumstantial evidence [24] that those violations formed a basis for McIsaac's surrendering of its precursor license to Health Canada in 2008. [FOF 43]. The Government also produced evidence that McIsaac shipped ephedrine to addresses that could not be confirmed. [FOF 44]. However, while 4 Ever Fit's customer list included companies with U.S. addresses while Mr. McIsaac owned that product, the Government failed to prove that the 4 Ever Fit product was actually purchased by those U.S. customers during his ownership. [FOF 45, 46].

Although the Respondent argues that ''these transactions . . . were made before Richard Pierce acquired the brand name 4 Ever Fit in 2008'' that fact is entirely irrelevant to this inquiry. [Resp. Brief at 8]. There is no dispute that Kevin McIsaac has a current ownership interest in the Respondent.[25] Therefore, by entrusting the Respondent with a DEA registration, so would Kevin McIsaac be entrusted. Accordingly, Kevin McIsaac's history of non-compliance with Canadian law, and the significance of that non-compliance given his decision to then relinquish his Class A license, negatively impacts a finding that he could ensure the Respondent's compliance with DEA law.

Next, the Government introduced evidence that GFR violated Canada's precursor regulations. [*See* FOF 55]. Specifically, the Government introduced Health Canada's inspection report of the Respondent, which stated ''GFR does not maintain a precursor access log. No record exists tracking personnel accessing stock either within the precursor cage, or within the overall warehouse.'' [FOF 57].

[23] Although the Government assessed the Respondent's prior location, [FOF 28–32], I find that assessment nonpersuasive given the additional facts pertaining to the Respondent's current location and its SOPs regarding security issues.

[24] The Respondent asserts that Mr. McIsaac surrendered his precursor license because his company no longer needed the registration. Mr. Pierce already had such a registration. Yet I do note the violations as being relevant here.

[25] The actual percentage ownership interest that Mr. McIsaac has in 4OTC, however, is unclear. [*See* FOF 98].

The Respondent, however, argues that ''conduct amounts to activity that is legal within Canada'' and those were mere ''observations'' and not ''citations'' in Health Canada's report. [Resp. Brief at 9–10]. Not only is this argument unpersuasive, it is untrue. Canadian law clearly states ''[a] licensed dealer shall keep, at the licensed site, a record showing, for each day on which a person has access to a place at the site where a Class A precursor is kept, the person's name and the date of access.'' [Canada Department of Justice, Precursor Control Regulations, Sec. 85(3) (2010)]. Therefore, in failing to maintain such an access log, GFR violated Canadian law. In addition, the Government established that GFR had a shortage of 79,000 tablets of ephedrine, and the Respondent does not address corrective measures proposed to prevent this type of shortage in the future. [FOF 56; *See gen.* Resp. Brief].

Nevertheless, I do find it significant that despite this regulatory infraction and shortages, and after numerous inspections by Health Canada, GFR Pharma has maintained a precursor license in Canada. [FOF 58–60]. Indeed, the record reflects that GFR handles a significant amount of ephedrine and its business practices reflect that it has relevant experience in handling ephedrine in Canada and could similarly handle ephedrine in the United States, where the DEA's laws are similar. [*See* FOF 49–52].

The Government further introduced evidence of a custom's seizure of GFR's product to suggest that the Respondent's past experience in handling ephedrine weighed in favor of denying its registration. [FOF 61–73]. However, the illegal aspects of that shipment cannot be attributed to the Respondent; therefore, the Government's argument on this basis fails. While Better Bodies attempted import violated both Canadian and U.S. law,[26] and One Stop Nutrition's failure to self certify violated DEA law,[27] the Government has failed to prove that Mr. Pierce was aware that Better Bodies would attempt to ship its product into the United States or in any way encouraged or facilitated that shipment other than selling its product in accordance with normal business practices. [FOF 73]. Therefore, under these circumstances, the fact that Better Bodies purchased GFR's product and attempted to ship it illegally does not weigh in favor of denying this Respondent's registration.[28]

ii. Respondent's Lack of Experience in Complying with DEA's Laws

As there are some aspects of DEA law that are unique, the Respondent's lack of experience in complying with such law will weigh against its registration, unless it can otherwise demonstrate it is capable of compliance. [*See Express Wholesale,* 69 FR at 62,089; *Joy's Ideas,* 70 FR at 33,198].

Here, the Respondent introduced its Standard Operating Procedures into evidence to demonstrate it is capable of complying with DEA law. [FOF 143]. Therein, the Respondent addressed the DEA's sales and recordkeeping requirements, shipping policies, importation requirements, and employee hiring mandates. [FOF 143]. The Respondent introduced testimony by its consultant that these policies were ''a good start with regard to operations.'' [FOF 147]. However, I give less weight to Mr. Mudri's testimony regarding the Respondent's compliance with these laws, as opposed to the security laws discussed *supra,* as he has not acted for the DEA in over 10 years, and the law has developed since his departure. [FOF 34, n.8, FOF 147, n. 17]. Indeed, he was unaware of the DEA's new requirement that retail sellers of ephedrine via the internet must self-certify with the DEA. [FOF 148]. Nevertheless, the Government has introduced no evidence nor made any argument that the Respondent's SOPs inadequately address the DEA's requirements,[29] therefore, I do not find that its lack of experience in complying with DEA law weighs in favor of denying its registration under factors II and IV.

Accordingly, in total I do not find the Respondent's experience in handling ephedrine weighs against its registration. While I am troubled by Mr. McIsaac's violations of Canada's regulations as I find those to be more significant than GFR's, I am persuaded by the fact that Mr. Schiefelbein will oversee the day-to-day operations of the company and that Mr. McIsaac will have no participation in that operation. [FOF 97, 98]. Furthermore, while I take notice of GFR's Canadian regulatory infractions, Mr. Pierce otherwise has a good track record of compliance with Health Canada's laws. [FOF 58–60]. Therefore, this experience lends credence to the fact that he would similarly comply with the DEA's laws. [See *Gregg & Sons,* 74 FR at 17, 524 (finding that despite infractions, the Respondent's overall record of compliance indicated he could be entrusted with a DEA registration)]. In addition, the Respondent's lack of experience in complying with DEA law is mitigated by the adequacy with which its SOPs address these laws, and the Government's failure to challenge them.

(2) Compliance with FDA law

The Controlled Substances Act makes clear that the DEA is to consider the Respondent's compliance with all applicable federal law in ascertaining whether to grant it a DEA registration. [21 U.S.C. 823(h)(2); *See also* ATF Fitness, 72 FR 9,967, 9,969 (DEA 2007) (stating ''Congress did not limit the subject matter of the laws that are properly considered in determining whether an applicant's compliance record supports granting it a registration'')]. Indeed, where the Respondent has violated FDA law, the DEA has denied it a registration. [*See ATF Fitness,* 72 FR at 9,969 (where the FDA inspected the Respondent and found (1) it had in its possession products that were banned in 2004; (2) it had failed to comply with the FDA's recordkeeping requirements; and (3) it had possessed mislabeled products)]. Therefore, if the Respondent's proposed practice will violate FDA law, the Respondent's application could be denied.

However, in a recent decision, the Administrator emphasized that she is without authority to definitively interpret the Food Drug and Cosmetic Act, and will not do so. [Tony T. Bui, M.D., 75 FR 49,799, 49,989 (DEA 2010)]. The Administrator then applied this ruling in *Paul Weir Battershell, N.P.,* Doc. No. 09–51 (July 15, 2011) (unpublished). There, she refused to find a violation of FDA law by a nurse-practitioner's prescription of Human Growth Hormone (''HGH'') on the basis that ''whether Congress intended to criminalize all prescribing of HGH by non-physicians, including those who can lawfully prescribe under state law, is quintessentially one for judicial cognizance.'' [*Id.* at 33, n.27]. However, she also found that ''Respondent's plea agreement does . . . establish that he violated the FDCA by causing the introduction of a misbranded drug into interstate commerce.'' [*Id.*].

Accordingly, two principles emerge from the Administrator's rulings. First, if the Government presents evidence of

[26] Canada has exportation requirements similar to the DEA's and the DEA requires an entity to register with the DEA prior to importing a list I chemical into its territory. [*See* Health Canada, Precursor Control Regulations 6, 7, 69 (2010) (requiring an exporter of precursor chemicals to register with Health Canada; 21 U.S.C. 957(a) (2006) (requiring an importer of precursor chemicals to register with DEA); FOF 17].

[27] FOF 16, 70.

[28] However, as discussed further under Factor V, Mr. Pierce's reaction to that shipment does weigh against the Respondent's registration.

[29] [*See gen.* Govt. Brief].

conduct by the Respondent that is plainly inconsistent with FDA law, then it has met its burden of proof as to the Respondent's noncompliance. Similarly, if the Government establishes a violation through plea agreement, or other irrefutable evidence, such will also weigh negatively against its registration, specifically, a finding of the Respondent's ability to comply with the CSA. [*See id.; ATF Fitness,* 72 FR at 9,969]. If, however, the Government presents evidence of conduct that *may* be a violation of FDA law, yet would require the agency to render an interpretation of the FDCA to reach such a violation, then such exercise is beyond the jurisdiction of the DEA and will have no bearing on the Respondent's registration under Factor II.[30]

i. FDA Labeling and Misbranding Provisions

Here, the Government has established a clear violation by the Respondent of the FDA's misbranding provisions.

The Food and Drug Administration regulates over-the-counter medications by setting forth approved over the counter combinations and guidelines for labeling those products in an OTC Monograph. [*See* Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products for Over-the-Counter Human Use, Final Monograph, 51 FR 35326 (1986) (codified at 21 CFR part 341)]. If a product's label lacks required information or contains false or misleading information, the FDA deems that product misbranded. [21 U.S.C. 352(a),(c); FDA, Key Legal Concepts: ''Interstate Commerce,'' ''Adulterated,'' ''Misbranded'' 1 (Feb. 9, 2006) (stating ''under the FD&C the term 'misbranding' applies to . . . [f]alse or misleading information . . . [and l]ack of required information . . . .'')]. The FDA prohibits the introduction of a misbranded product into interstate commerce. [21 U.S.C. 331(b)].

The FDA Monograph requires an OTC bronchodilator[31] label to contain the following statement under the heading ''indications:'' ''For temporary relief of shortness of breath, tightness of chest, and wheezing due to bronchial asthma.'' [21 CFR 341.76(b), (b)(1]. The FDA emphasizes that including this language is not discretionary. [*Compare* 21 CFR 341.76(b)(1) with (b)(2).]. The Respondent's proposed packages do not contain the required language. [*See* FOF 127]. Therefore, as the Respondent's proposed packaging plainly violates the FDCA, such weighs in favor of denying its registration.[32]

In addition to requiring certain labeling, the FDA permits OTC bronchodilators to list other indications, as provided in § 371.76(b), as well as other truthful and nonmisleading statements describing those indications. [21 CFR 341.76(b)]. None of those indications include using the bronchodilator for weight loss or otherwise as a dietary supplement. [341.76(b)(2)]. In addition, the definition of ''label'' in the context of misbranding has been construed broadly by federal courts to include a circular, pamphlet, brochure, newsletter, or other piece of literature that helps sell a product, even if it did not accompany the drug when traveling across state lines. [*See* V.E. Irons, Inc. v. United States, 244 F. 2d 34 (1st Cir. 1957); United States v. 47 Bottles, More or Less, Jenasol Rj Formula 60, 320 F.2d 564 (3d Cir. 1963)].

Here, the Respondent's packaging originally contained a logo naming the product ''4 Ever Fit.'' Although this label raises concerns under the FDA's proscription against nonmisleading statements on the products packaging, the Respondent's current label, which lacks that logo, does not. [*See* FOF 112, 127]. Therefore, I find whether, under these circumstances, there would have been a violation of this regulation is moot in light of the Respondent's new measures.

In addition, whether the Respondent's internet sale of its product further violates the FDCA's misbranding provisions, depends entirely on how it intends to market its product. Despite numerous assertions to the contrary, there is substantial evidence that the Respondent would market its product similar to its stated competitor, Vasapro. [*See* FOF 143(d)(i) (assertion of compliance with FDA law); FOF 102, 111, 124 (asserting the product will only be sold as a bronchodilator and will be sold separate from 4EF USA's products); FOF 91 (asserting its only competitor is Vasapro)]. The marketing of Vasapro's product raises serious misbranding concerns. [FOF 92 (marketing of Vasapro as weight loss and dietary supplement)]. Nevertheless, whether the FDA would deem such statements misleading and, accordingly, such marketing misbranding is an issue beyond the ken of this tribunal, and therefore will not weigh in favor of nor against the Respondent's registration.

In light of the foregoing, I find that the Respondent's practice will plainly violate the FDCA's required labeling for indications by not stating that the product is ''for temporary relief of shortness of breath, tightness of chest, and wheezing due to bronchial asthma.'' However, I do not find, *in toto,* that the Respondent's level of compliance with FDA law indicates that the Respondent is either unwilling or unable to comply with the CSA.

[30] Here, although the Government urges throughout its brief that the Respondent's practice would violate FDA law, the Government has failed to point out *any* specific provision of FDA law that the Respondent's proposed practice would violate. [(*See* Govt. Brief)].

[31] The FDA's monograph on OTC medications currently approves the use of ephedrine as a primary ingredient in OTC bronchodilators. [21 CFR 341.16]. Although in 1995, the agency promulgated a proposed rule to remove ephedrine from the monograph, the agency has not taken final action on that rule. [*See* 60 FR 38,643]. Similarly, although the FDA issued a proposed rule in 2005, eliminating combination ephedrine/guaifenesin from the OTC Monograph, due to its determination of the limited clinical effectiveness of guaifenesin in the treatment of asthma, the FDA has yet to issue a final ruling on that regulation. [*See* 70 FR 40,232 (2005)]. Therefore, under the FDA's current monograph, the Respondent's product may be sold over the counter as bronchodilator medications. [*See* FOF 104; 21 CFR 341.18 (listing guaifenesin as the expectorant active ingredient included in the cough-cold monograph)].

[32] The FDA Monograph requires OTC bronchodilators to have a ''statement of identity.'' Accordingly, the Monograph requires the label to contain ''the established name of the drug, if any, and identifies the product as a ''bronchodilator.'' [21 U.S.C. 341.76]. Here, the Respondent's label contains the word ''bronchodilator,'' albeit inconspicuously, under the term ''Purpose'' and under the section labeled ''Drug Facts.'' [FOF 127(b)(1)]. However as this language is not plainly inconsistent with FDA's regulation, I do not find the Respondent's proposed ''statement of identity'' weighs in favor of denying its registration.

The OTC Monograph further requires bronchodilator products be labeled with the following warnings and directions for use:

(1) ''Do not use this product unless a diagnosis of asthma has been made by a doctor.''

(2) ''Do not use this product if you have heart disease, high blood pressure, thyroid disease, diabetes, or difficulty in urination due to enlargement of the prostate gland unless directed by a doctor.''

(3) ''Do not use this product if you have ever been hospitalized for asthma or if you are taking any prescription drug for asthma unless directed by a doctor.''

(4) *Drug interaction precaution.* ''Do not use if you are now taking a prescription monoamine oxidase inhibitor (MAOI) (certain drugs for depression, psychiatric, or emotional conditions, or Parkinson's disease), or for 2 weeks after stopping the MAOI drug. If you do not know if your prescription drug contains an MAOI, ask a doctor or pharmacist before taking this product.''

(i) ''Do not continue to use this product, but seek medical assistance immediately if symptoms are not relieved within 1 hour or become worse.''

(ii) ''Some users of this product may experience nervousness, tremor, sleeplessness, nausea, and loss of appetite. If these symptoms persist or become worse, consult your doctor.''

(iii)''Adults and children 12 years of age and over: Oral dosage is 12.5 to 25 milligrams every 4 hours, not to exceed 150 milligrams in 24 hours, or as directed by a doctor. Do not exceed recommended dose unless directed by a doctor. Children under 12 years of age: Consult a doctor.''

[21 CFR 341.76]. The Respondent's proposed packaging label contains that language verbatim. [*See* FOF 127].

(3) State Law

Similar to the FDA's laws, the Respondent has no experience in complying with the complex state regulatory and statutory schemes that apply to ephedrine. [FOF 125; *See* FOF 129]. Some states have scheduled ephedrine as a controlled substance, therefore prohibiting the Respondent from selling its product in that state. [*Id.*]. Other states require licensure. [*Id.*].

Although the Respondent has assured this tribunal throughout its DEA application, the hearing, and in its post-hearing brief that it intends to comply with all laws governing its practice,[33] the Respondent has also demonstrate a general unfamiliarity with state laws. For example, the Respondent failed to recognize the need for a non-drug wholesale permit in Arizona, the state where it intends to store ephedrine, prior to the hearing in this matter, when the Government's counsel highlighted the need for it on cross-examination. [FOF 137, 138].

In addition, deficiencies in its SOPs fail to provide further assurance that it is capable of compliance with state law. For example, the SOPs' requirements for the State of Michigan indicate that a state license is required; they list the maximum number of packages that may be sold per transaction as 2; state the maximum number of grams of the 4 OTC product that can be sold per month as 9 and cannot exceed a 25/400 ephedrine/guaifenesin combination; indicate the Respondent must keep records for 6 months; and further provide the minimum age for purchase is 18, and both photo ID and signature are required. However, the SOPs completely overlook the fact that the state of Michigan expressly prohibits the internet sale of ephedrine into its territory. [FOF 134]. Therefore, if the Respondent was to rely on its SOPs and sell its products through the internet to customers in Michigan, it would violate state law.

In addition, under the bulleted outline for New Hampshire, the SOPs only state ''comply with federal regulations.'' When Mr. Pierce was questioned about this SOP he agreed that he could be pretty certain that New Hampshire would allow 4 OTC to sell ephedrine into the state, so long as they were compliant with federal regulations. [FOF 132]. Later in the SOPs, however, on the chart for state requirements, there is a ''Y'' under the column marked ''state license'' corresponding to the state of New Hampshire. [FOF 132]. While the Government has not provided evidence of whether in fact New Hampshire does require such licensure, this internal inconsistency raises compliance concerns if this document were to be relied on by the Respondent. Furthermore, the Respondent's expert, Mr. Mudri, was unfamiliar with state law and therefore could not ensure the Respondent's compliance. [FOF 139].

The inadequacies of the Respondents SOPs on state law underscore my concerns with its registration. Although the Respondent argues that it has completed its due diligence in investigating their legal obligations, they also state that their SOPs are a ''work in progress'' and that they are relying on their counsel to bring them further into compliance. [FOF 135–36]. However, as the Respondent points out, its application has been pending before this agency since 2007. [FOF 26]. Despite that amount of time, the Respondent has yet to ascertain how to conduct its internet business within the confines of state law. Therefore, I am not persuaded that it would be able to do so in the immediate future, and I find accordingly that its lack of experience, and failure to otherwise demonstrate compliance with state law, weighs against its registration.

c. Respondent's Prior Conviction Record Under Federal or State Laws Relating To Controlled Substances Or To Chemicals Controlled Under Federal or State Law;

Neither the Respondent, nor its owners have been convicted of an offense related to controlled substances or list I chemicals, therefore, this factor weighs neither in favor nor against granting the Respondent's registration. [*See* Dewey C. Mackay, M.D., 75 FR 49,956, 49,973 (DEA 2010) (stating ''while a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry'') (citing Jayam Krishna-Iyer, 74 Fed Reg. 459, 461 (DEA 2009); Edmund Chein, M.D., 72 FR 6,580, 6,593 n.22 (DEA 2007)].

d. Other Factors Affecting the Public's Interest

The DEA will consider factors I through IV as well as other factors that affect the public interest to determine whether the Respondent's registration is consistent with the public interest. The agency has clarified the bounds of the considerations it makes under Factor V, however, in stating it is limited ''to those where there is ''a substantial relationship between the conduct and the CSA's purpose of preventing drug abuse and diversion.'' [*Bui,* 75 FR at 49,988; *See also ATF Fitness,* 72 FR at 9,967].

Here, the Government does not allege that the Respondent's registration will be used as a conduit for the diversion of ephedrine into the clandestine manufacture of methamphetamine. Indeed, the threat of diversion created by the Respondent's registration is the internet sale of its products. However, the DEA does not outlaw the sale of ephedrine via the internet and has instead promulgated regulations setting daily and monthly sales limits and requiring records of all sales to address this issue. [*See* 21 U.S.C. 1310, et seq. and 1314.100 et seq.]. Therefore, the Respondent's internet sales alone do not weigh in favor of denial of its registration under this factor.

The Government argues, however, that the Respondent's registration is inconsistent with the public interest, due to its failure to disclose a list of customers at the time of registration. During the hearing Ms. Klett testified on behalf of the DEA that the agency requires a customer list along with an importer registration because the Department of Justice urged the DEA to implement new protocols to better regulate precursors to methamphetamine production. [FOF 18]. Therefore, once the DEA receives the customer list, it verifies each customer to ensure that the importer's product will not be diverted. [FOF 19, 20]. That directive is not in the CMEA, however, nor has the DEA promulgated that requirement into regulation. [*See* 21 U.S.C. 971 (requiring an importer to disclose to whom the list I chemical will be transferred upon import (not application)) and 21 CFR Part 1313)]. Also, the DEA has no such requirement for domestic mail order sales, inferably because the DEA regulates those sales by imposing daily and monthly sales limits to protect against diversion. [*See* FOF 13–15; 21 CFR 1314.01–13.14.155 (2011)].

Here, however, the DEA's policies behind requiring a customer list are satisfied by the Respondent acting as both an importer *and* a retailer; therefore, the Government's argument for denial of the Respondent's application on this basis fails. Here, unlike most other importers, the Respondent does not intend to sell its product to companies who will then distribute it to end users. Instead the

[33] FOF 97, 150; Respt. Brief at 11 (stating ''4 OTC has expended a great amount of time and resources in ensuring that its intended activities relating to the import and distribution of ephedrine containing products within the United States will be in compliance with all pertinent federal and state laws'').

Respondent intends to both import and distribute its product to end users. [FOF 22, 24]. In that regard, the Respondent has already provided the DEA with a customer list of its retail distributors, as it has only one: itself. In addition, not only has the DEA verified that customer, it has specifically investigated that customer to ensure that it has protocols in place to protect against diversion. [FOF 28, 29, 34]. Accordingly, both the purpose behind the CMEA and DEA's policy are met by the disclosure that the Respondent has made in this case, and the Respondent's failure to disclose its retail customers does not otherwise weigh against its registration. [*See* FOF 3 (describing purpose behind CMEA); FOF 19 (describing purpose behind requiring customer list)].[34]

However, under this factor, I find Mr. Pierce's reaction to the Better Bodies shipment into the United States, and his general credibility weigh in favor of denial. When asked whether he still conducted business with Better Bodies after the customs seizure, he stated, ''[w]e have no control over them buying the product from us and shipping it without our knowledge. [Health Canada] . . . has been informed.'' [FOF 73]. However, GFR *does* have control over to whom it sells its product, and GFR's decision to continue to supply a company that has illegally handled its product reflects a general apathy towards diversion. As Mr. Pierce is the President and CEO of GFR, and the principle owner of the Respondent, this factor raises a concern that he would similarly turn a blind eye to the misuse of the Respondent's product in the United States.

Furthermore, Mr. Pierce's testimony throughout this proceeding raises credibility concerns and consequently concerns about whether he could be trusted with a DEA registration. Specifically, during the hearing Mr. Pierce testified that he conducted no market research on the Respondent prior to investing in it, yet was certain that there was a need for its product in the United States as a bronchodilator and that individuals would purchase it over the internet for that purpose. [FOF 116–122]. I find the assertion that he invested in the Respondent blindly, in light of his extensive business experience at GFR and other companies, highly unlikely. [*See* FOF 47, 77, 81, 87]. In addition, I find it more likely that he was aware of the market for ephedrine as a dietary supplement in the United States based on Mr. Schiefelbein's experience selling it as such prior to the FDA's ban in 2004, as well as his own experience selling it for that purpose in Canada. [FOF 83, 53, 54]. Such knowledge likely motivated his investment, a fact he made efforts to conceal during this proceeding. Such lack of candor weighs against the Respondent's registration. [Net Wholesale, 70 FR 24,626, 24,627 (DEA 2005)].

V. Conclusion and Recommendation

In light of the foregoing, I find that the Government has proved by a preponderance of the evidence that the Respondent's registration would be inconsistent with the public interest due to its current inability to comply with state and FDA law, its lack of candor, and its attitude towards diversion. Once the Government has met its burden of proof, the burden shifts to the Respondent to establish that its Registration would otherwise be consistent with the public interest.

Here, the Respondent argues that its registration is consistent with the public interest because, among other reasons, it has completed its due diligence to ensure compliance with all applicable laws and regulations. [*See* Resp. Brief at 10 (stating ''4 OTC has expended a great amount of time and resources in ensuring that its intended activities relating to the import and distribution of ephedrine containing products within the United States will be in compliance with all pertinent federal and state laws'')]. However, it is clear that the Respondent has yet to grasp those laws, because its stated practices stand contrary to them, and its SOPs otherwise fail to adequately address them.

Accordingly, it is my recommendation that the Respondent's application be denied.

Dated: September 22, 2011

/s/Gail A. Randall

Administrative Law Judge

[FR Doc. 2012–14307 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

[34] However, to ensure that the Respondent doesn't evade the customer list disclosure laws by acting as both a retailer and a distributor, I would recommend that if the Respondent's registration is granted, it should be limited to importation and retail sales *only* and the Respondent should be precluded from selling its product to other distributors without first coordinating such registration modification with the DEA. [FOF 117, 118].

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–13]

Donald Brooks Reece II, M.D.; Dismissal of Proceeding

On November 19, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Donald Brooks Reece II, M.D. (Respondent), of Morehead City, N.C. The Order proposed the revocation of Respondent's DEA Certificate of Registration as a practitioner, and the denial of any pending application to renew or modify the registration, on the ground that Respondent's registration is inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f). Show Cause Order at 1 (citing 21 U.S.C. 824(a)(4)).

Respondent requested a hearing on the allegations and an Administrative Law Judge (ALJ) conducted a hearing on May 9–13, 2011. Thereafter, on September 30, 2011, the ALJ issued his decision, which concluded that ''Respondent's continued registration would be fully inconsistent with the public interest,'' and recommended that his registration be revoked and that any pending application to renew or modify his registration be denied. ALJ at 33. Respondent filed Exceptions, and on November 21, 2011, the ALJ forwarded the record to this Office for final agency action.[1]

Upon review of the record, it was noted that Respondent's registration was due to expire on April 30, 2012. GX 1. Because in the absence of a timely renewal application, Respondent's registration would expire, *see* 5 U.S.C. 558(c), pursuant to 5 U.S.C. 556(e) and 21 CFR 1316.59(e), I have taken official notice of Respondent's registration record with the Agency.[2] According to

[1] On February 9, 2012, the Government also filed a pleading entitled: ''Notice To The Administrator Regarding State Authority,'' with attachments. Therein, the Government observed that Respondent had entered into a Consent Order with the North Carolina Medical Board, pursuant to which he agreed to cease the practice of medicine or surgery in North Carolina, the State in which he held his DEA registration. Notice to the Administrator Regarding State Authority, at 3. This Order was effective on December 8, 2011. *Id.,* Attachment 5, at 6.

[2] In accordance with the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding-even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). To

this record, Respondent has not filed a renewal application. I therefore find that Respondent's registration has expired.

Under DEA precedent, ''if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke.'' *Ronald J. Riegel,* 63 FR 67132, 67133 (1998); *see also Thomas E. Mitchell,* 76 FR 20032, 20033 (2011). Moreover, in the absence of an application (whether timely filed or not), there is nothing to act upon. Accordingly, because Respondent has allowed his registration to expire and has not filed either a renewal or a new application, this case is now moot and will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I hereby order that the Order to Show Cause issued to Donald Brooks Reece II, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: June 2, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–14315 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Lipomed, Inc.

By Notice dated April 2, 2012, and published in the **Federal Register** on April 12, 2012, 77 FR 21998, Lipomed, Inc., One Broadway, Cambridge, Massachusetts 02142, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
4-methyl-N-methylcathinone (1248)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
Fenethylline (1503)	I
Aminorex (1585)	I
4-Methylaminorex (cis isomer) (1590)	I
Gamma Hydroxybutyric Acid (2010)	I
Methaqualone (2565)	I
Mecloqualone (2572)	I
1-Pentyl-3-(1-naphthoyl)indole (7118)	I
1-Butyl-3-(1-naphthoyl)indole (7173)	I
1-[2-(4-Morpholinyl)ethyl]-3(1-naphthoyl) indole (7200)	I
Alpha-ethyltryptamine (7249)	I
Ibogaine (7260)	I
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-	I
hydroxycyclohexyl]-phenol (7297)	I
5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (7298)	I
Lysergic acid diethylamide (7315)	I
2,5-Dimethoxy-4-(n)-propylthiophenethylamine (7348)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Parahexyl (7374)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390)	I
4-Bromo-2,5-dimethoxyamphetamine (7391)	I
4-Bromo-2,5-dimethoxyphenethylamine (7392)	I
4-Methyl-2,5-dimethoxyamphetamine (7395)	I
2,5-Dimethoxyamphetamine (7396)	I
2,5-Dimethoxy-4-ethylamphetamine (7399)	I
3,4-Methylenedioxyamphetamine (7400)	I
5-Methoxy-3,4-methylenedioxyamphetamine (7401)	I
N-Hydroxy-3,4-methylenedioxyamphetaimine (7402)	I
3,4-Methylenedioxy-N-ethylamphetamine (7404)	I
3,4-Methylenedioxymethamphetamine (7405)	I
4-Methoxyamphetamine (7411)	I
5-Methoxy-N-N-dimethyltryptamine (7431)	I
Alpha-methyltryptamine (7432)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
5-Methoxy-N,N-diisopropyltryptamine (7439)	I
N-Ethyl-1-phenylcyclohexylamine (7455)	I
1-(1-Phenylcyclohexyl)pyrrolidine (7458)	I
1-[1-(2-Thienyl)cyclohexyl]piperidine (7470)	I
1-[1-(2-Thienyl)cyclohexyl]pyrrolidine (7473)	I
N-Ethyl-3-piperidyl benzilate (7482)	I
N-Methyl-3-piperidyl benzilate (7484)	I
N-Benzylpiperazine (7493)	I
3,4-methylenedioxypyrovalerone (7535)	I
3,4-methlenedioxy.N-methylcathinone (7540)	I

allow Respondent the opportunity to refute the facts of which I take official notice, Respondent may file a motion for reconsideration within fifteen calendar days of service of this order which shall commence on the date this order is mailed.

Drug	Schedule
Alphaprodine (9010)	I
Acetyldihydrocodeine (9051)	I
Benzylmorphine (9052)	I
Codeine-N-oxide (9053)	I
Cyprenorphine (9054)	I
Desomorphine (9055)	I
Etorphine (except HCl) (9056)	I
Codeine methylbromide (9070)	I
Dihydromorphine (9145)	I
Difenoxin (9168)	I
Heroin (9200)	I
Hydromorphinol (9301)	I
Methyldesorphine (9302)	I
Methyldihydromorphine (9304)	I
Morphine methylbromide (9305)	I
Morphine methylsulfonate (9306)	I
Morphine-N-oxide (9307)	I
Myrophine (9308)	I
Nicocodeine (9309)	I
Nicomorphine (9312)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Acetorphine (9319)	I
Acetylmethadol (9601)	I
Allylprodine (9602)	I
Alphacetylmethadol except levo-alphacetyl-methadol (9603)	I
Alphamethadol (9605)	I
Dioxaphetyl butyrate (9621)	I
Dipipanone (9622)	I
Ethylmethylthiambutene (9623)	I
Etonitazene (9624)	I
Etoxeridine (9625)	I
Furethidine (9626)	I
Hydroxypethidine (9627)	I
Ketobemidone (9628)	I
Levomoramide (9629)	I
Levophenacylmorphan (9631)	I
Morpheridine (9632)	I
Noracymethadol (9633)	I
Norlevorphanol (9634)	I
Normethadone (9635)	I
Norpipanone (9636)	I
Phenadoxone (9637)	I
Phenampromide (9638)	I
Phenoperidine (9641)	I
Piritramide (9642)	I
Proheptazine (9643)	I
Properidine (9644)	I
Racemoramide (9645)	I
Trimeperidine (9646)	I
Phenomorphan (9647)	I
Propiram (9649)	I
Tilidine (9750)	I
Para-Flouorofentanyl (9812)	I
3-Methylfentanyl (9813)	I
Acetyl-alpha-methylfentanyl (9815)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Lisdexamfetamine (1205)	II
Phenmetrazine (1631)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Nabilone (7379)	II
1-Phenylcyclohexylamine (7460)	II
Phencyclidine (7471)	II
4-Anilino-N-phenethyl-4-piperidine (8333)	II
Phenylacetone (8501)	II
Alphaprodine (9010)	II
Anileridine (9020)	II
Cocaine (9041)	II
Codeine (9050)	II

Drug	Schedule
Etorphine HCl (9059)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Levomethorphan (9210)	II
Levorphanol (9220)	II
Isomethadone (9226)	II
Meperidine (9230)	II
Meperidine intermediate-B (9233)	II
Metazocine (9240)	II
Methadone (9250)	II
Methadone intermediate (9254)	II
Metopon (9260)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273)	II
Morphine (9300)	II
Thebaine (9333)	II
Dihydroetorphine (9334)	II
Levo-alphacetylmethadol (9648)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Phenazocine (9715)	II
Piminodine (9730)	II
Racemethorphan (9732)	II
Racemorphan (9733)	II
Alfentanil (9737)	II
Remifentanil (9739)	II
Sufentanil (9740)	II
Carfentanil (9743)	II
Tapentadol (9780)	II
Bezitramide (9800)	II
Fentanyl (9801)	II

The company plans to import analytical reference standards for distribution to its customers for research and analytical purposes.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Lipomed, Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971.

DEA has investigated Lipomed, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: June 4, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–14162 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Rhodes Technologies

By Notice dated April 17, 2012, and published in the **Federal Register** on April 26, 2012, 77 FR 24984, Rhodes Technologies, 498 Washington Street, Coventry, Rhode Island 02816, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances:

Drug	Schedule
Opium, raw (9600)	II
Poppy Straw Concentrate (9670)	II

The company plans to import the listed controlled substances in order to bulk manufacture controlled substances in Active Pharmaceutical Ingredient (API) form.

The company distributes the manufactured APIs in bulk form to its customers.

Comments and requests for hearings on applications to import narcotic raw material are not appropriate. 72 FR 3417(2007)

DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Rhodes Technologies to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Rhodes Technologies to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an

importer of the basic classes of controlled substances listed.

Dated: June 5, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–14163 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application; Apertus Pharmaceuticals, LLC

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 27, 2012, Apertus Pharmaceuticals, LLC, 331 Consort Drive, St Louis, Missouri 63011, made application to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Alfentanil (9737)	II
Remifentanil (9739)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The company plans to manufacture small quantities of the listed controlled substances to make reference standards which will be distributed to their customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 13, 2012.

Dated: June 4, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–14165 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Pilot Surveys of Employee Voice in the Coal Mining Industry

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored new information collection request (ICR) titled, ''Pilot Surveys of Employee Voice in the Coal Mining Industry,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before July 12, 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*, on the day following publication of this notice 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 DOL–MSHA, Office of Management and Budget, Room 10235, New Executive Office Building, 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 DOL seeks OMB approval to conduct an information collection as part of a pilot study to determine how to measure workers' voice in mining workplaces under the jurisdiction of the MSHA. The DOL working definition for voice in the workplace is workers' ability to access information on their rights in the workplace, their understanding of those rights, and their ability to exercise these rights without fear of discrimination or retaliation. Voice in the workplace is a key outcome goal for the Secretary of Labor and part of her vision of good jobs for everyone. A separate concurrent effort will measure workers' voice in workplaces under the jurisdiction of the Wage and Hour Division and Occupational Safety and Health Administration. Measuring voice among miners, however, poses unique data collection challenges, including implementing a survey in a setting that feels non-threatening to mine workers, and asking questions in a format that reflects mining community cultures and practices. The DOL seeks to perform a pilot study to investigate the efficacy of different data collection methods and to develop a survey instrument that is appropriate for the mining community. The primary research question is what measures of voice and perceived non-compliance, combined with what modes of data collection, could be best used to track MSHA's worker-protection outreach activity? This ICR covers a set two or three small-scale pilot data collections. Data collection for this effort will employ two or three strategies: (1) Submission of paper questionnaires to be filled out by individual mine workers during offsite mining-related training sessions, (2) recruitment of miners by using radio and paper advertisements, and (3) a mail or phone survey. The DOL is currently assessing the feasibility of each method prior to implementation. For example, implementation of a phone or mail survey will depend on the availability of a valid list of miners. A maximum of 125 respondents will be surveyed under each collection mode for 375 maximum respondents for the overall effort.

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. For additional information, see the related notice published in the **Federal Register** on January 19, 2012 (77 FR 2760).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB ICR Reference Number 201205–1219–001. 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: DOL–MSHA.

Title of Collection: Pilot Surveys of Employee Voice in the Coal Mining Industry.

OMB ICR Reference Number: 201205–1219–001.

Affected Public: Individuals or households.

Total Estimated Number of Respondents: 375.

Total Estimated Number of Responses: 375.

Total Estimated Annual Burden Hours: 156.

Total Estimated Annual Other Costs Burden: $0.

Dated: June 6, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–14210 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–22–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Job Corps Process Study

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) proposal titled, ''Job Corps Process Study,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before July 12, 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,* on the day following publication of this notice 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 DOL–ETA, Office of Management and Budget, Room 10235, New Executive Office Building, 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: 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 ETA is requesting clearance for an information collection to conduct site visits to Job Corps centers and a survey of center directors for a process study of the Job Corps program. The study seeks to explore and identify associations between centers' practices and their performance on a range of relevant outcomes, including gains in foundational academic skills during students' time on center; completion of relevant academic and career technical programs; attainment of credentials; and placement and earnings after students leave the center. The ETA expects that the study's results can be used for peer-to-peer learning, technical assistance, and development of performance measurement systems.

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. For additional information, see the related notice published in the **Federal Register** on January 18, 2012 (77 FR 2567).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB ICR Reference Number 201201–1205–003. 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: DOL–ETA.

Title of Collection: Job Corps Process Study.

OMB ICR Reference Number: 201201–1205–003.

Affected Public: Federal Government, Individuals or Households, and Private Sector—Businesses or other for-profits and Not-for profit institutions.

Total Estimated Number of Respondents: 528.

Total Estimated Number of Responses: 528.

Total Estimated Annual Burden Hours: 552.

Total Estimated Annual Other Costs Burden: $0.

Dated: June 5, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–14171 Filed 6–11–12; 8:45 a.m.]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Employment and Training Administration; Proposed Information Collection Request for the ETA 538 and ETA 539, Weekly Initial and Continued Claims; Comment Request for Extension Without Change

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data about the Unemployment Insurance Weekly Claims data collection, which expires September 30, 2012.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before August 13, 2012.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov*. A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

The ETA 538 and ETA 539 reports are weekly reports which contain information on initial claims and continued weeks claimed. These figures are important economic indicators. The ETA 538 provides information that allows national unemployment claims information to be released to the public five days after the close of the reference period. The ETA 539 contains more detailed weekly claims information and the state's 13-week insured unemployment rate which is used to determine eligibility for the Extended Benefits program.

II. Review Focus

The Department 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 minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Extension Without Changes

Title: Weekly Initial and Continued Claims.

OMB Number: 1205–0028.

Affected Public: State Workforce Agencies.

Form(s): ETA 538, ETA 539.

Frequency: Weekly.

Total Responses: 104 (52 weekly responses for each of the two reports).

Average Time per Response: 30 minutes per submittal for the ETA 538, 50 minutes per submittal for the ETA 539.

Estimated Total Burden Hours

ETA 538 53 States × 52 reports × 30 min. = 1378 hours

ETA 539 53 States × 52 reports × 50 min. = 2297 hours

Total Burden = 3675 hours

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Signed in Washington, DC, on this 5th day of June, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–14173 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,275]

Pfizer Therapeutic Research, Formerly Known as Warner Lambert Company, Pfizer Worldwide Research & Development Division, Antibacterials Research Unit, Pharmacokinetics, Dynamics and Metabolism Department, Antibacterial Chemistry Department, Analytical Chemistry and Material Management Department Groton, CT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Revised Determination of Reconsideration of Eligibility to Apply for Worker Adjustment Assistance on December 2, 2011, applicable to workers of Pfizer Therapeutic Research, Pfizer Worldwide Research & Development Division, Antibacterial Research Unit, Groton, Connecticut (Pfizer-ARU).

At the request of the state workforce office, the Department reviewed the certification for workers of Pfizer-ARU.

The Department has determined that other units at the Groton, Connecticut facility operate in conjunction with Pfizer-ARU and have experienced worker separations related to the shift of in the supply of services to a foreign country.

In order to ensure proper worker group coverage, the Department is amending the worker group identified in the certification for TA–W–80,275 to include the Pharmacokinetics, Dynamics and Metabolism Department, Antibacterial Chemistry Department, and Analytical Chemistry and Material Management Department located in Groton, Connecticut.

The amended notice applicable to TA–W–80,275 is hereby issued as follows:

All workers of Pfizer Therapeutic Research, formerly known as Warner Lambert Company, Pfizer Worldwide Research & Development Division, Antibacterial Research Unit, Pharmacokinetics, Dynamics and Metabolism Department, Antibacterial

Chemistry Department, and Analytical Chemistry and Material Management Department, Groton, Connecticut, who became totally or partially separated from employment on or after July 8, 2010 through December 2, 2013, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 25th day of May, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–14195 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,459]

Roseburg Forest Products Composite Panels Division Missoula, Montana; Notice of Negative Determination on Reconsideration

On March 14, 2012, the Department of Labor (Department) issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Roseburg Forest Products, Composite Panels Division, Missoula, Montana (subject firm). The Department's Notice was published in the **Federal Register** on March 26, 2012 (77 FR 17524). The workers are engaged in employment related to the production of particleboard.

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination based on the findings that worker separations were not attributable to either increased imports by the subject firm or its declining customers of particleboard (or articles like or directly competitive with particleboard), or a shift/acquisition of the production of particleboard (or articles like or directly competitive with particleboard) to/from a foreign country by the workers' firm.

In the request for reconsideration, a company official alleged that workers at the subject firm were impacted by increased import competition of particleboard similar to workers at three other subject firm facilities who are eligible to apply for Trade Adjustment Assistance (Louisville, Missouri; Orangeburg, South Carolina; and Russellville, South Carolina).

During the reconsideration investigation, the Department reviewed and confirmed information collected during the initial investigation and collected additional information from the subject firm.

The reconsideration investigation findings confirmed that neither the subject firm nor its major declining customers increased imports of articles like or directly competitive with particleboard in the period under investigation. Additionally, the reconsideration investigation findings confirmed that the subject firm did not shift the production of particleboard (or a like or directly competitive article) to a foreign country or acquire the production of such articles from a foreign country.

After careful review of the request for reconsideration, previously-submitted information, and information obtained during the reconsideration investigation, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After careful review, I determine that the requirements of Section 222 of the Act, 19 U.S.C. 2272, have not been met and, therefore, deny the petition for group eligibility of to apply for adjustment assistance, in accordance with Section 223 of the Act, 19 U.S.C. 2273.

Signed in Washington, DC, on this 25th day of May, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–14194 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Announcement Regarding States Triggering ''Off'' in the Emergency Unemployment Compensation 2008 Program and the Federal-State Extended Benefits Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Announcement regarding states triggering ''off'' in the Emergency Unemployment Compensation 2008 (EUC08) Program and the Federal-State Extended Benefits (EB) Program.

The U.S. Department of Labor (Department) produces trigger notices indicating which states qualify for both EB and EUC08 benefits, and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notices covering state eligibility for these programs can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.*

The following changes have occurred since the publication of the last notice regarding states' EB and EUC08 trigger status:

- Based on data released by the Bureau of Labor Statistics on March 30, 2012, the three month average, seasonally adjusted total unemployment rate in Connecticut fell below the 8.0% rate required to remain ''on'' in a high unemployment period (HUP) within the EB program. Claimants in this state were eligible for up to 20 weeks of benefits through April 21, 2012, but starting April 22, 2012, the maximum potential entitlement in the EB program for this state decreased from 20 weeks to 13 weeks.
- Based on data released by the Bureau of Labor Statistics on March 30, 2012, as well as revisions to prior year data released on February 29, 2012, Alabama, Delaware, Georgia, Indiana, Maryland, and Washington no longer meet one of the criteria to remain ''on'' in EB, i.e., having their current three month average, seasonally adjusted total unemployment rate be at least 110% of one of the rates from a comparable period in one of the three prior years. This triggered these states ''off'' EB and the end of the payable period for these states in the EB program was the week ending April 21, 2012.
- Although some states have triggered ''off'' of EB, they are currently triggered ''on'' to Tier 4 of the EUC08 program. Under Public Law 112–96, new Tier 4 claimants in states that are triggered

''off'' in the EB program, but are triggered ''on'' in Tier 4 of the EUC08 program, may be eligible for augmentation from a maximum potential duration of 6 weeks to a maximum potential duration of 16 weeks for a limited period of time. Details on this potential benefit augmentation can be found at *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5271* starting at the bottom of Page 4. States that were affected by this provision were Arizona, Kentucky, Michigan, Mississippi, Oregon, Puerto Rico, South Carolina, and Tennessee. In addition, Georgia and Indiana were eligible to provide for up to 16 weeks of Tier 4 benefits for new Tier 4 claimants starting April 22.

- Based on data released by the Bureau of Labor Statistics on March 30, 2012, the three month average, seasonally adjusted total unemployment rate for Virginia fell below the threshold to remain ''on'' in Tier 3 of the EUC08 program. As a result, the current maximum potential entitlement in this state in the EUC08 program decreased from 47 weeks to 34 weeks. The week ending April 21, 2012 was the last week in which EUC08 claimants in this state could exhaust Tier 2, and establish Tier 3 eligibility. Under the phase-out provisions, claimants in this state can receive any remaining entitlement they have in Tier 3 after April 21, 2012.
- Based on data released by the Bureau of Labor Statistics on March 30, 2012, the three month average, seasonally adjusted total unemployment rates for Tennessee and Washington fell below the threshold to remain ''on'' in Tier 4 of the EUC08 program. As a result, the current maximum potential entitlement in these states for the EUC08 program decreased from 53 weeks to 47 weeks. The week ending April 21, 2012 was the last week in which EUC08 claimants in these states could exhaust Tier 3, and establish Tier 4 eligibility. Under the phase-out provisions, claimants in these states can receive any remaining entitlement they have in Tier 4 after April 21, 2012.

Information for Claimants

The duration of benefits payable in the EUC08 program, and the terms and conditions under which they are payable, are governed by Public Laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, 111–205, 111–312, 112–96, and the operating instructions issued to the states by the Department. The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the Department.

In the case of a state concluding an EB period, the State Workforce Agency will furnish a written notice of any change in potential entitlement to each individual who had established eligibility for EB (20 CFR 615.13(c)(4)). Persons who believe they may be entitled to benefits under the EB or EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4524, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by email: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 5th day of June, 2012.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2012–14174 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Announcement Regarding States Triggering ''Off'' in the Emergency Unemployment Compensation 2008 Program and the Federal-State Extended Benefits Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Announcement regarding states triggering ''off'' in the Emergency Unemployment Compensation 2008 (EUC08) Program and the Federal-State Extended Benefits (EB) Program.

The U.S. Department of Labor (Department) produces trigger notices indicating which states qualify for both EB and EUC08 benefits, and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notices covering state eligibility for these programs can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.*

The following changes have occurred since the publication of the last notice regarding states' EB and EUC08 trigger status:

- Based on data released by the Bureau of Labor Statistics on April 20, 2012, California, Colorado, Connecticut, Florida, Illinois, North Carolina, Pennsylvania, and Texas no longer meet one of the criteria to remain ''on'' in EB, i.e., having their current three month average, seasonally adjusted total unemployment rate be at least 110% of one of the rates from a comparable period in one of the three prior years. This triggers these states ''off'' EB and the end of the payable period in the EB program for these states will be the week ending May 12, 2012.
- Based on data released by the Bureau of Labor Statistics on April 20, 2012, the three month average, seasonally adjusted total unemployment rate for Indiana fell below the threshold to remain ''on'' in Tier 4 of the EUC08 program. As a result, the current maximum potential entitlement in this state in the EUC08 program will decrease from 53 weeks to 47 weeks. The week ending May 12, 2012 will be the last week in which EUC claimants in this state can exhaust Tier 3, and establish Tier 4 eligibility. Under the phase-out provisions, claimants in this state can receive any remaining entitlement they have in Tier 4 after May 12, 2012.
- Based on data released by the Bureau of Labor Statistics on April 20, 2012, the three month average, seasonally adjusted total unemployment rate for Oklahoma fell below the threshold to remain ''on'' in Tier 3 of the EUC08 program. As a result, the current maximum potential entitlement in this state in the EUC08 program will decrease from 47 weeks to 34 weeks. The week ending May 12, 2012 will be the last week in which EUC claimants in this state can exhaust Tier 2, and establish Tier 3 eligibility. Under the phase-out provisions, claimants in this state can receive any remaining entitlement they have in Tier 3 after May 12, 2012.
- With data released for the 13 week period ending April 21, 2012, Alaska's 13-week Insured Unemployment Rate (IUR) has fallen below the 6% threshold to remain ''on'' in EB and Tier 4 of EUC. This triggers Alaska ''off'' EB and the end of the payable period for this state in the EB program will be the week ending May 12, 2012. This same data also causes Alaska to fall below the threshold to remain ''on'' in Tier 4 of the EUC08 program. As a result, the current maximum potential entitlement in this state in the EUC08 program will decrease from 53 weeks to 47 weeks. The week ending May 12, 2012 will be the last week in which EUC claimants in this state can exhaust Tier 3, and

establish Tier 4 eligibility. Under the phase-out provisions, claimants in this state can receive any remaining entitlement they have in Tier 4 after May 12, 2012.

• Claimants in states that are triggered ''on'' to Tier 4 of the EUC08 program, but not triggered ''on'' to EB, may be eligible for augmentation of their Tier 4 entitlement from a maximum potential duration of 6 weeks to a maximum potential duration of 16 weeks. Details on this can be found at the bottom of the page for this link: *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5271*. States currently affected by this provision are Arizona, Georgia, Indiana, Kentucky, Michigan, Mississippi, Oregon, Puerto Rico, and South Carolina. States that will be eligible to provide for up to 16 weeks of Tier 4 benefits for new Tier 4 claimants starting May 13 are California, Florida, Illinois, and North Carolina.

Information for Claimants

The duration of benefits payable in the EUC08 program, and the terms and conditions under which they are payable, are governed by Public Laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, 111–205, 111–312, 112–96, and the operating instructions issued to the states by the Department. The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the Department.

In the case of a state concluding an EB period, the State Workforce Agency will furnish a written notice of any change in potential entitlement to each individual who had established eligibility for EB (20 CFR 615.13(c)(4)). Persons who believe they may be entitled to benefits under the EB or EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4524, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by email: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 5th day of June, 2012.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2012–14172 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket Number OSHA–2012–0020]

Whistleblower Protection Advisory Committee

AGENCY: Occupational Safety and Health Administration (OSHA), DOL.

ACTION: Request for nominations to serve on the Whistleblower Protection Advisory Committee.

SUMMARY: The Assistant Secretary of Labor for Occupational Safety and Health requests nominations for membership on the Whistleblower Protection Advisory Committee (WPAC).

DATES: Nominations for WPAC must be submitted (postmarked, sent, transmitted, or received) by July 27, 2012.

ADDRESSES: You may submit nominations for WPAC, identified by the OSHA Docket No., OSHA–2012–0020, by any of the following methods:

Electronically: Nominations, including attachments, may be submitted electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

Facsimile: If your nomination and supporting materials, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger or courier service: Submit your nominations and supporting materials to the OSHA Docket Office, Docket No. OSHA–2012–0020, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). 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.–4:45 p.m., e.t.

Instructions: All nominations and supporting materials for WPAC must include the Agency name and docket number for this **Federal Register** notice (Docket No. OSHA–2012–0020). Because of security-related procedures, submitting nominations by regular mail may result in a significant delay in their receipt. Please contact the OSHA Docket Office for information about security procedures for submitting nominations by hand delivery, express delivery, and messenger or courier service. For additional information on submitting nominations see the ''Public Participation—Submission of Nominations and Access to Docket'' heading in the **SUPPLEMENTARY INFORMATION** section below.

Submissions in response to this **Federal Register** notice, including personal information provided, are posted without change at http://www.regulations.gov. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and dates of birth.

Docket: To read or download submissions 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 are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through that Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT: Sandra Dillon, Director, Office of the Whistleblower Protection Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3610, 200 Constitution Avenue NW., Washington, DC., 20210; telephone (202) 693–2199, this is not a toll-free number; email address *Dillon.Sandra@dol.gov.*

SUPPLEMENTARY INFORMATION: The Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) invites interested individuals to submit nominations for membership on the Whistleblower Protection Advisory Committee (WPAC).

WPAC's duties are solely advisory and consultative. WPAC advises, consults with, and makes recommendations to the Secretary of Labor (Secretary) and the Assistant Secretary on matters relating to the improvement of the fairness, efficiency, effectiveness and transparency of OSHA's whistleblower protection activities. In particular, WPAC will make recommendations regarding the development and/or implementation of:

• Better customer service to both workers who raise complaints and employers who are the subject of investigations;

• Improvement in the investigative and enforcement process, and the training of OSHA investigators;

• Improvement of regulations governing OSHA investigations;

• Cooperative activities with federal agencies responsible for areas also covered by the whistleblower protection statutes enforced by OSHA; and

• Other matters concerning the fairness, efficiency and transparency of OSHA's whistleblower investigations as identified by the Secretary or the Assistant Secretary.

WPAC is a continuing advisory body and operates in compliance with the Occupational Safety and Health Act of 1970, as well as the Federal Advisory Committee Act (5 U.S.C. App. 2) and its implementing regulations (see ''Authority and Signature'' section).

WPAC is comprised of 12 voting members, all of whom the Secretary appoints. The composition of WPAC and categories of new members to be appointed are as follows:

• Four management representatives who are employers or are from employer associations in industries covered by one or more of the whistleblower laws;

• Four labor representatives who are workers or from worker advocacy organizations in industries covered by one or more of the whistleblower laws;

• One member represents the State Plan states; and

• Three public representatives from colleges, universities, non-partisan think tanks, and/or other entities, that have extensive knowledge and expertise on whistleblower statutes and issues.

In addition, the committee will also have three Ad hoc/Ex-officio/Non-voting members who are regular government employees from other Federal Government agencies. They will be selected by the Secretary from Departments that have jurisdiction over statutes with whistleblower provisions, for example, the Securities and Exchange Commission (Sarbanes-Oxley Act), or the Department of Transportation's Federal Aviation Administration (Wendell H. Ford Aviation Investment and Reform Act for the 21st Century), or the Federal Railroad Administration (Federal Railroad Safety Act).

The members serve two-year terms, unless a member becomes unable to serve, resigns, ceases to be qualified to serve, or is removed by the Secretary. If a vacancy occurs before a term expires, the Secretary may appoint a new member who represents the same interest as the predecessor to serve for the remainder of the unexpired term. The committee meets at least two times a year.

Any individual or organization may nominate one or more qualified persons for membership. Nominations must include the nominee's name, contact information, and current occupation or position. The nomination also must include a resume of the nominee's background, experience and qualifications. The nomination must identify the category that the candidate is qualified to represent, and include a statement that the nominee is aware of the nomination and is willing to serve on WPAC for a two-year term.

WPAC members will be selected on the basis of their experience, knowledge, and competence in the field of whistleblower protection. The information received through this nomination process, in addition to other relevant sources of information, will assist the Secretary in appointing members to serve on WPAC. In selecting WPAC members, the Secretary will consider individuals nominated in response to this **Federal Register** notice, as well as other qualified individuals.

Before candidates are appointed, the U.S. Department of Labor (Department) conducts a basic background check using publically available, Internet-based sources.

The Department is committed to bringing greater diversity of thought, perspective and experience to its advisory committees. In addition, the Department encourages nominees of all races, genders, ages, disabilities and sexual orientations to apply.

Public Participation—Submission of Nominations and Access to Docket

You may submit nominations (1) Electronically at *http://www.regulations.gov*, 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 docket number for this **Federal Register** notice, (OSHA Docket No. OSHA 2012–0020). You may supplement electronic nominations by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit the documents to the OSHA Docket Office (see **ADDRESSES** section above). The additional materials must clearly identify your electronic nomination by name, date, and docket number so OSHA can attach them to your nomination. Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of nominations. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office (see **ADDRESSES** section above).

Submissions are posted without change at *http://www.regulations.gov.* OSHA therefore cautions individuals 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 *http://www.regulations.gov.* 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. 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.

Electronic copies of this **Federal Register** document are available at: *http://www.regulations.gov.* This document, as well as news releases and other relevant information, also are available at OSHA's Web site at *http://www.osha.gov.*

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App. 2), its implementing regulations (41 CFR Part 102–3), chapter 1600 of Department of Labor Management Series 3 (Mar. 17, 2008), Secretary of Labor's Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012), and the Secretary of Labor's authority to administer the whistleblower provisions found in Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c); the Surface Transportation Assistance Act, 49 U.S.C. 31105; the Asbestos Hazard Emergency Response Act, 15 U.S.C. 2651; the International Safe Container Act, 46 U.S.C. 80507; the Safe Drinking Water Act, 42 U.S.C. 300j–9(i); the Federal Water Pollution Control Act, 33 U.S.C. 1367; the Toxic Substances Control Act, 15 U.S.C. 2622; the Solid Waste Disposal Act, 42 U.S.C. 6971; the Clean Air Act, 42 U.S.C. 7622; the

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610; the Energy Reorganization Act, 42 U.S.C. 5851; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121; the Sarbanes-Oxley Act, 18 U.S.C. 1514A; the Pipeline Safety Improvement Act, 49 U.S.C. 60129; the Federal Railroad Safety Act, 49 U.S.C. 20109; the National Transit Systems Security Act, 6 U.S.C. 1142; the Consumer Product Safety Improvement Act, 15 U.S.C. 2087; Section 1558 of the Affordable Care Act, P.L. 111–148; the Consumer Financial Protection Act of 2010, 12 U.S.C.A. 5567, the Seaman's Protection Act, 46 U.S.C. 2114, and Section 402 of the FDA Food Safety Modernization Act, Public Law 111–353.

Signed at Washington, DC, on June 6, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–14170 Filed 6–11–12; 8:45 am]

BILLING CODE 4510–26–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting; Notice

DATE AND TIME: The Operations & Regulations Committee of the Legal Services Corporation's Board of Directors will meet June 18, 2012. The meeting will commence at 2:30 p.m., Eastern Daylight Time, and will continue until the conclusion of the Committee's agenda.

LOCATION: F. William McCalpin Conference Center, Legal Services Corporation Headquarters, 3333 K Street NW., Washington, DC 20007.

PUBLIC OBSERVATION: Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below but are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold. From time to time, the presiding Chair may solicit comments from the public.

CALL–IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1–866–451–4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please immediately ''MUTE'' your telephone.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda.
2. Approval of minutes of the Committee's meeting of April 16, 2012.
3. Consider and act on revisions to Board's contributions protocol.
   - Victor M. Fortuno, General Counsel
4. Consider and act on Rulemaking Options Paper on possible amendment to LSC's regulation on Subgrants, 45 CFR Part 1627.
   - Mark Freedman, Senior Assistant General Counsel
5. Consider and act on comments on proposed rulemaking on termination procedures, enforcement, and suspension procedures.
   - Staff Report on the Proposed Rulemaking
     - Mark Freedman, Senior Assistant General Counsel
   - Public Comment on the Proposed Rulemaking
6. Public comment.
7. Consider and act on other business.
8. Consider and act on motion to adjourn the meeting.

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

NON–CONFIDENTIAL MEETING MATERIALS: Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC Web site, at *http://www.lsc.gov/board-directors/meetings/board-meeting-notices/non-confidential-materials-be-considered-open-session.*

ACCESSIBILITY: LSC complies with the American's with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov,* at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: June 8, 2012.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2012–14455 Filed 6–8–12; 4:15 pm]

BILLING CODE 7050–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before July 12, 2012. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: *request.schedule@nara.gov.*

Fax: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, National Records Management Program (ACNR), National Archives and Records

Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Forest Service (N1–95–10–4, 313 items, 303 temporary items). Records related to various programs throughout the agency, including general correspondence, reports, studies, plans, audits, case files, interagency, intergovernmental, and commercial agreements. Proposed for permanent retention are administrative history files, national resource planning policy files, program development and planning files, heritage program management files, habitat planning and evaluation surveys, geologic resources files, and watershed protection and flood protection reports.

2. Department of Agriculture, Forest Service (N1–95–12–6, 1 item, 1 temporary item). Records pertaining to fees collected for campground permits.

3. Department of Agriculture, Rural Development (N1–572–09–4, 1 item, 1 temporary item). Master files of an electronic information system containing copies of loan documents.

4. Department of Commerce, National Telecommunications and Information Administration (N1–417–12–1, 1 item, 1 temporary item). Federal spectrum certification applications, including requests for frequency assignments, geographic area information, operating units, requirement criteria, and equipment lists.

5. Department of Defense, National Reconnaissance Office; Department of Defense, National Geospatial-Intelligence Agency; Department of Defense, National Security Agency (N1–525–11–1, 11 items, 7 temporary items). Routine policy and administrative records associated with a multi-mission ground station including site level committee records, visitor arrangement files, briefing materials, charitable fund-raising records, and standard operating instructions. Proposed for permanent retention are site-specific policy and agreement files and historical files on the establishment of the ground station.

6. Department of Health and Human Services, Indian Health Service (DAA–0513–2012–0004, 11 items, 11 temporary items). Records include administrative files, correspondence, notices, and memoranda relating to Health Insurance Portability and Accountability Act privacy requests.

7. Department of Justice, Agency-wide (DAA–0060–2011–0009, 6 items, 5 temporary items). Records of internal administrative guidance and directives. Proposed for permanent retention are record copies of all orders signed by the Attorney General.

8. Department of Justice, Federal Bureau of Investigation (N1–65–11–25, 2 items, 2 temporary items). Records relating to the administration of aircraft and other surveillance equipment in support of agency operations.

9. Department of Justice, Federal Bureau of Investigation (N1–65–11–29, 4 items, 4 temporary items). Records relating to testing and eligibility for agent and police officer promotions.

10. Department of Justice, Justice Management Division (N1–60–09–43, 8 items, 8 temporary items). Content and management records for the agency's internal Web site.

11. Department of State, Bureau of International Organizations (DAA–0059–2011–0014, 2 items, 1 temporary item). Records of the Office of Policy, Regional, and Functional Organizations, including working files and copies of memorandums, briefing books, and issue papers. Proposed for permanent retention are records establishing the office.

12. Department of State, Bureau of Diplomatic Security (DAA–0059–2011–0016, 6 items, 6 temporary items). Records of the Office of Information Security documenting the approval and use of secure facilities, visitor and access requests, correspondence related to contractors, and master files of electronic information systems used to track security incidents and security requirements.

13. Department of State, Office of the Under Secretary for Public Diplomacy and Public Affairs (N1–59–11–12, 1 item, 1 temporary item). Master files of an electronic information system used for recording and tracking short-term missions and diplomatic activities worldwide.

14. Department of Transportation, Federal Railroad Administration (N1–399–07–21, 19 items, 14 temporary items). General Law Division records including routine legislative and litigation case files, general subject files, and attorney working files. Proposed for permanent retention are legislation, subject and litigation case files designated as landmark as well as historical program files.

15. Department of Transportation, Federal Railroad Administration (N1–399–08–2, 17 items, 14 temporary items). Safety Law Division records including routine legislative and litigation case files, subject files, closed

civil cases, enforcement files, attorney working files, copies of discovery documents, and master files of an electronic information system used to track workflow. Proposed for permanent retention are legislation and litigation case files and subject files designated as landmark.

16. Department of Transportation, Federal Railroad Administration (N1–399–08–9, 3 items, 2 temporary items). Master files of an electronic information system used for processing post-accident toxicological testing. Proposed for permanent retention are master files of an electronic information system containing toxicology test results and related accident information.

17. Department of Transportation, Federal Railroad Administration (N1–399–08–12, 33 items, 26 temporary items). Office of Railroad Safety records including routine administrative requests, audit case files, copies of published court dockets, subject files, and safety related program files for railroad administration. Proposed for permanent retention are case files of major accident investigations, safety records for Amtrak operations, high-speed rail records, merger records, recommendations, orders, and advisories.

18. Department of Transportation, Federal Transit Administration (N1–408–11–22, 4 items, 3 temporary items). Organization background files and copies of organization planning files. Proposed for permanent retention are a master set of organization planning files.

19. Department of Transportation, Federal Transit Administration (N1–408–11–23, 3 items, 2 temporary items). Case files for directives regarding one-time or temporary instructions and directives from other agencies. Proposed for permanent retention are case files for directives regarding policy, organization, and procedures.

20. Department of the Treasury, Financial Crimes Enforcement Network (N1–559–11–1, 15 items, 7 temporary items). Records of the Office of the Director, including case tracking files, development files for publications and reports, and web maintenance records. Proposed for permanent retention are program files, organization files, policy records, public affairs records, and publications.

21. Department of the Treasury, Financial Management Service (N1–425–09–5, 7 items, 6 temporary items). Records of transactions and administration of collections, payments, and claims. Proposed for permanent retention are significant policy files governing these activities.

22. Administrative Office of the United States Courts, United States Courts of Appeals (N1–276–09–1, 2 items, 1 temporary item). Non-electronic administrative correspondence for appellate case files. Proposed for permanent retention are non-electronic case files.

23. Administrative Office of the United States Courts, United States District Courts (N1–21–11–2, 1 item, 1 temporary item). Electronic sound recordings of criminal case sentencing filed with the clerk of court in lieu of transcripts.

24. Federal Communications Commission, Agency-wide (N1–173–09–2, 1 item, 1 temporary item). Master files of an electronic information system used to report on trends in communications service quality.

25. Nuclear Regulatory Commission, Office of Federal and State Materials and Environmental Management Programs and Office of Nuclear Material Safety and Safeguards (N1–431–08–3, 4 items, 4 temporary items). Master files and outputs of an electronic information system used to manage information about sealed sources and devices licensed by the agency.

26. Nuclear Regulatory Commission, Office of Federal and State Materials and Environmental Management Programs (N1–431–08–6, 4 items, 4 temporary items). Master files and outputs of an electronic information system used to manage information about nationally tracked sealed sources licensed by the agency.

27. Nuclear Regulatory Commission, Regional Offices (N1–431–08–14, 2 items, 2 temporary items). Master files and outputs of electronic information systems that maintain information on safety status and incidents at licensed nuclear facilities.

28. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards (N1–431–08–17, 4 items, 3 temporary items). Master files and outputs of an electronic information system used to manage information about containers licensed for use in transporting nuclear material. Proposed for permanent retention are reports that describe licensed containers.

29. Nuclear Regulatory Commission, Office of Nuclear Regulatory Research (N1–431–08–21, 3 items, 2 temporary items). Master files and status reports of an electronic information system used to track generic safety issues at licensed nuclear facilities. Proposed for permanent retention are formal reports relating to these issues.

30. Nuclear Regulatory Commission, Office of Federal and State Materials and Environmental Management Programs (N1–431–09–1, 3 items, 1 temporary item). Master files of an electronic information system used to maintain information about incidents involving nuclear materials, including equipment failure, lost materials, leaking of sealed sources, exposure of individuals to radiation, and misadministration of medical doses of radiation. Proposed for permanent retention are quarterly and annual reports on the incidents.

Dated: May 31, 2012.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2012–14222 Filed 6–11–12; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Arts Advisory Panel Meeting

AGENCY: National Endowment for the Arts, National Foundation on the Arts and Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that nine meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW, Washington, DC, 20506 as follows (ending times are approximate):

Media Arts (application review): By teleconference. This meeting will be closed.

Dates: July 9, 2012; 11:00 a.m. to 1:00 p.m. EDT.

Arts Education (application review): In room 730. This meeting will be closed.

Dates: July 10, 2012; 9:00 a.m. to 5:00 p.m. EDT.

Theater/Musical Theater (application review): In room 627. This meeting will be closed.

Dates: July 10–11, 2012, from 9:00 a.m. to 5:30 p.m. EDT on July 10th and from 9:00 a.m. to 3:00 p.m. EDT on July 11th.

Theater/Musical Theater (application review): In room 627. This meeting will be closed.

Dates: July 12–13, 2012, from 9:00 a.m. to 5:30 p.m. EDT on July 12th and from 9:00 a.m. to 3:00 p.m. EDT on July 13th.

Arts Education (application review): In room 627. This meeting will be closed.

Dates: July 17, 2012. From 9:00 a.m. to 5:00 p.m. EDT.

Music (application review): In room 714. This meeting will be closed.

Dates: July 17–18, 2012; 9:00 a.m. to 5:30 p.m. EDT on July 17th and 9:00 a.m. to 4:30 p.m. EDT on July 18th.

Music (application review): In room 714. This meeting will be closed.

Dates: July 19, 2012. From 9:00 a.m. to 5:00 p.m. EDT.

Museums (application review): In room 716. This meeting will be closed.

Dates: July 17–18, 2012. From 9:00 a.m. to 5:30 p.m. EDT on July 17th and 9:00 a.m. to 5:30 p.m. EDT on July 18th.

Museums (application review): In room 716. This meeting will be closed.

Dates: July 19, 2012. From 9:00 a.m. to 5:30 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

SUPPLEMENTARY INFORMATION: The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 15, 2012, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Dated: June 7, 2012.

Kathy Plowitz-Worden,

Panel Coordinator, National Endowment for the Arts.

[FR Doc. 2012–14240 Filed 6–11–12; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On May 2, 2012, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on June 6, 2012 to: Steven D. Emslie—Permit No. 2013–003.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 2012–14149 Filed 6–11–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0280]

Agency Information Collection Activities: Submission for the Office of Management and Budget Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on February 9, 2012 (77 FR 6827).

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* NRC Form 7, ''Application for NRC Export or Import License, Amendment, Renewal or Consent Request(s).''

3. *Current OMB approval number:* 3150–0027.

4. *The form number if applicable:* NRC Form 7.

5. *How often the collection is required:* On occasion; for each separate export, import, amendment, and renewal license or consent request.

6. *Who will be required or asked to report:* Any person in the U.S. who wishes to export or import (a) nuclear material and equipment or byproduct material subject to the requirements of a specific license; (b) amend a license; (c) renew a license, and (d) for requests for consent to export Category 1 quantities of byproduct material.

7. *An estimate of the number of annual responses:* 120.

8. *The estimated number of annual respondents:* 120.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 288.

10. *Abstract:* Persons in the U.S. wishing to export or import nuclear material or equipment, or byproduct material requiring a specific authorization, amend or renew a license, or wishing to request consent to export Category 1 quantities of byproduct material must file an NRC Form 7 application. The NRC Form 7 application will be reviewed by the NRC and by the Executive Branch, and if applicable statutory, regulatory, and policy considerations are satisfied, the NRC will issue an export, import, amendment, renewal license or notice of consent.

The public may examine and have copied for a fee, publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by July 12, 2012. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0027), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *Chad_S_Whiteman@omb.eop.gov* or submitted by telephone at 202–395–4718.

The NRC Clearance Officer is Tremaine Donnell, 301–415–6258.

Dated at Rockville, Maryland, this 5th day of June, 2012.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2012–14166 Filed 6–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0131]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from May 17, 2012 to May 30, 2012. The last biweekly notice was published on May 29, 2012 (77 FR 31655).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and is publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0131. You may submit comments by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0131. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0131 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0131.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0131 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS, and the NRC does not edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination; any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a

hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The

E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by email at *MSHD.Resource@nrc.gov*, or by a toll-free call at 1–866 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*.

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Maricopa County, Arizona

Date of amendment request: March 8, 2012.

Description of amendment request: The amendments would eliminate the use of the term CORE ALTERATIONS throughout the Technical Specifications (TSs). The proposed amendment incorporates changes reflected in Technical Specification Task Force (TSTF) Change Traveler TSTF–471–A, Revision 1, ''Eliminate use of term CORE ALTERATIONS in ACTIONS and Notes.'' The U.S. Nuclear Regulatory Commission (NRC) staff reviewed and approved TSTF–471 by letter dated December 7, 2006 (ADAMS Accession No. ML062860320). The changes are consistent with NUREG–1432, ''Standard Technical Specifications—Combustion Engineering Plants,'' Revision 4 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12102A165).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change eliminates the use of the defined term CORE ALTERATIONS from the Technical Specifications. CORE ALTERATIONS are not an initiator of any accident previously evaluated except a fuel handling accident. The revised Technical Specifications that protect the initial conditions of a fuel handling accident also require the suspension of movement of irradiated fuel assemblies. Suspending movement of irradiated fuel assemblies protects the initial condition of a fuel handling accident and, therefore, suspension of CORE ALTERATIONS is not required. Suspension of CORE ALTERATIONS does not provide mitigation of any accident previously evaluated. Therefore, CORE ALTERATIONS do not affect the initiators of the accidents previously evaluated and suspension of CORE ALTERATIONS does not affect the mitigation of the accidents previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

No new or different accidents result from utilizing the proposed change. The changes do not involve a physical modification of the plant (i.e., no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Only two accidents are postulated to occur during plant conditions where CORE ALTERATIONS may be made: a fuel handling accident and a boron dilution

accident. Suspending movement of irradiated fuel assemblies prevents a fuel handling accident. Also requiring the suspension of CORE ALTERATIONS is a redundant requirement to suspending movement of irradiated fuel assemblies and does not increase the margin of safety. CORE ALTERATIONS have no effect on a boron dilution accident. Core components are not involved in the initiation or mitigation of a boron dilution accident and the SHUTDOWN MARGIN limit is based on assuming the worse-case configuration of the core components.

Therefore, CORE ALTERATIONS have no effect on the margin of safety related to a boron dilution accident.

The NRC staff has reviewed the licensee's analysis and, based on that review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: Michael G. Green, Senior Regulatory Counsel, Pinnacle West Capital Corporation, P.O. Box 52034, Mail Station 8695, Phoenix, Arizona 85072–2034.

NRC Branch Chief: Michael T. Markley.

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit 2, New London County, Connecticut

Date of amendment request: April 13, 2012.

Description of amendment request: The proposed amendment would revise the Millstone Power Station, Unit 2 (MPS2) Technical Specification (TS) requirements related to diesel fuel oil testing consistent with NUREG–1432, Rev. 3.1, ''Standard Technical Specifications, Combustion Engineering Plants,'' December 1, 1995, and NRC approved Technical Specification Task Force (TSTF) TSTF–374, ''Revision to TS 5.5.13 and Associated TS Bases for Diesel Fuel Oil,'' Revision 0.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the *Code of Federal Regulations* (10 CFR) 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes modify the TS requirements related to diesel fuel oil testing consistent with NRC approved TSTF–374, ''Revision to TS 5.5.13 and Associated TS Bases for Diesel Fuel Oil,'' Revision 0. To adopt changes consistent with the content of TSTF–374 for use in the custom TS of MPS2, the existing MPS2 diesel fuel oil testing program will be modified. These changes replace the criteria of ''Water and sediment < 0.05%'' with the criteria of ''A clear and bright appearance with proper color or a water and sediment content within limits'' and remove specific American Society for Testing and Materials (ASTM) standard references from TS.

The proposed changes do not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, and configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes do not adversely affect the ability of structures, systems, and components (SSCs) to perform their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Further, the proposed changes do not increase the types and amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures.

Therefore, the changes do not involve a significant increase in the probability or consequences or any accident previously evaluated.

Criterion 2

Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes are used to provide operational flexibility regarding evolving industry standards while maintaining operational conditions which are consistent with the design basis. Removing of specific details from TS, since the details are already specified in licensee-controlled documents, provides the flexibility needed to maintain state-of-the-art technology in fuel oil sampling and analysis methodology. The procedural details associated with the involved specifications that are removed from TS and residing in licensee-controlled documents are not required to be in the TS to provide adequate protection of the public health and safety, since the TS still retains the requirement for compliance with applicable standards. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation in the provision, maintaining, or use of diesel fuel oil. The requirements retained in the TS continue to require testing of the diesel fuel oil to ensure the proper functioning of the DGs.

Therefore, the changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3

Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

The proposed changes are consistent with the content of TSTF–374 for use in the custom TS of MPS2. These changes remove specific ASTM standard references and a preventive maintenance cleaning requirement from TS since the references and requirements are already specified in licensee-controlled documents. The proposed changes provide the flexibility needed to improve fuel oil sampling and analysis methodologies while maintaining sufficient controls to ensure continued quality of the fuel oil. The margin of safety provided to the DGs by these detailed fuel specifications is unaffected by the proposed changes since there continue to be TS requirements to ensure fuel oil is of the appropriate quality for emergency DG use and DG operability is unaffected.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: George Wilson.

Exelon Generation Company, LLC (EGC), Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Units 1 and 2 (Braidwood), Will County, Illinois, Docket Nos. STN 50–454 and STN 50–455, Byron Station, Units 1 and 2 (Byron), Ogle County, Illinois

Date of amendment request: March 20, 2012.

Description of amendment request: The proposed amendment would modify Braidwood and Byron Technical Specifications to permanently exclude portions of the steam generator (SG) tube below the top of the SG tubesheet from periodic SG tube inspections and plugging or repair for Braidwood, Unit 2 and for Byron, Unit 2. In addition, the proposed amendment would revise TS 5.6.9 to remove reference to the previous temporary alternate repair criteria and provide reporting requirements specific to the permanent alternate repair criteria.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or

consequences of an accident previously evaluated?

Response: No.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change that alters the steam generator (SG) inspection and reporting criteria does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Of the various accidents previously evaluated, the proposed changes only affect the steam generator tube rupture (SGTR), postulated steam line break (SLB), feedwater line break (FLB), locked rotor and control rod ejection accident evaluations. Loss-of-coolant accident (LOCA) conditions cause a compressive axial load to act on the tube. Therefore, since the LOCA tends to force the tube into the tubesheet rather than pull it out, it is not a factor in this amendment request. Another faulted load consideration is a safe shutdown earthquake (SSE); however, the seismic analysis of Model D5 SGs has shown that axial loading of the tubes is negligible during an SSE.

During the SGTR event, the required structural integrity margins of the SG tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the constraint provided by the presence of the tubesheet and the tube-to-tubesheet joint. Tube burst cannot occur within the thickness of the tubesheet. The tube-to-tubesheet joint constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tubesheet, and from the differential pressure between the primary and secondary side, and tubesheet rotation. Based on this design, the structural margins against burst, as discussed in draft Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes,'' and TS 5.5.9, are maintained for both normal and postulated accident conditions.

The proposed change has no impact on the structural or leakage integrity of the portion of the tube outside of the tubesheet. The proposed change maintains structural and leakage integrity of the SG tubes consistent with the performance criteria of TS 5.5.9. Therefore, the proposed change results in no significant increase in the probability of the occurrence of a SGTR accident.

At normal operating pressures, leakage from tube degradation below the proposed limited inspection depth is limited by the tube-to-tubesheet crevice. Consequently, negligible normal operating leakage is expected from degradation below the inspected depth within the tubesheet region.

The consequences of an SGTR event are not affected by the primary-to-secondary leakage flow during the event as primary-to-secondary leakage flow through a postulated tube that has been pulled out of the tubesheet is essentially equivalent to a severed tube. Therefore, the proposed change does not result in a significant increase in the consequences of a SGTR.

Primary-to-secondary leakage from tube degradation in the tubesheet area during operating and accident conditions is restricted due to contact of the tube with the tubesheet. The leakage is modeled as flow through a porous medium through the use of the Darcy equation. The leakage model is used to develop a relationship between operational leakage and leakage at accident conditions that is based on differential pressure across the tubesheet and the viscosity of the fluid. A leak rate ratio was developed to relate the leakage at operating conditions to leakage at accident conditions. Since the fluid viscosity is based on fluid temperature and it is shown that for the most limiting accident, the fluid temperature does not exceed the normal operating temperature and therefore the viscosity ratio is assumed to be 1.0. Therefore, the leak rate ratio is a function of the ratio of the accident differential pressure and the normal operating differential pressure.

The leakage factor of 1.93 for Braidwood Station Unit 2 and Byron Station Unit 2, for a postulated SLB/FLB, has been calculated as shown in Table 9–7 of WCAP–17072–P, Revision 0. However, EGC Braidwood Station Unit 2 and Byron Station Unit 2 will apply a factor of 3.11 as determined by Westinghouse evaluation LTR–SGMP–09–100 P-Attachment, Revision 1, to the normal operating leakage associated with the tubesheet expansion region in the condition monitoring (CM) and operational assessment (OA). The leakage factor of 3.11 applies specifically to Byron Unit 2 and Braidwood Unit 2, both hot and cold legs, in Table RAI24–2 of LTR–SGMP–09–100 P-Attachment, Revision 1. Through application of the limited tubesheet inspection scope, the existing operating leakage limit provides assurance that excessive leakage (i.e., greater than accident analysis assumptions) will not occur. The assumed accident induced leak rate limit is 0.5 gallons per minute at room temperature (gpmRT) for the faulted SG and 0.218 gpmRT for each of the unfaulted SGs for accidents that assume a faulted SG. These accidents are the SLB and the locked rotor with a stuck open PORV. The assumed accident induced leak rate limit for accidents that do not assume a faulted SG is 1.0 gpmRT for all SGs. These accidents are the locked rotor and control rod ejection.

No leakage factor will be applied to the locked rotor or control rod ejection transients due to their short duration, since the calculated leak rate ratio is less than 1.0.

The TS 3.4.13 operational leak rate limit is 150 gallons per day (gpd) (0.104 gpmRT) through any one SG. Consequently, there is sufficient margin between accident leakage and allowable operational leakage. The maximum accident leak rate ratio for the Model D5 design SGs is 1.93 as indicated in WCAP–17072–P, Revision 0, Table 9–7. However, EGC will use the more conservative value of 3.11 accident leak rate ratio for the most limiting SG model design identified in Table RAI24–2 of LTRSGMP–09–100 P-Attachment Revision 1. This results in significant margin between the conservatively estimated accident leakage and the allowable accident leakage (0.5 gpmRT).

For the CM assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 3.11 and added to the total leakage from any other source and compared to the allowable accident induced leakage limit. For the OA, the difference in the leakage between the allowable leakage and the accident induced leakage from sources other than the tubesheet expansion region will be divided by 3.11 and compared to the observed operational leakage.

Based on the above, the performance criteria of NEI–97–06, Revision 3, and draft RG 1.121 continue to be met and the proposed change does not involve a significant increase in the probability or consequences of the applicable accidents previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not introduce any changes or mechanisms that create the possibility of a new or different kind of accident. Tube bundle integrity is expected to be maintained for all plant conditions upon implementation of the permanent alternate repair criteria. The proposed change does not introduce any new equipment or any change to existing equipment. No new effects on existing equipment are created nor are any new malfunctions introduced.

Therefore, based on the above evaluation, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change defines the safety significant portion of the SG tube that must be inspected and repaired. WCAP–17072–P, Revision 0, as modified by WCAP–17330–P, Revision 1, identifies the specific inspection depth below which any type tube degradation has no impact on the performance criteria in NEI 97–06, Revision 3, 'Steam Generator Program Guidelines.''

The proposed change that alters the SG inspection and reporting criteria maintains the required structural margins of the SG tubes for both normal and accident conditions. NEI 97–06, and draft RG 1.121 are used as the bases in the development of the limited tubesheet inspection depth methodology for determining that SG tube integrity considerations are maintained within acceptable limits. Draft RG 1.121 describes a method acceptable to the NRC for meeting General Design Criteria (GDC) 14, ''Reactor Coolant Pressure Boundary,'' GDC 15, ''Reactor Coolant System Design,'' GDC 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary,'' and GDC 32, ''Inspection of Reactor Coolant Pressure Boundary,'' by reducing the probability and consequences of a SGTR. Draft RG 1.121 concludes that by determining the limiting safe conditions for tube wall degradation, the probability and consequences of a SGTR are reduced. This draft RG uses safety factors on loads for tube burst that are consistent with

the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking, WCAP–17072–P, Revision 0, as modified by WCAP–17330–P, Revision 1, defines a length of degradation-free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary-to-secondary leakage during all plant conditions. The methodology for determining leakage as described in WCAP–17072–P, Revision 0, as modified by LTR–SGMP–09–100 P–Attachment\ shows that significant margin exists between an acceptable level of leakage during normal operating conditions that ensures meeting the SLB accident-induced leakage assumption and the TS leakage limit of 150 gpd.

Based on the above, it is concluded that the proposed changes do not result in any reduction in a margin of safety.

Based on the above, EGC concludes that the proposed change presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road Warrenville, IL 60555.

NRC Branch Chief: Jacob I. Zimmerman.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Nuclear Power Plant, Units 1 and 2, Somervell County, Texas

Date of amendment request: March 28, 2012.

Brief description of amendment: The amendment would revise Technical Specification (TS) 5.5.9, ''Unit 1 Model D76 and Unit 2 Model D5 Steam Generator (SG) Program,'' to permanently exclude portions of the Comanche Peak Nuclear Power Plant (CPNPP), Unit 2, Model D5 SG tubes below the top of the SG tubesheet from periodic SG tube inspections. In addition, this amendment would revise TS 5.6.9, ''Unit 1 Model D76 and Unit 2 Model D5 Steam Generator Tube Inspection Report,'' to provide permanent reporting requirements specific to CPNPP, Unit 2, that have previously been established on a one-cycle basis.

The proposed amendment constitutes a redefinition of the SG tube primary-to-secondary pressure boundary and defines the safety significant portion of the tube that must be inspected or plugged. Tube flaws detected below the safety significant portion of the tube are not required to be plugged. Allowing flaws in the non-safety significant portion of the tube to remain in service minimizes unnecessary tube plugging and maintains the safety margin of the steam generators to perform the safety function to maintain the reactor coolant pressure boundary, maintain reactor coolant flow, and maintain primary to secondary heat transfer.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Of the accidents previously evaluated, the limiting transients with consideration to the proposed change to the SG tube inspection and repair criteria are the steam generator tube rupture (SGTR) event, the steam line break (SLB), and the feed line break (FLB) postulated accidents.

The required structural integrity margins of the SG tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the constraint provided by the presence of the tubesheet and the tube-to-tubesheet joint. Tube burst cannot occur within the thickness of the tubesheet. The tube-to-tubesheet joint constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tubesheet, differential pressure between the primary and secondary side, and tubesheet rotation. Based on this design, the structural margins against burst, as discussed in Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR [Pressurized Water Reactor] Steam Generator Tubes,'' [(Agencywide Documents Access and Management System (ADAMS) Accession No. ML082120667)] and TS 5.5.9 are maintained for both normal and postulated accident conditions.

The proposed change has no impact on the structural or leakage integrity of the portion of the tube outside of the tubesheet. The proposed change maintains structural and leakage integrity of the SG tubes consistent with the performance criteria in TS 5.5.9. Therefore, the proposed change results in no significant increase in the probability of the occurrence of [an] SGTR accident.

At normal operating pressures, leakage from tube degradation below the proposed limited inspection depth is limited by the tube-to-tubesheet crevice. Consequently, negligible normal operating leakage is expected from degradation below the inspected depth within the tubesheet region. The consequences of an SGTR event are not affected by the primary-to-secondary leakage flow during the event as primary-to-secondary leakage flow through a postulated tube that has been pulled out of the tubesheet is essentially equivalent to a severed tube. Therefore, the proposed change does not result in a significant increase in the consequences of [an] SGTR.

The probability of [an] SLB is unaffected by the potential failure of a steam generator tube as the failure of tube is not an initiator for [an] SLB event.

The leakage factor of 3.16 for CPNPP Unit 2, for a postulated SLB/FLB, has been calculated as described in Westinghouse [Electric Company, LLC] Letter LTR–SGMP–09–100 [N]P—Attachment, ''Response to NRC Request for Additional Information on H*; Model F and Model D5 Steam Generators,'' dated August 12, 2009 [(ADAMS Accession No. ML101730391)], and is shown in Revised Table 9–7 of this same document. Specifically, for the condition monitoring (CM) assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 3.16 and added to the total leakage from any other source and compared to the allowable accident induced leakage limit. For the operational assessment (OA), the difference in the leakage between the allowable leakage and the accident induced leakage from sources other than the tubesheet expansion region will be divided by 3.16 and compared to the observed operational leakage. The accident-induced leak rate limit for CPNPP Unit 2 is 1.0 gpm [gallons per minute]. The TS operational leak rate limit through any one steam generator is 150 gpd [gallons per day] (0.1 gpm). Consequently, there is significant margin between accident leakage and allowable operational leakage. The SLB/FLB overall leakage factor is 3.16 resulting in significant margin between the conservatively estimated accident induced leakage and the allowable accident leakage.

No leakage factor was applied to the locked rotor or control rod ejection transients due to their short duration.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change that alters the SG inspection and reporting criteria does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed change that alters the steam generator inspection and reporting criteria

does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and all safety functions will continue to perform as previously assumed in accident analyses.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in the margin of safety?

Response: No.

The proposed change that alters the steam generator inspection and reporting criteria maintains the required structural margins of the SG tubes for both normal and accident conditions. Nuclear Energy Institute [(NEI) document NEI] 97–06, Rev. 3, ''Steam Generator Program Guidelines,'' and NRC Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes,'' are used as the bases in the development of the limited tubesheet inspection depth methodology for determining that SG tube integrity considerations are maintained within acceptable limits. RG 1.121 describes a method acceptable to the NRC for meeting General Design Criteria (GDC) 14, ''Reactor coolant pressure boundary,'' GDC 15, ''Reactor coolant system design,'' GDC 31, ''Fracture prevention of reactor coolant pressure boundary,'' and GDC 32, ''Inspection of reactor coolant pressure boundary,'' by reducing the probability and consequences of a SGTR. RG 1.121 concludes that by determining the limiting safe conditions for tube wall degradation, the probability and consequences of a SGTR are reduced. RG 1.121 uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially oriented cracking, the H* Analysis documented in Section 4.1 [of the application dated March 28, 2012] defines a length of degradation-free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary-to-secondary leakage during all plant conditions. The methodology for determining leakage provides for large margins between calculated and actual leakage values in the proposed limited tubesheet inspection depth criteria.

Therefore, the proposed change does not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1800 M Street NW., Washington, DC 20036.

NRC Branch Chief: Michael T. Markley.

NextEra Energy Duane Arnold, LLC, Docket No. 50–331, Duane Arnold Energy Center (DAEC), Linn County, Iowa

Date of amendment request: September 29, 2011, as supplemented by letter dated March 12, 2012.

Description of amendment request: The proposed amendment would revise the DAEC Technical Specifications (TSs) by modifying existing Surveillance Requirements (SRs) regarding various modes of operation of the main steam safety/relief valves (SRVs). The proposed amendment would modify the TS requirements for testing of the SRVs by replacing the current requirement to manually actuate each SRV during plant startup with a series of overlapping tests that demonstrate the required functions of successive valve stages. Elimination of the manual actuation requirement at low reactor pressure and steam flow decreases the potential for SRV leakage and spurious SRV opening.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed changes modify TS SR 3.4.3.2, SR 3.5.1.9, and SR 3.6.1.5.1 to provide an alternative means for testing the main steam SRVs, ADS [Automatic Depressurization System] valves, and LLS [Low-Low Set] relief valves. Accidents are initiated by the malfunction of plant equipment, or the catastrophic failure of plant structures, systems, or components. The performance of SRV testing is not a precursor to any accident previously evaluated and does not change the manner in which the valves are operated. The proposed testing requirements will not contribute to the failure of the SRVs nor any plant structure, system, or component. NextEra Energy Duane Arnold has determined that the proposed change in testing methodology provides an equivalent level of assurance that the SRVs are capable of performing their intended safety functions. Thus, the proposed changes do not affect the probability of an accident previously evaluated.

The performance of SRV testing provides confidence that the relief valves are capable of depressurizing the reactor pressure vessel (RPV). This will protect the reactor vessel from overpressurization and allow the combination of the Low Pressure Coolant Injection and Core Spray Systems to inject into the RPV as designed. The LLS relief logic causes two LLS relief valves to be opened at a lower pressure than the relief mode pressure setpoints and causes the LLS relief valves to stay open longer, such that reopening of more than one valve is prevented on subsequent actuations. Thus, the LLS relief function prevents excessive short duration SRV cycling, which limits induced thrust loads on the SRV discharge line for subsequent actuations of the relief valve. The proposed changes do not affect any function related to the safety mode of the dual function SRVs. The proposed changes involve the manner in which the subject valves are tested, and have no effect on the types or amounts of radiation released or the predicted offsite doses in the event of an accident. The proposed testing requirements are sufficient to provide confidence that these valves are capable of performing their intended safety functions.

In addition, an inadvertent opening of an SRV is an analyzed event in the DAEC UFSAR [Updated Final Safety Analysis Report] (Section 15.1.7.2), as well as the assumption of a single SRV failure to open on demand in other transients and accidents, as appropriate (e.g., one ADS valve failure in the LOCA [loss-of-coolant accident] analysis). Since the proposed testing requirements do not alter the assumptions for any analyzed transient or accident, the radiological consequences of any accident previously evaluated are not increased.

Therefore, the change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed changes do not affect the assumed accident performance of the main steam SRVs, nor any plant structure, system, or component previously evaluated. The proposed changes do not install any new equipment, and installed equipment is not being operated in a new or different manner. The proposed change in test methodology will ensure that the valves remain capable of performing their safety functions due to meeting the testing requirements of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code, with the exception of opening the valve following installation or maintenance for which a relief request has been submitted (Ref. 6.1 [of the September 29, 2011, application]), proposing an acceptable alternative. No setpoints are being changed which would alter the dynamic response of plant equipment. Accordingly, no new failure modes are introduced.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

Overpressure protection of the RCPB [reactor coolant pressure boundary] is based on the SRVs' setpoints and total relief capacity. The setpoints are verified at an offsite testing facility; this requirement is not altered by the proposed change. The relief capacity of each SRV is determined by the valve's geometry, which is also not altered by the proposed test methods.

The proposed changes will allow testing of the valve actuation electrical circuitry, including the solenoid, and mechanical actuation components, without causing the SRV to open. The SRVs will be manually actuated prior to installation in the plant. Therefore, all modes of SRV operation will be tested prior to entering the mode of operation requiring the valves to perform their safety functions. The proposed changes do not affect the valve setpoint or the operational criteria that cause the SRVs to open during plant transients or accidents, either manually or automatically. There are no changes proposed which alter the setpoints at which protective actions are initiated, and there is no change to the operability requirements for equipment assumed to operate for accident mitigation.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Mitchell S. Ross, P. O. Box 14000 Juno Beach, FL 33408–0420.

NRC Acting Branch Chief: Istvan Frankl.

Southern Nuclear Operating Company, Inc. Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP) Units 3 and 4, Burke County, Georgia

Date of amendment request: April 6, 2012, and revised on April 12 and May 7, 2012.

Description of amendment request: The proposed changes would amend Combined License Nos. NPF–91 and NPF–92 for Vogtle Electric Generating Plant (VEGP) Units 3 and 4, respectively, in regard to the upper tolerance on the Nuclear Island (NI) critical sections basemat thickness as identified in the plant-specific Design Control Document (DCD).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

As indicated in FSAR (plant-specific DCD) Subsection 3.8.5.5, the design function of the basemat is to provide the interface between the nuclear island structures and the supporting soil or rock. The basemat transfers the load of nuclear island structures to the supporting soil or rock. The basemat transmits seismic motions from the supporting soil or rock to the nuclear island. The revision of the basemat construction tolerance does not have an adverse impact on the response of the basemat and nuclear island structures to safe shutdown earthquake ground motions or loads due to anticipated transients or postulated accident conditions. The revision of the basemat construction tolerance does not impact the support, design, or operation of mechanical and fluid systems. There is no change to plant systems or the response of systems to postulated accident conditions. There is no change to the predicted radioactive releases due to normal operation or postulated accident conditions. The plant response to previously evaluated accidents or external events is not adversely affected, nor does the change described create any new accident precursors.

Therefore, there is no significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change is to increase the construction tolerance for the basemat thickness. The revision of the basemat construction tolerance does not change the design of the basemat or nuclear island structures. The revision of the basemat construction tolerance does not change the design function, support, design, or operation of mechanical and fluid systems. The revision of the basemat construction tolerance does not result in a new failure mechanism for the basemat or new accident precursors. As a result, the design function of the basemat is not adversely affected by the proposed change.

Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The revision in the basemat thickness construction tolerance does not have an adverse impact on the strength of the basemat. The increase in the basemat thickness construction tolerance does not have an adverse impact on the seismic design spectra or the structural analysis of the basemat or other nuclear island structures. The revision in the basemat thickness construction tolerance has no impact of the analysis of the nuclear island for sliding or overturning. As a result, the design function of the basemat is not adversely affected by the proposed change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Branch Chief: Mark E. Tonacci.

Virginia Electric and Power Company, Docket No. 50–338 and 50–339, North Anna Power Station, Units 1 and 2, Louisa County, Virginia

Date of amendment request: April 2, 2012.

Description of amendment request: The proposed amendment would delete the Steam Generator Water Level Low Coincident with Steam Flow/Feedwater Flow Mismatch Reactor Trip Function from the Technical Specification (TS) Table 3.3.1–1 Item 15.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1—Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The initiating conditions and assumptions for accidents described in the Updated Final Safety Analyses Report remain as previously analyzed. The proposed change does not introduce a new accident initiator nor does it introduce changes to any existing accident initiators or scenarios described in the Updated Final Safety Analyses Report. The Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level reactor trip is not credited for accident mitigation in any accident analyses described in the Updated Final Safety Analyses Report. The Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level trip was designed to meet the control and protection systems interaction criteria of IEEE–279. The Steam Generator Level Median Signal Selector (MSS) prevents adverse control and protection system interaction such that it replaces the need for the Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level reactor trip to satisfy the IEEE–279 requirements. As such, the affected control and protection systems will continue to perform their required functions without adverse interaction, and maintain the capability to shut down the reactor when required on Low-Low Steam Generator water level. The ability to mitigate a loss of heat

sink accident previously evaluated is unaffected. The frequency categories of previously evaluated accidents are not changed.

Therefore, neither the probability of occurrence nor the consequences of an accident previously evaluated is significantly increased.

Criterion 2—Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The substitution of the MSS for the Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level trip will not introduce any new failure modes to the required protection functions. The MSS only interacts with the feedwater control system. The Steam Generator Water Level Low-Low protection function is not affected by this change. Isolation devices upstream of the MSS circuitry ensure that the Steam Generator Water Level Low-Low protection function is not affected. The MSS is designed to reduce the frequency of system failures through utilization of highly reliable components in a configuration that relies on a minimum of additional equipment. Components used in the MSS are of a quality consistent with low failure rates and minimum maintenance requirements, and conform to protection system requirements. Furthermore, the design provides the capability for complete unit testing that provides unambiguous determination of credible system failures. It is through these features that the overall design of the MSS minimizes the occurrence of undetected failures that may exist between test intervals.

Therefore, the possibility for a new or different kind of accident from any accident previously evaluated is not created.

Criterion 3—Does this change involve a significant reduction in a margin of safety?

The proposed amendment does not involve revisions to any safety analysis limits or safety system settings that will adversely impact plant safety. The proposed amendment does not alter the functional capabilities assumed in a safety analysis for any system, structure, or component important to the mitigation and control of design bases accident conditions within the facility. Nor does this amendment revise any parameters or operating restrictions that are assumptions of a design basis accident. In addition, the proposed amendment does not affect the ability of safety systems to ensure that the facility can be placed and maintained in a shutdown condition for extended periods of time.

The ability of the Steam Generator Water Level Low-Low reactor trip function credited in the safety analysis to protect against a sudden loss of heat sink event is not affected by the proposed change: Since the Steam Generator Low-Low Level trip is credited alone as providing complete protection for the accident transients that result in low steam generator level, eliminating the Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level trip will not change any safety analysis conclusion for any analyzed accident described in the Updated Final Safety Analyses Report.

The MSS prevents adverse control and protection system interaction such that it replaces the need for the Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level reactor trip and satisfies the IEEE–279 requirements.

The proposed change improves the margin of safety since removal of the Steam/Feedwater Flow Mismatch and Low Steam Generator Water Level trip function decreases the potential for challenges to plant safety systems, decreases the plant surveillance/maintenance activity, and reduces plant complexity. These changes result in a reduction in the potential for unnecessary plant transients.

The Technical Specifications continue to assure that the applicable operating parameters and systems are maintained within the design requirements and safety analysis assumptions. Therefore, the elimination of this trip function will not result in a significant reduction in the margin of safety as defined in the Updated Final Safety Analyses Report or Technical Specifications.

Therefore, it is concluded that this change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Nancy L. Salgado.

Virginia Electric and Power Company, Docket No. 50–339, North Anna Power Station, Unit 2, Louisa County, Virginia

Date of amendment request: May 11, 2012.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) 3.1.7, ''Rod Position Indication'' to allow two demand position indicators in one or more banks to be inoperable for up to 4 hours. This change is proposed as a temporary change to the TS for the current operating cycle and is proposed as a footnote to the current TS Limiting Condition for Operation (LCO) Section 3.1.7, Condition D.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1—Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change provides a new Condition for two demand position indicators inoperable in one or more banks. The inoperability of two demand position indicators in one or more banks does not directly affect any accident analysis or design basis limits or cause any limit not to be met, because the demand position indicator only provides the intended demand as determined by the rod control system. The actual position of the control rods is determined by use of the Rod Position Indications (RPIs) for each control rod, or the movable incore detector system when the RPIs are inoperable.

The inoperability of the demand position indicators does prevent the comparison of the RPIs to the demand position indication for verification of rod insertion and rod group alignment limits, which is conducted as a periodic surveillance to maintain the reactor within analyzed conditions. The use of a 4 hour Completion Time limit provides a restriction that limits the time that reactor operation can continue during this loss of the demand position indication. Since the loss of the demand position indication does not cause the rods to change position, hence the actual control rod positions are expected to remain within required limits. Placing the Rod Control System in a condition incapable of rod movement is a positive control to prevent rod stepping while maintenance is being performed.

The proposed change to allow two demand position indicators to be inoperable in one or more banks does not affect the automatic or manual shutdown capability of the reactor protection system and no accident analyses are impacted by the proposed change. The operability of the control rods is not affected by the inoperability of the demand position indicators.

Therefore, neither the probability of occurrence nor the consequences of an accident previously evaluated is significantly increased.

Criterion 2—Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change provides new requirements for two demand position indicators inoperable in one or more banks. No new accident initiators are introduced by the proposed requirements because the allowed condition for inoperability of the demand position indicators does not cause any new failure modes to be created that can cause an accident. The proposed change does not affect the reactor protection system or the reactor control system. The control rods should remain within the required limits because the failure of the demand position indicators does not cause the rods to change position and the RPIs remain available in the affected banks to verify the position of the control rods. In addition, the Rod Control System is placed in a condition incapable of rod movement as a positive control to prevent rod stepping while maintenance is

being performed. Hence, no new failure modes or accident sequences are created that would cause a new or different kind of accident from any accident previously evaluated.

Therefore, the possibility for a new or different kind of accident from any accident previously evaluated is not created.

Criterion 3—Does this change involve a significant reduction in a margin of safety?

The operability of the RPIs is required to determine control rod positions and thereby ensure compliance with the control rod alignment and insertion limits. The proposed change does not alter the requirement to determine rod position, but provides a new Condition for two demand position indicators inoperable in one or more banks. The inoperability of two demand position indicators for one or more banks results in the reduced ability to periodically verify that RPIs are operable and within expected limits. The condition does prevent the comparison of the RPIs to the demand position indication for verification of rod insertion and rod group alignment limits, which is conducted as periodic surveillance to maintain the reactor within analyzed conditions. The loss of the demand position indication does not cause the rods to change position, hence the actual control rod positions are expected to remain within required limits. The use of a 4 hour Completion Time limit provides a restriction that limits the time that reactor operation can continue during this loss of the demand position indication. This ensures the condition is promptly corrected or the reactor shutdown in accordance with the applicable Technical Specifications action statements. Thus, the proposed change maintains the operation of the reactor within the applicable margins of safety because the inoperability will be corrected or the unit will be shutdown prior to any significant reduction in the ability to verify control rod position by the use analog RPIs.

Therefore, it is concluded that this change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Nancy L. Salgado.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: November 30, 2011.

Description of amendment request: The proposed amendment would revise the Wolf Creek Generating Station Technical Specification (TS) 3.8.1, ''AC Sources—Operating,'' Surveillance Requirements related to Diesel Generator test loads, voltage, and frequency. The proposed changes will correct non-conservative Diesel Generator load values that are currently under administrative controls.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The diesel generators are required to be OPERABLE in the event of a design basis accident coincident with a loss of offsite power to mitigate the consequences of the accident. The diesel generators are not accident initiators and therefore these changes do not involve a significant increase in the probability of an accident previously evaluated.

The accident analyses assume that at least one engineered safety feature bus is provided with power either from the offsite circuits or the diesel generators. The Technical Specification change proposed in this license amendment request will continue to assure that the diesel generators have the capacity and capability to assume their maximum design basis accident loads. The proposed change does not significantly change how the plant would mitigate an accident previously evaluated.

The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, and configuration of the facility or the manner in which the plant is operated and maintained. The proposed change does not adversely affect the ability of structures, systems, and components (SSC) to perform their intended safety function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Further, the proposed change does not increase the types and amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposure.

Therefore, the proposed change does not represent a significant increase the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Technical Specification change does not involve a change in the plant design, system operation, or the use of the diesel generators. The proposed change requires the diesel generators to be tested at increased loads which envelope the actual power demand requirements for the diesel generators during design basis conditions. These revised loads continue to demonstrate the capability and capacity of the diesel generators to perform their required functions. There are no new failure modes or mechanisms created due to testing the diesel generators at the proposed test loading. Testing of the emergency diesel generators at the proposed test loadings does not involve any modification in the operational limits or physical design of plant systems. There are no new accident precursors generated due to the proposed test loadings.

Therefore, it is concluded that the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed Technical Specification change will continue to demonstrate that the diesel generators meet the Technical Specification definition of OPERABILITY, that is, the proposed tests will demonstrate that the diesel generators will perform their safety function and the necessary diesel generator attendant instrumentation, controls, cooling, lubrication and other auxiliary equipment required for the emergency diesel generators to perform their safety function loads are also tested at these proposed loadings. The proposed testing will also continue to demonstrate the capability and capacity of the diesel generators to supply their required loads for mitigating a design basis accident.

The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not impacted by this change. The proposed change will not result in plant operation in a configuration outside the design basis.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street NW., Washington, DC 20037.

NRC Branch Chief: Michael T. Markley.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has

determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. 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.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: July 27, 2011, as supplemented by letters dated September 16, 2011, and February 7, February 24, and April 3, 2012.

Brief description of amendment: The amendment modified River Bend Station's (RBS) Technical Specification (TS) 3.3.6.1, ''Primary Containment and Drywell Isolation Instrumentation,'' to revise the allowable value (AV) and related setpoints for the Main Steam Tunnel Temperature functions 1.e, 3.f, and 4.h in TS Table 3.3.6.1–1. In addition, the RBS's Emergency Action Levels will be revised to reflect the changes to the AV and related setpoints in TS 3.3.6.1.

Date of issuance: May 30, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 174.

Facility Operating License No. NPF–47: The amendment revised the Facility Operating License and Technical Specifications.

Date of initial notice in Federal Register: February 7, 2012 (77 FR 6147). The supplemental letters dated September 16, 2011, and February 7, February 24, and April 3, 2012, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 30, 2012.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, and PSEG Nuclear LLC, Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York and Lancaster Counties, Pennsylvania

Date of application for amendments: June 2, 2011, as supplemented by letter dated November 10, 2011.

Brief description of amendments: The amendments modify Technical Specification (TS) 3.1.2, ''Reactivity Anomalies,'' to change the method used to perform the reactivity anomaly surveillance. Specifically, the amendments allow performance of the surveillance based on the difference between the monitored (i.e., actual) core reactivity and the predicted core reactivity. The surveillance was previously performed based on the difference between the monitored control rod density and the predicted control rod density.

Date of issuance: May 25, 2012.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendments Nos.: 284 and 287.

Renewed Facility Operating License Nos. DPR–44 and DPR–56: The amendments revised the License and TSs.

Date of initial notice in ***Federal Register:*** September 6, 2011 (76 FR 55129).

The letter dated November 10, 2011, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated May 25, 2012.

No significant hazards consideration comments received: No.

South Carolina Electric and Gas Company, Docket No. 50–395, Virgil C. Summer, Nuclear Station (VCSNS), Unit 1, Jenkinsville, South Carolina

Date of application for amendment: August 11, 2011.

Brief description of amendment: This amendment revised the VCSNS Technical Specification (TS) to allow an updating of the applicable topical report in TS 6.9.1.11, ''Core Operating Limits Report'' to use the three-dimensional Advanced Nodal Code neutronic model.

Date of Issuance: May 30, 2012.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No: 190.

Renewed Facility Operating License No. NPF–12: Amendment revises the License and Technical Specifications.

Date of initial notice in ***Federal Register:*** October 11, 2011 (76 FR 62864).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 30, 2012.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 1st day of June, 2012.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–13921 Filed 6–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–443; NRC–2010–0206]

License Renewal Application for Seabrook Station, Unit 1 ; NextEra Energy Seabrook, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: License renewal application; intent to prepare supplement to draft

supplemental environmental impact statement.

SUMMARY: On May 25, 2010, NextEra Energy Seabrook, LLC (NextEra), submitted to the U.S. Nuclear Regulatory Commission (NRC) an application for renewal of Facility Operating License NPF–86 for an additional 20 years of operation at Seabrook Station, Unit 1 (Seabrook). The current operating license for Seabrook expires on March 15, 2030. The purpose of this document is to inform the public that the NRC will be preparing a supplement to the draft Supplemental Environmental Impact Statement (SEIS) to address information related to severe accident mitigation alternatives (SAMA) analysis in accordance with the NRC's regulations.

ADDRESSES: Please refer to Docket ID NRC–2010–0206, when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2010–0206. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Wentzel, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6459; email: *michael.wentzel@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

NextEra submitted an application for renewal of Facility Operating License NPF–86 for an additional 20 years of operation at Seabrook. Approximately 13 miles south of Portsmouth, New Hampshire, Seabrook is located in Rockingham County in Seabrook, New Hampshire.

The current operating license for Seabrook expires on March 15, 2030. The application for renewal, dated May 25, 2010, was submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR)—Part 54, and included an environmental report (ER).

On August 1, 2011, the NRC staff issued its draft SEIS, documenting its preliminary analysis and recommendation on the proposed action—renewal of the operating licenses for Seabrook. The draft SEIS is available in ADAMS under package Accession No. ML11213A080.

This document is being published in accordance with the National Environmental Policy Act and the NRC's regulations found at 10 CFR Part 51. The purpose of this document is to inform the public that the NRC will be preparing a supplement to the draft SEIS to address information relating to the SAMA analysis for Seabrook in accordance with the NRC's regulations found at 10 CFR 51.72.

Subsequent to the issuance of the draft SEIS, by letter dated March 19, 2012, NextEra notified the NRC of changes that were made to the SAMA analysis for Seabrook. The changes include changes to source term used in the analysis, as well as the identification of new, potentially cost-beneficial SAMAs. The letter from NextEra to the NRC is available in ADAMS under Accession No. ML12080A137.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, NextEra submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Part 51 and is available in ADAMS under Accession Nos. ML101590092 and ML101590089.

In addition, the ER is available for public inspection at the Seabrook Library located at 25 Liberty Lane, Seabrook, NH 03874, and at the Amesbury Public Library located at 149 Main Street, Amesbury, MA 01913.

Dated at Rockville, Maryland, this 31st day of May 2012.

For the Nuclear Regulatory Commission.

David J. Wrona,

Chief, Projects Branch 2, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–14265 Filed 6–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–293; NRC–2012–0130]

Entergy Nuclear Operations, Inc., Pilgrim Nuclear Power Station; Record of Decision and Issuance of Renewed Facility Operating License No. DPR–35 for an Additional 20–Year Period

AGENCY: Nuclear Regulatory Commission.

ACTION: License renewal application; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued renewed facility operating license No. DPR–35 to Entergy Operations Inc. (the licensee), the operator of the Pilgrim Nuclear Power Station (PNPS). Renewed facility operating license No. DPR–35 authorizes operation of PNPS by the licensee at reactor core power levels not in excess of 2,028 megawatts thermal in accordance with the provisions of the PNPS renewed license and its technical specifications. This also serves as the record of decision for the renewal of facility operating license No. DPR–35, consistent with the NRC's regulations.

ADDRESSES: Please refer to Docket ID NRC–2012–0130 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0130. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

SUPPLEMENTARY INFORMATION:

Discussion

Notice is hereby given that the NRC has issued renewed facility operating license No. DPR–35 to Entergy Operations Inc., the operator of the PNPS. Renewed facility operating license No. DPR–35 authorizes operation of PNPS by the licensee at reactor core power levels not in excess of 2,028 megawatts thermal in accordance with the provisions of the PNPS renewed license and its technical specifications.

The notice also serves as the record of decision for the renewal of facility operating license No. DPR–35, consistent with Title 10 of the *Code of Federal Regulations* (10 CFR) 51.103. As discussed in the final supplemental environmental impact statement (FSEIS) for PNPS, Supplement 47 to NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Pilgrim Nuclear Power Station,'' dated July 2007 (ADAMS Accession Nos. ML071990020 and ML071990027), the Commission has considered a range of reasonable alternatives that included fossil fuel generation, renewable energy sources, demand-side measures such as energy conservation, and the no-action alternative. The factors considered in the record of decision can be found in the FSEIS for PNPS.

PNPS is a boiling water reactor located 4 miles southeast of Plymouth, Massachusetts. The application for the renewed license, ''Pilgrim Nuclear Power Station License Renewal Application,'' dated January 25, 2006 (ADAMS Accession No. ML060300028), complied with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. As required by the Act and the Commission's regulations in 10 CFR Chapter 1, the Commission has made appropriate findings, which are set forth in the license. Prior public notice of the action involving the proposed issuance of the renewed license and of an opportunity for a hearing regarding the proposed issuance of the renewed license was published in the **Federal Register** on March 27, 2006 (71 FR 15222).

For further details with respect to this action, see: (1) Entergy Nuclear Operation, Inc., license renewal application for Pilgrim Nuclear Power Station dated January 25, 2006, as supplemented by letters dated through April 24, 2012; (2) the Commission's safety evaluation report (NUREG–1891), published in November 2007, as supplemented (ADAMS Accession Nos. ML073241016, ML072210478, and ML11147A036); (3) the licensee's Final Safety Analysis Report; and (4) the Commission's FSEIS (NUREG–1437, Supplement 29), for the Pilgrim Nuclear Power Station, published in July 2007.

Dated at Rockville, Maryland, this 29th day of May, 2012.

For the Nuclear Regulatory Commission.

Dennis Morey,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–14262 Filed 6–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Power Uprates; Notice of Meeting

The ACRS Subcommittee on Power Uprates will hold a meeting on June 22, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance, with the exception of portions that may be closed to protect information that is proprietary pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows:

Friday, June 22, 2012—8:30 a.m. Until 5:00 p.m.

The Subcommittee will review the Safety Evaluation (SER) associated with the St. Lucie 2 extended power uprate application. The Subcommittee will hear presentations by and hold discussions with the NRC staff, Florida Power and Light Company, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Weidong Wang (Telephone 301–415–6279 or Email: Weidong.Wang@nrc.gov) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North Building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: June 4, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–14224 Filed 6–11–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0002]

Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of June 11, 18, 25; July 2, 9, 16, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of June 11, 2012

Friday, June 15, 2012

9:30 a.m. Joint Meeting of the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) on Grid Reliability (Public Meeting). To be held at FERC Headquarters, 888

First Street NE., Washington, DC. (Contact: Jim Andersen, 301–415–3565.)

This meeting will be webcast live at the Web address—*www.ferc.gov.*

Week of June 18, 2012—Tentative

There are no meetings scheduled for the week of June 18, 2012.

Week of June 25, 2012—Tentative

There are no meetings scheduled for the week of June 25, 2012.

Week of July 2, 2012—Tentative

There are no meetings scheduled for the week of July 2, 2012.

Week of July 9, 2012—Tentative

Tuesday, July 10, 2012

9:30 a.m. Strategic Programmatic Overview of the Operating Reactors Business Line (Public Meeting). (Contact: Trent Wertz, 301–415–1568.)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

Week of July 16, 2012—Tentative

There are no meetings scheduled for the week of July 16, 2012.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by email at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: June 7, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–14403 Filed 6–8–12; 4:15 pm]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30100; 812–13937]

Arrow Investment Advisers, LLC and Arrow Investments Trust; Notice of Application

June 6, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Arrow Investment Advisers, LLC (''Arrow'') and Arrow Investments Trust (the ''Trust'').

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) Actively-managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

DATES: *Filing Dates:* The application was filed on August 5, 2011, and amended on March 9, 2012, and May 22, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief 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 July 2, 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: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: 2943 Olney-Sandy Spring Road, Suite A, Olney, Maryland 20832.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Senior Counsel, at (202) 551–6868 or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

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 Trust will be registered as an open-end management investment company under the Act and is a statutory trust organized under the laws of Delaware. The Trust will initially offer an actively-managed investment series, Arrow Global Tactical Yield ETF (the ''Initial Fund''). The investment objective of the Initial Fund will be to seek to preserve and grow capital, independent of market direction.

2. Arrow, a Delaware limited liability company, will serve as investment adviser to the Initial Fund. Each Advisor (as defined below) is or will be is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Advisor may in the future retain one or more subadvisers (''Subadvisors'') to manage the portfolio of Funds (as defined below). Any Subadvisor will be registered under the Advisers Act. A registered broker-dealer under the Securities Exchange Act of 1934 (''Exchange Act''), which may be an affiliate of the Advisor, will act as the distributor and principal underwriter of the Funds (''Distributor'').

3. Applicants request that the order apply to the Initial Fund and any future

series of the Trust or of any other open-end management companies that may utilize active management investment strategies (''Future Funds''). Any Future Fund will (a) be advised by Arrow or an entity controlling, controlled by, or under common control with Arrow (together with Arrow, an ''Advisor''), and (b) comply with the terms and conditions of the application.[1] The Initial Fund and Future Funds together are the ''Funds''. Each Fund will consist of a portfolio of securities (including fixed income securities and/or equity securities) and/or currencies and other assets (''Portfolio Instruments'').[2] Funds may invest in ''Depositary Receipts''. A Fund will not invest in any Depositary Receipts that the Advisor or Subadvisor deems to be illiquid or for which pricing information is not readily available.[3] Each Fund will operate as an actively managed exchange-traded fund (''ETF''). The Funds may invest in other open-end and/or closed-end investment companies and/or ETFs.

4. Applicants also request that any exemption under section 12(d)(1)(J) of the Act from sections 12(d)(1)(A) and (B) apply to: (i) Any Fund that is currently or subsequently part of the same ''group of investment companies'' as an Initial Fund within the meaning of section 12(d)(1)(G)(ii) of the Act; (ii) any principal underwriter for the Fund; (iii) any brokers selling Shares of a Fund to an Investing Fund (as defined below); and (iv) each management investment company or unit investment trust registered under the Act that is not part of the same ''group of investment companies'' as the Funds within the meaning of section 12(d)(1)(G)(ii) of the Act and that enters into a FOF Participation Agreement (as defined below) with a Fund (such management investment companies, ''Investing Management Companies,'' such unit investment trusts, ''Investing Trusts,'' and Investing Management Companies and Investing Trusts together, ''Investing Funds''). Investing Funds do not include the Funds.

5. Applicants anticipate that a Creation Unit will consist of at least 25,000 Shares and that the price of a Share will range from $20 to $200. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into a participant agreement with the Distributor and the transfer agent of the Fund (''Authorized Participant'') with respect to the creation and redemption of Creation Units. An Authorized Participant is either: (a) A broker or dealer registered under the Exchange Act (''Broker'') or other participant in the Continuous Net Settlement System of the National Securities Clearing Corporation, a clearing agency registered with the Commission and affiliated with the Depository Trust Company (''DTC''), or (b) a participant in the DTC (such participant, ''DTC Participant''). The Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[4] On any given Business Day[5] the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or redemption, as the ''Creation Basket.'' In addition, the Creation Basket will correspond pro rata to the positions in a Fund's portfolio (including cash positions),[6] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;[7] or (c) TBA Transactions,[8] short positions and other positions that cannot be transferred in kind[9] will be excluded from the Creation Basket.[10] If there is a difference between the net asset value (''NAV'') attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Cash Amount'').

6. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount, as described above; (b) if, on a given Business Day, a Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, a Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; (d) if, on a given Business Day, a Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC Process or DTC Process; or (ii) in the case of Funds holding non-U.S. investment (''Global Funds''), such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if a Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not

[1] All entities that currently intend to rely on the 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. An Investing Fund (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

[2] Neither the Initial Fund nor any Future Fund will invest in options contracts, futures contracts or swap agreements.

[3] Depositary Receipts are typically issued by a financial institution, a ''depositary'', and evidence ownership in a security or pool of securities that have been deposited with the depositary. No affiliated persons of applicants, any Future Fund or any Subadvisor will serve as the depositary bank for any Depositary Receipts held by a Fund.

[4] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (''Securities Act''). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to Rule 144A under the Securities Act, the Funds will comply with the conditions of Rule 144A.

[5] Each Fund will sell and redeem Creation Units on any day the Fund is open, including as required by section 22(e) of the Act (each, a ''Business Day'').

[6] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for that Business Day.

[7] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[8] A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree on general trade parameters such as agency, settlement date, par amount and price.

[9] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[10] Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Cash Amount (defined below).

available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Global Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[11]

7. Each Business Day, before the open of trading on a national securities exchange, as defined in section 2(a)(26) of the Act (''Stock Exchange''), on which Shares are listed, each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. A Stock Exchange will disseminate every 15 seconds throughout the trading day an amount representing, on a per Share basis, the sum of the current value of the Deposit Instruments and the estimated Cash Amount.

8. An investor purchasing or redeeming a Creation Unit from a Fund may be charged a fee (''Transaction Fee'') to protect existing shareholders of the Funds from the dilutive costs associated with the purchase and redemption of Creation Units.[12] All orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant and the Distributor will transmit all purchase orders to the relevant Fund. The Distributor will be responsible for delivering a prospectus (''Prospectus'') to those persons purchasing Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it.

9. Shares will be listed and traded at negotiated prices on a Stock Exchange and traded in the secondary market. Applicants expect that Stock Exchange specialists (''Specialists'') or market makers (''Market Makers'') will be assigned to Shares. The price of Shares trading on the Stock Exchange will be based on a current bid/offer in the secondary market. Transactions involving the purchases and sales of Shares on the Stock Exchange will be subject to customary brokerage commissions and charges.

10. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Specialists or Market Makers, acting in their unique role to provide a fair and orderly secondary market for Shares, also may purchase Creation Units for use in their own market making activities.[13] Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[14] Applicants expect that arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV per Share should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

11. Shares will not be individually redeemable and owners of Shares may acquire those Shares from a Fund, or tender such shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed by or through an Authorized Participant. As discussed above, redemptions of Creation Units will generally be made on an in-kind basis, subject to certain specified exceptions under which redemptions may be made in whole or in part on a cash basis, and will be subject to a Transaction Fee.

12. Neither the Trust nor any Fund will be marketed or otherwise held out as a ''mutual fund.'' Instead, each Fund will be marketed as an ''actively-managed exchange-traded fund.'' In any advertising material where features of obtaining, buying or selling Shares traded on the Stock Exchange are described there will be an appropriate statement to the effect that Shares are not individually redeemable.

13. The Funds' Web site, which will be publicly available prior to the public offering of Shares, will include the Prospectus and additional quantitative information updated on a daily basis, including, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or mid-point of the bid/ask spread at the time of the calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Instruments held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[15]

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that 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. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may

[11] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[12] Where a Fund permits an in-kind purchaser to substitute cash in lieu of depositing one or more Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to offset the cost to the Fund of buying those particular Deposit Instruments.

[13] If Shares are listed on NYSE Arca, Nasdaq or a similar electronic Stock Exchange, one or more member firms of that Stock Exchange will act as Market Maker and maintain a market for Shares trading on the Stock Exchange. On Nasdaq, no particular Market Maker would be contractually obligated to make a market in Shares. However, the listing requirements on Nasdaq, for example, stipulate that at least two Market Makers must be registered in Shares to maintain a listing. In addition, on Nasdaq and NYSE Arca, registered Market Makers are required to make a continuous two-sided market or subject themselves to regulatory sanctions. If Shares are listed on a Stock Exchange such as the NYSE, one or more member firms will be designated to act as a Specialist and maintain a market for the Shares trading on the Stock Exchange. No Market Maker or Specialist will be an affiliated person, or an affiliated person of an affiliated person, of the Funds, except within section 2(a)(3)(A) or (C) of the Act due to ownership of Shares, as described below.

[14] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC Participants.

[15] Applicants note that under accounting procedures followed by the Funds, trades made on the prior Business Day will be booked and reflected in NAV on the current Business Day. Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit each Fund to redeem Shares in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Creation Units from each Fund. Applicants further state that because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary materially from their NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) Prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution system of investment company shares by eliminating price competition from brokers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity should ensure that the difference between the market price of Shares and their NAV remains narrow.

Section 22(e) of the Act

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants observe that settlement of redemptions of Creation Units of Global Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which those Funds invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Portfolio Instruments to redeeming investors, coupled with local market holiday schedules, will require a delivery process of up to 12 calendar days. Applicants therefore request relief from section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction, up to a maximum of 12 calendar days, in the principal local markets where transactions in the Portfolio Instruments of each Global Fund customarily clear and settle, but in all cases no later than 12 calendar days following the tender of a Creation Unit.

8. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the actual payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that allowing redemption payments for Creation Units of a Fund to be made within a maximum of 12 calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants state the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days and the maximum number of days needed to deliver the proceeds for each affected Global Fund. Applicants are not seeking relief from section 22(e) with respect to Global Funds that do not effect creations or redemptions in-kind.

Section 12(d)(1) of the Act

9. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment 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, or any other broker or dealer from selling its shares 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.

10. Applicants request relief to permit Investing Funds to acquire Shares in excess of the limits in section 12(d)(1)(A) of the Act and to permit the Funds, their principal underwriters and any Broker to sell Shares to Investing Funds in excess of the limits in section 12(d)(l)(B) of the Act. Applicants submit that the proposed conditions to the requested relief address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

11. Applicants submit that their proposed conditions address any

concerns regarding the potential for undue influence. To limit the control that an Investing Fund may have over a Fund, applicants propose a condition prohibiting the adviser of an Investing Management Company (''Investing Fund Advisor''), sponsor of an Investing Trust (''Sponsor''), any person controlling, controlled by, or under common control with the Investing Fund Advisor or Sponsor, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Investing Fund Advisor, the Sponsor, or any person controlling, controlled by, or under common control with the Investing Fund Advisor or Sponsor (''Investing Fund's Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any sub-adviser to an Investing Management Company (''Investing Fund Sub-Advisor''), any person controlling, controlled by or under common control with the Investing Fund Sub-Advisor, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Investing Fund Sub-Advisor or any person controlling, controlled by or under common control with the Investing Fund Sub-Advisor (''Investing Fund's Sub-Advisory Group'').

12. Applicants propose a condition to ensure that no Investing Fund or Investing Fund Affiliate [16] (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Investing Fund Advisor, Investing Fund Sub-Advisor, employee or Sponsor of the Investing Fund, or a person of which any such officer, director, member of an advisory board, Investing Fund Advisor, Investing Fund Sub-Advisor, employee or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

13. Applicants propose several conditions to address the potential for layering of fees. Applicants note that the board of directors or trustees (''Board'') of any Investing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will be required to find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Investing Management Company may invest. Applicants also state that any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.[17]

14. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a 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 permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

15. To ensure that an Investing Fund is aware of the terms and conditions of the requested order, the Investing Funds must enter into an agreement with the respective Funds (''FOF Participation Agreement''). The FOF Participation Agreement will include an acknowledgement from the Investing Fund that it may rely on the order only to invest in a Fund and not in any other investment company.

Sections 17(a)(1) and (2) of the Act

16. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include 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 and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company and provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. Each Fund may be deemed to be controlled by an Advisor and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Advisor (an ''Affiliated Fund'').

17. Applicants request an exemption under sections 6(c) and 17(b) of the Act from sections 17(a)(1) and 17(a)(2) of the Act to permit in-kind purchases and redemptions of Creation Units by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25% of the outstanding Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25% of the Shares of one or more Affiliated Funds.[18] Applicants also request an exemption in order to permit a Fund to sell its Shares to and redeem its Shares from, and engage in the in-kind transactions that would accompany such sales and redemptions with, certain Investing Funds of which the Funds are affiliated persons or a second-tier affiliates.[19]

18. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units.

[16] An ''Investing Fund Affiliate'' is any Investing Fund Advisor, Investing Fund Sub-Advisor, Sponsor, promoter and principal underwriter of an Investing Fund, and any person controlling, controlled by or under common control with any of these entities. ''Fund Affiliate'' is an investment adviser, promoter, or principal underwriter of a Fund or any person controlling, controlled by or under common control with any of these entities.

[17] Any reference to NASD Conduct Rule 2830 includes any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority.

[18] Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of an Investing Fund because an investment adviser to the Funds is also an investment adviser to an Investing Fund.

[19] Applicants expect most Investing Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between an Investing Fund and a Fund, relief from section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to an Investing Fund and redemptions of those Shares. The requested relief is intended to also cover the in-kind transactions that may accompany such sales and redemptions.

Absent the unusual circumstances discussed in the application, the Deposit Instruments and Redemption Instruments available for a Fund will be the same for all purchasers and redeemers, respectively, and will correspond *pro rata* to the Fund's Portfolio Instruments. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be the same for all purchases and redemptions. Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Instruments currently held by the relevant Funds. Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of the Fund.

19. Applicants also submit that the sale of Shares to and redemption of Shares from an Investing Fund meets the standards for relief under sections 17(b) and 6(c) of the Act. Applicants note that any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund in accordance with policies and procedures set forth in the Fund's registration statement.[20] Applicants also state that the proposed transactions are consistent with the general purposes of the Act and appropriate in the public interest.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief

1. As long as a Fund operates in reliance on the requested order, the Shares of the Fund will be listed on a Stock Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis, for each Fund the prior Business Day's NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

4. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Instruments held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

5. The Advisor or any Subadvisor, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund could not engage directly.

6. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively-managed exchange-traded funds.

B. 12(d)(1) Relief

1. The members of the Investing Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of the Investing Fund's Sub-Advisory Group will not control (individually or in the aggregate) a 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 a Fund, the Investing Fund's Advisory Group or the Investing Fund's Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares in the same proportion as the vote of all other holders of the Shares. This condition does not apply to the Investing Fund's Sub-Advisory Group with respect to a Fund for which the Investing Fund Sub-Advisor or a person controlling, controlled by or under common control with the Investing Fund Sub-Advisor acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in a Fund to influence the terms of any services or transactions between the Investing Fund or an Investing Fund Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to assure that the Investing Fund Advisor and any Investing Fund Sub-Advisor are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by an Investing Fund in Shares exceeds the limit in section 12(d)(1)(A)(i) of the Act, the Board of the Fund, including a majority of the independent directors or trustees, will determine that any consideration paid by the Fund to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Investing Fund Advisor, or Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b-1 under the Act) received from a Fund by the Investing Fund Advisor, or Trustee or Sponsor, or an affiliated person of the Investing Fund Advisor, or Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Advisor, or Trustee, or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Investing Fund in the Fund. Any Investing Fund Sub-Advisor will waive fees otherwise payable to the Investing Fund Sub-Advisor, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Investing Fund Sub-Advisor, or an affiliated person of the Investing Fund Sub-Advisor, other than any advisory fees paid to the Investing Fund Sub-Advisor or its affiliated person by the Fund, in connection with the

[20] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of an Investing Fund, or an affiliated person of such person, for the purchase by the Investing Fund of Shares of the Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to an Investing Fund, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

investment by the Investing Management Company in the Fund made at the direction of the Investing Fund Sub-Advisor. In the event that the Investing Fund Sub-Advisor waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an Affiliated Underwriting.

7. The Board of a Fund, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) 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 (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board 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 interest of shareholders.

8. Each Fund 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 Affiliated Underwritings once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in Shares in excess of the limits in section 12(d)(1)(A), each Investing Fund and the Fund will execute an FOF Participation Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers, or Trustee and Sponsor, as applicable, 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 in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of the names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the FOF 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.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the independent directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund relying on the section 12(d)(1) relief will acquire 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 permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14234 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, June 14, 2012 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, June 14, 2012 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: June 7, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–14345 Filed 6–8–12; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67143; File No. SR–NYSEArca–2012–52]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Qualifications for Credits for Electronic Executions of Posted Customer Liquidity in Penny Pilot Issues and To Amend the Fees for Electronic Complex Order Executions

June 6, 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 May 31, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the qualifications for credits for electronic executions of posted Customer liquidity in Penny Pilot issues and to amend the fees for Electronic Complex Order executions. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 amend the qualifications for credits for electronic executions of posted Customer liquidity in Penny Pilot issues and to amend the fees for Electronic Complex Order executions. The Exchange proposes to make the changes operative on June 1, 2012.

For executions prior to May 8, 2012, OTP Holders and OTP Firms that exceed the following thresholds of total monthly electronic executions of Customer posted liquidity receive the corresponding credits for all electronic executions of Customer posted liquidity in Penny Pilot issues:[3]

CUSTOMER MONTHLY POSTING THRESHOLDS

	Monthly total contracts executed from posted liquidity	Per contract rate on all posted liquidity
Threshold 1	More than 350,000	−$0.28
Threshold 2	More than 800,000	−$0.36
Threshold 3	More than 1,200,000	−$0.42
Threshold 4	More than 3,500,000	−$0.43

For executions beginning May 8, 2012, OTP Holders and OTP Firms that meet or exceed the qualifications below receive the corresponding credit for all electronic executions of Customer posted liquidity in Penny Pilot issues:

Tier	Qualification basis (average electronic executions per day)**			Credit applied to posted electronic customer executions in penny pilot issues
Base				($0.25)
Tier 1	15,000 Customer Posted Contracts in Penny Pilot Issues.			(0.38)
Tier 2	25,000 Customer Posted Contracts in Penny Pilot Issues, or.	75,000 Posted Contracts in Penny Pilot Issues, any Account Type*.		(0.40)
Tier 3	50,000 Customer Posted Contracts in Penny Pilot Issues.			(0.43)
Tier 4	65,000 Customer Posted Contracts in Penny Pilot Issues, Plus 0.3% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market,* or.	100,000 Posted Contracts in Penny Pilot Issues, any Account type,* or.	100,000 Customer Posted and Removing Contracts in Penny Pilot Issues.	(0.44)

* Includes transaction volume from the OTP Holder's or OTP Firm's affiliates.
** For the month of May 2012, calculation of average electronic executions per day shall begin on May 8, 2012.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As provided under NYSE Arca Options Rule 6.72, options on certain issues have been approved to trade with a minimum price variation of $0.01 as part of a pilot program that is currently scheduled to expire on June 30, 2012. The Exchange will submit a separate rule filing to extend the terms of the pilot.

The Exchange proposes to amend the Fee Schedule as follows. First, the Exchange proposes to eliminate the transitional tiers for electronic executions of posted Customer liquidity in Penny Pilot issues that were applicable through May 7, 2012 because they will no longer apply as of June 1, 2012.

Second, for the Customer monthly posting tier qualifications, the Exchange proposes that each qualification calculation also include an OTP Holder's or OTP Firm's executions of Electronic Complex Orders, including those from the OTP Holder's or OTP Firm's affiliates, for all issues and regardless of account type.[4] For example, to qualify for Tier 2, an OTP Holder or OTP Firm would be required to either execute electronically (1) an average daily volume (''ADV'') of 25,000 contracts from the combination of (i) posted Customer orders in Penny Pilot issues and (ii) Electronic Complex Orders from all OTP Holders and Firms and their affiliates, in all issues and regardless of account type, or (2) an ADV of 75,000 contracts from the combination of (i) posted contracts in Penny Pilot issues, regardless of account type, and (ii) Electronic Complex Orders from all OTP Holders and Firms and their affiliates, in all issues and regardless of account type. There would be no change to the credit rates that correspond to the tiers.

Finally, the Exchange proposes to amend the rates for Electronic Complex Order executions. Under NYSE Arca Options Rule 6.91, an Electronic Complex Order means any Complex Order[5] or any Stock/Option Order[6] or Stock/Complex Order[7] that is entered into the NYSE Arca System. As proposed, all Complex to Complex Order executions would be 0.06 per contract side, rather than the current 0.10 per contract side. Additionally, a Complex to Complex Order for which the same OTP Holder or OTP Firm represents both sides will no longer be free, but would instead be charged the 0.06 rate per contract side proposed herein.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and furthers the objectives of Section 6(b)(4) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that deleting outdated text adds clarity to the Fee Schedule and makes it easier to use.

The Exchange believes that charging all Complex to Complex Order executions $0.06 per contract side, rather than the current $0.10 per contract side, and eliminating the special rate (i.e., no charge) for Complex to Complex Orders when the same firm represents both sides is reasonable, equitable, and non-discriminatory because the Exchange has determined that the special rate has not led to increased trading volumes and therefore it would be more equitable to charge all participants the same rate.

The Exchange further believes that including Electronic Complex Orders in the eligibility for Customer posting credits in Penny Pilot issues is reasonable, equitable, and not unfairly discriminatory because it would incent OTP Holders and OTP Firms to increase the level of order flow sent to, and liquidity added on, the Exchange, thereby potentially improving the quality and efficiency of order interaction and executions on the Exchange. The inclusion of Complex trades will also encourage more complex orders to be sent to the Exchange, thereby increasing trade opportunities for all participants. The Exchange further believes that the tiers, as amended, are reasonable, equitable and not unfairly discriminatory because they are set at levels that would be more achievable for OTP Holders and OTP Firms. Overall, the Exchange believes that this will result in more OTP Holders and OTP Firms qualifying for the tiers, receiving the credits, and therefore reducing their overall transaction costs on the Exchange. The Exchange further believes that the proposed change is reasonable, equitable and not unfairly discriminatory because the tiers, and the corresponding credits, will apply uniformly to all OTP Holders and OTP Firms.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. The Exchange believes that the proposed rule change reflects this competitive environment because it would broaden the conditions under which OTP Holders and OTP Firms may qualify for the tiers and because it would result in an increase in the corresponding credit rates.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[10] of the Act and

[4] Although the Exchange will include these Electronic Complex Orders in the calculation of the Customer monthly posting tier qualifications, executions of Electronic Complex Orders will not receive a credit under this section of the Fee Schedule.

[5] Under NYSE Arca Options Rule 6.62(e), a Complex Order is any order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.

[6] Under NYSE Arca Options Rule 6.62(h), a Stock/Option Order is an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of option contract(s) on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight option contracts per unit of trading of the underlying stock or convertible security established for that series by the Options Clearing Corporation.

[7] Under NYSE Arca Options Rule 6.62(h), a Stock/Complex Order is the purchase or sale of a Complex Order coupled with an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') representing either: (A) The same number of units of the underlying stock or convertible security as are represented by the options leg of the Complex Order with the least number of Options contracts, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than 8 options contracts per unit of trading of the underlying stock or convertible security established for that series by the Clearing Corporation, as represented by the options leg of the Complex Order with the least number of options contracts.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A).

subparagraph (f)(2) of Rule 19b–4 [11] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–52 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2012–52. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–52 and should be submitted on or before July 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14190 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67124; File No. SR–CBOE–2012–052]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the CBOE Stock Exchange Fees Schedule

June 5, 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 May 31, 2012, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the CBOE Stock Exchange (''CBSX'') Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the CBSX Fees Schedule with regards to connectivity fees. CBSX recently moved its trading systems over to the Equinix NY4 facility (''NY4''). In addition to 1 Gigabit Ethernet (''1 Gbps'') network access, NY4 has capacity to accommodate 10 Gigabit Ethernet (''10 Gbps'') network access. The Exchange would like to make such a connection available to CBSX market participants. However, the equipment and infrastructure necessary to provide the 10 Gbps connection is more expensive than that necessary to provide a 1 Gbps connection. As such, the Exchange proposes to adopt a $1,000 per month fee for access to a 10 Gbps Network Access Port ($2,000 for Sponsored Users), and to clarify on the Fees Schedule that the connection currently being provided for $250 per month ($500 for Sponsored Users) is for a 1 Gbps connection to a Network Access Port. CBSX market participants will be able to elect to connect to CBSX's trading system via either a 1 Gbps or 10 Gbps Network Access port. Regardless of which is chosen, the Network Access Port fee will be assessed for each port that provides direct access to CBSX's trading system. The Exchange currently charges a different rate for regular access and Sponsored User access, and merely proposes to increase the rates in equal proportion.

The proposed change is to take effect on June 1, 2012.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of

Section 6(b) of the Act.[3] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[4] 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, and with Section 6(b)(4) of the Act[5], which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

Assessing a higher fee for 10 Gbps connectivity than for 1 Gbps connectivity is reasonable because 10 Gbps connectivity is more robust than 1 Gbps connectivity, and is equitable and not unfairly discriminatory because 10 Gbps connectivity requires more costly equipment and maintenance, and the Exchange must recoup the costs related to providing 10 Gbps connectivity. Further, CBSX market participants may still elect for the less-expensive 1 Gbps connectivity. Finally, the amount of the fee for 10 Gbps connectivity is less than the amount of the fees for 10 Gbps connectivity assessed by other exchanges.[6]

Assessing higher fees for Sponsored Users is equitable and not unfairly discriminatory because Sponsored Users are able to access the Exchange and use the equipment provided without possessing a trading permit. As such, Trading Permit Holders who have a trading permit will have a higher level of commitment to transacting business on CBSX and using Exchange facilities than Sponsored Users. Finally, these increases maintain the same proportionate amounts that are paid by regular users relative to Sponsored Users.

Clarifying that the current $250 monthly fee for a Network Access Port ($500 for Sponsored Users) is for a 1 Gbps connection removes impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, protects investors and the public interest by eliminating any confusion about which connection will be assessed which fee (now that CBSX will be offering both the 1 Gbps and 10 Gbps connection options).

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition 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 neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[7] of the Act and paragraph (f) of Rule 19b–4[8] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov. Please include File Number SR–CBOE–2012–052 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–052. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2012–052, and should be submitted on or before July 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14164 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f(b)(4).

[6] *See* New York Stock Exchange Price List, page 13, which lists monthly prices of $12,000–61,500 for different types of 10 Gbps connectivity (along with initial charges of $10,000–50,000) and International Securities Exchange Schedule of Fees, page 9, which lists a low-latency Ethernet network access fee of $7,000 per month.

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67123; File No. SR–Phlx–2012–75]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

June 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4[2] thereunder, notice is hereby given that, on May 30, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain Routing Fees to recoup costs incurred by the Exchange in routing to The NASDAQ Options Market LLC (''NOM'').

While the changes proposed herein are effective upon filing, the Exchange has designated these changes to be operative on June 1, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to recoup costs that the Exchange incurs for routing and executing certain orders in equity and index options to NOM. The Exchange's Pricing Schedule at Section V currently includes the following Routing Fees for routing Customer, Professional, Firm, Broker-Dealer and Market Maker [3] orders to away markets.

Exchange	Customer	Professional	Firm/broker-dealer/market maker
NYSE AMEX	$0.11	$0.31	$0.55
BATS Penny	0.55	0.55	0.55
BATS non-Penny	0.86	0.91	0.91
BOX	0.11	0.11	0.55
CBOE	0.11	0.31	0.55
CBOE orders greater than 99 contracts in RUT, RMN, NDX, MNX, ETFs, ETNs and HOLDRs	0.29	0.31	0.55
C2	0.55	0.56	0.55
ISE	0.11	0.29	0.55
ISE Select Symbols	0.31	0.39	0.55
NYSE ARCA (Penny Pilot)	0.55	0.55	0.55
NYSE ARCA (Standard)	0.11	0.11	0.55
NOM	0.54	0.54	0.55
NOM (NDX and MNX)	0.56	0.56	0.55

The Exchange is proposing to amend the current ''NOM (NDX and MNX)'' Routing Fees by renaming those fees as ''NOM–MNX.'' The Exchange is proposing to adopt separate Routing Fees for NOM–NDX as follows:

Exchange	Customer	Professional	Firm/broker-dealer/market maker
NOM–NDX	$0.11	$0.81	$0.81

NOM recently amended its fees relating to options on the Nasdaq 100 Index traded under the symbol NDX to assess Professionals, Firms, Non-NOM Market Makers and NOM Market Makers (''Non-Customers'') a $0.70 per contract Fee for Removing Liquidity.[4] The Exchange is proposing to amend its Routing Fees to adopt new NDX NOM Routing Fees to account for the revised Customer and Non-Customer NOM NDX Fees to Remove Liquidity and other routing costs incurred by the Exchange when routing to NOM.

In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC (''NOS''), a member of the Exchange, as the Exchange's exclusive order router.[5] NOS is utilized by the Exchange's fully automated options trading system, PHLX XL®,[6] solely to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS is charged a $0.06 clearing fee and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange

[3] For the purposes of Routing Fees, a Market Maker includes Specialists (*see* Rule 1020) and ROTs (Rule 1014(b)(i) and (ii), which includes SQTs (*see* Rule 1014(b)(ii)(A)) and RSQTs (*see* Rule 1014(b)(ii)(B)).

[4] *See* SR–NASDAQ–2012–068. NOM is not assessing a Customer a Fee to Remove Liquidity in NDX. NOM previously assessed the following Fees for Removing Liquidity for NDX and MNX: $0.50 per contract for Customers, $0.50 per contract for Professionals, $0.50 per contract for Firms, $0.50 per contract for Non-NOM Market Makers and $0.40 per contract for NOM Market Makers. The Exchange recently adopted separate fees for NDX as noted herein.

[5] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[6] This proposal refers to ''PHLX XL'' as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as ''Phlx XL II.'' *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from ''Phlx XL II'' to ''PHLX XL'' for branding purposes.

currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at away markets, and technical costs associated with routing.[7]

The Exchange also proposes to amend Section V to relocate note 13 to reference the ISE Select Symbols Routing Fee and remove the stray asterisk that is currently next to the ISE Select Symbols title. The Exchange believes that the asterisk is more appropriately placed near the fee it is describing.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed amendment to the current NOM Routing Fees to rename the current fees to apply solely to options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX and adopt separate fees for NDX orders routed to NOM is reasonable because the two separate categories take into account the different fees for removing liquidity assessed by NOM for MNX and NDX. The Exchange seeks to recoup costs incurred when routing orders to NOM on behalf of its members.

The Exchange believes that the proposed amendment to the current NOM Routing Fees to rename those fees as ''NOM–MNX'' and not otherwise amend those fees but adopt separate Routing Fees for NDX options routed to NOM is equitable and not unfairly discriminatory because the Exchange will uniformly apply the NOM–MNX and NOM–NDX Routing Fees to its members.

The proposed NOM Routing Fees for NDX are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Professional, Firm, Broker-Dealer and Market Maker orders to NOM on behalf of members. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the remove fees assessed to Non-Customers by NOM for NDX options, plus clearing and other administrative and technical fees for the execution of Customer and Non-Customer orders when routed to NOM. The Exchange also believes that the proposed NOM NDX Routing Fees are equitable and not unfairly discriminatory because they would be uniformly applied to all Non-Customer NDX orders that are routed to NOM and to cover the costs for Customer NDX orders that are routed to NOM.

The Exchange believes that the proposed technical amendment to relocate the note in Section V is reasonable, equitable and not unfairly discriminatory because it will further clarify the note and the ISE Select Symbols Routing Fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[10] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2012–75 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–75. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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–Phlx–

[7] The Exchange is therefore adopting NOM's Fees for Removing Liquidity of $0.70 per contract for Professional, Firm, Non-NOM Market Maker and NOM Maker Makers orders, a $0.06 clearing cost and another $0.05 per contract associated with administrative and technical costs associated with operating NOS, a total of $0.81 per contract. The Exchange would only assess a Customer the 0.06 clearing cost and another $0.05 per contract associated with administrative and technical costs associated with operating NOS (a total of $0.11 per contract) because a Customer is not assessed a Fee for Removing Liquidity on NOM.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

2012–75 and should be submitted on or before July 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14189 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67144; File No. SR–CBOE–2012–053]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Trades for Less Than $1

June 6, 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 June 1, 2012, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to extend its program that allows transactions to take place at a price that is below $1 per option contract through June 28, 2013. The text of the proposed rule change is available on the Exchange's Web site (*www.cboe.org/Legal*), 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 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

An ''accommodation'' or ''cabinet'' trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Cabinet trading is generally conducted in accordance with the Exchange Rules, except as provided in Exchange Rule 6.54, *Accommodation Liquidations (Cabinet Trades),* which sets forth specific procedures for engaging in cabinet trades. Rule 6.54 currently provides for cabinet transactions to occur via open outcry at a cabinet price of $1 per option contract in any options series open for trading in the Exchange, except that the Rule is not applicable to trading in option classes participating in the Penny Pilot Program. Under the procedures, bids and offers (whether opening or closing a position) at a price of $1 per option contract may be represented in the trading crowd by a Floor Broker or by a Market-Maker or provided in response to a request by a PAR Official/OBO, a Floor Broker or a Market-Maker, but must yield priority to all resting orders in the PAR Official/OBO cabinet book (which resting cabinet book orders may be closing only). So long as both the buyer and the seller yield to orders resting in the cabinet book, opening cabinet bids can trade with opening cabinet offers at $1 per option contract.

The Exchange has temporarily amended the procedures through June 29, 2012 to allow transactions to take place in open outcry at a price of at least $0 but less than $1 per option contract.[5] These lower priced transactions are traded pursuant to the same procedures applicable to $1 cabinet trades, except that (i) bids and offers for opening transactions are only permitted to accommodate closing transactions in order to limit use of the procedure to liquidations of existing positions, and (ii) the procedures are also available for trading in option classes participating in the Penny Pilot Program.[6] The Exchange believes that allowing a price of at least $0 but less than $1 better accommodates the closing of options positions in series that are worthless or not actively traded, particularly due to market conditions which may result in a significant number of series being out-of-the-money. For example, a market participant might have a long position in a call series with a strike price of $100 and the underlying stock might now be trading at $30. In such an instance, there might not otherwise be a market for that person to close-out the position even at the $1 cabinet price (*e.g.,* the series might be quoted no bid).[7]

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release Nos. 59188 (December 30, 2008), 74 FR 480 (January 6, 2009)(SR–CBOE–2008–133)(adopting the amended procedures on a temporary basis through January 30, 2009), 59331 (January 30, 2009), 74 FR 6333 (February 6, 2009)(extending the amended procedures on a temporary basis through May 29, 2009), 60020 (June 1, 2009), 74 FR 27220 (June 8, 2009)(SR–CBOE–2009–034)(extending the amended procedures on a temporary basis through June 1, 2010), 62192 (May 28, 2010), 75 FR 31828 (June 4, 2010)(SR–CBOE–2010–052)(extending the amended procedures on a temporary basis through June 1, 2011); 64403 (May 4, 2011), 76 FR 27110 (May 10, 2011)(SR–CBOE–2011–048)(extending the amended procedures on a temporary basis through December 30, 2011); and 65872 (December 2, 2011), 76 FR 76788 (December 8, 2011)(SR–CBOE–2011–113)(extending the amended procedures on a temporary basis through June 29, 2012).

[6] Currently the $1 cabinet trading procedures are limited to options classes traded in $0.05 or $0.10 standard increment. The $1 cabinet trading procedures are not available in Penny Pilot Program classes because in those classes an option series can trade in a standard increment as low as $0.01 per share (or $1.00 per option contract with a 100 share multiplier). Because the temporary procedures allow trading below $0.01 per share (or $1.00 per option contract with a 100 share multiplier), the procedures are available for all classes, including those classes participating in the Penny Pilot Program.

[7] As with other accommodation liquidations under Rule 6.54, transactions that occur for less than $1 are not be disseminated to the public on the consolidated tape. In addition, as with other accommodation liquidations under Rule 6.54, the transactions are exempt from the Consolidated Options Audit Trail (''COATS'') requirements of Exchange Rule 6.24, *Required Order Information.* However, the Exchange maintains quotation, order and transaction information for the transactions in the same format as the COATS data is maintained. In this regard, all transactions for less than $1 must be reported to the Exchange following the close of each business day. The rule also provides that transactions for less than $1 will be reported for clearing utilizing forms, formats and procedures established by the Exchange from time to time. In this regard, the Exchange initially intends to have clearing firms directly report the transactions to The Options Clearing Corporation (''OCC'') using OCC's position adjustment/transfer procedures. This manner of reporting transactions for clearing is similar to the procedure that CBOE currently

Continued

The purpose of the instant rule change is to extend the operation of these temporary procedures through June 28, 2013, so that the procedures can continue without interruption while CBOE considers whether to seek permanent approval of the temporary procedures.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act [8] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [10] 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. The Exchange believes that allowing for liquidations at a price less than $1 per option contract better facilitates the closing of options positions that are worthless or not actively trading. Further, the Exchange believes the proposal is consistent with the Act because the proposed extension is of appropriate length to allow the Exchange and the Commission to continue to assess the impact of the Exchange's authority to allow transactions to take place in open outcry at a price of at least $0 but less than $1 per option in accordance with its attendant obligations and conditions, including the process for submitting such transactions to OCC for clearing.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition 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 neither solicited nor received comments on the proposal.

employs for on-floor position transfer packages executed pursuant to Exchange Rule 6.49A, *Transfer of Positions.*

[8] 15 U.S.C. 78s(b)(1).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6)(iii) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) [15] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the pilot may continue without interruption while the Exchange considers whether to seek permanent approval of the temporary procedures. The Exchange also believes that acceleration of the operative date so that the program can continue without interruption is consistent with the protection of investors and the public interest because it will allow the orderly closing of option positions that are worthless or not actively traded.

The Commission believes that waiving operative delay as of June 29, 2012 is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding any potential investor confusion that could result from a temporary interruption in the pilot program. Further, the Commission notes that, because the filing was submitted for immediate effectiveness on June 1, the fact that the current rule provision does not expire until June 29th will afford interested parties the opportunity to comment on the proposal before the Exchange requires it to become operative. For this reason, the Commission designates the proposed rule change to be operative on June 29, 2012.[17]

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 No. SR–CBOE–2012–053 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 No. SR–CBOE–2012–053. 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

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6)(iii). 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 this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2012–053 and should be submitted on or before July 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14191 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67145; File No. SR–NYSEArca–2012–34]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade the Huntington US Equity Rotation Strategy ETF and Huntington EcoLogical Strategy ETF Under NYSE Arca Equities Rule 8.600

June 6, 2012.

I. Introduction

On April 12, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Huntington US Equity Rotation Strategy ETF and Huntington EcoLogical Strategy ETF (each, a ''Fund'' and collectively, ''Funds'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on April 27, 2012.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Funds pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Funds will be actively managed exchange-traded funds. The Shares of each Fund will be offered by Huntington Strategy Shares (''Trust''), a Delaware statutory trust registered with the Commission as an open-end management investment company.[4] Huntington Asset Advisors, Inc. (''Adviser'') is the investment adviser of each Fund and will manage the investment portfolios of the Funds. SEI Investments Distribution Co. (''Distributor'') is the principal underwriter and distributor of the Funds' Shares. Citibank, N.A. is the custodian for the Funds. The Exchange represents that the Adviser is affiliated with two broker-dealers and has implemented a fire wall with respect to each affiliated broker-dealer regarding access to information concerning the composition and/or changes to a Fund portfolio.[5]

Huntington US Equity Rotation Strategy ETF

The Fund's investment objective is to seek capital appreciation. Under normal conditions,[6] the Fund will invest at least 80% of its net assets in the exchange-listed common stocks of select companies organized in the U.S. and included in the S&P Composite 1500® (''Companies''). The S&P Composite 1500 is a combination of the following indices: the S&P 500®; the S&P MidCap 400®; and the S&P SmallCap 600®. The Fund will invest in Companies within each of the large-cap, mid-cap, and small-cap U.S. equity market segments (each a ''Market Segment''). The large-cap segment is represented by companies comprising the S&P 500, the mid-cap segment is represented by companies comprising the S&P MidCap 400, and the small-cap segment is represented by the companies comprising the S&P SmallCap 600.

The Fund will also invest in Companies operating in each of the ten sectors represented in the S&P Composite 1500. A sector is a large grouping of companies operating within the market that share similar characteristics. The ten sectors comprising the S&P Composite 1500 are: utilities, consumer staples, information technology, healthcare, financials, energy, consumer discretionary, materials, industrials, and telecommunication services (''Sectors'').

As market conditions change, the Fund intends to rotate the investment focus of the Fund so as to overweight its portfolio in Companies comprising those Market Segments and Sectors that the Adviser believes offer the greatest potential for capital appreciation in the given market environment and underweight its portfolio in those Market Segments and Sectors that the Adviser believes offer the least potential for capital appreciation in that same market environment (as described in more detail below). If the Fund's portfolio allocation to a particular Market Segment or Sector exceeds that Market Segment's or Sector's current weighting in the S&P Composite 1500, the Fund will be ''overweighting'' that Market Segment or Sector. Similarly, if the Fund's portfolio allocation to a specific Market Segment or Sector is less than that Market Segment's or Sector's current weighting in the S&P Composite 1500, then the Fund will be ''underweighting'' that Market Segment or Sector. The Adviser believes that

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 66846 (April 23, 2012), 77 FR 25218 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). On April 6, 2012, the Trust filed with the Commission an amendment to the Trust's Registration Statement on Form N–1A under the Securities Act of 1933 and under the 1940 Act relating to the Funds (File Nos. 333–170750 and 811–22497) (''Registration Statement''). In addition, the Exchange represented in the Notice that the Trust had also filed an Amended and Restated Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812–13785), dated April 3, 2012 (''Exemptive Application''). *See* Investment Company Act Release No. 30032 (April 10, 2012). In the Notice, the Exchange stated that the Shares would not be listed on the Exchange until an order (''Exemptive Order'') under the 1940 Act has been issued by the Commission with respect to the Exemptive Application. The Commission notes that it has issued an Exemptive Order granting certain exemptive relief to the Trust, Adviser, and Distributor under the 1940 Act. *See* Investment Company Act Release No. 30061 (May 8, 2012) (File No. 812–13785). The Exchange represents that investments made by the Funds will comply with the conditions set forth in the Exemptive Order.

[5] *See* Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that, in the event (a) the Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[6] The term ''under normal conditions'' includes, but is not limited to, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

these adjustments, collectively, will position the Fund for continued capital appreciation in the new market environment.

The Adviser retains a broad mandate and discretion to invest in Companies consistent with its evaluation of the capital appreciation potential of the Market Segments and Sectors. The strategy of overweighting and underweighting Sectors to maximize opportunities for capital appreciation may result in the Fund investing greater than 25% of its total assets in the equity securities of Companies operating in one or more Sectors. Sectors are comprised of multiple individual industries, and the Fund will not invest more than 25% of its total assets in an individual industry.

The Adviser will invest in Companies consistent with its assessment of the capital appreciation opportunities of each Market Segment and Sector. To determine the percentage of the Fund's portfolio to invest in each Market Segment and Sector, the Adviser will use ''top-down'' analysis (analyzing the impact of economic trends before considering the performance of individual stocks) to evaluate broad economic trends. These trends are used to anticipate shifts in the business cycle. The Adviser also will analyze each Market Segment and Sector to determine which Market Segment(s) and Sector(s) may benefit the most from these trends and business shifts over the next 12 months. Factors considered in assessing each Market Segment and Sector include: (1) The relationship between each Market Segment or Sector and the current business cycle; (2) valuation levels; (3) earnings growth potential; and (4) analyses of the Companies included in the respective Market Segments and Sectors.

The Adviser will monitor the market environment, Market Segments, and Sectors and may rotate the Fund's investment focus by adjusting the Fund's Market Segments and/or Sector weightings consistent with its ongoing assessment of the capital appreciation potential of each Market Segment and Sector. The Adviser may also rely, in part, on technical analysis (such as analyzing and examining past price movements to anticipate or forecast future price movements) to determine the timing of any changes to the Market Segment and/or Sector weightings.

The Fund will invest in those Companies within the Market Segments and Sectors that offer the best potential for capital appreciation based on the Adviser's evaluation of company fundamentals (including historic earnings, revenue, cash flow, and valuation (such as price-earnings ratio and book value)).

Huntington EcoLogical Strategy ETF

The Fund's investment objective is to seek capital appreciation. Under normal conditions, the Fund will invest at least 80% of its net assets in the exchange-listed equity securities of ecologically-focused companies. The Fund will primarily (at least 65% of total assets) invest in the U.S. exchange-listed common stock of ecologically-focused companies organized in the U.S. (''U.S. Companies''). The Fund, however, may also invest up to 35% of total assets in the exchange-listed common stock (or the equivalent thereof) and sponsored American Depositary Receipts (''ADRs'') [7] of ecologically-focused companies organized outside the U.S. (''Foreign Companies'').[8] The Fund may invest in companies of all sizes.

The Adviser will apply the following ecologically-focused criteria to identify the equity securities of U.S. and Foreign Companies. ''Ecologically-focused companies'' are companies that have positioned their business to respond to increased environmental legislation, cultural shifts towards environmentally conscious consumption, and capital investments in environmentally oriented projects. These companies include, but are not limited to, all U.S. and Foreign Companies that are components of one or more well-recognized environmentally focused indices (such as the Dow Jones Sustainability Indexes and the DB NASDAQ OMX Clean Tech Index).

The Fund will also invest in ecologically-focused companies which are not included in a well-recognized environmentally-focused index, but generate at least ⅓ of their revenues from activities aligned with one or more of the following environmental themes (''Environmental Themes''):

- Alternative renewable power, such as solar, wind, geothermal, hydro, or biomass;
- Alternative renewable fuel, such as biofuel, biomass, or hydrogen;
- Alternative engines, such as electric, flywheel, or micro turbines;
- Energy efficiency such as energy efficient building materials, power, lighting, heating, or fuel;
- Resource conservation/healthier use of resources, such as recycling or renewable materials; and
- Healthy lifestyle, such as pollution control or organic foods.

A company that is not included in an environmentally-focused index or does not generate ⅓ of its revenue from activities aligned with one or more Environmental Themes shall also be considered an ecologically-focused company if the Adviser believes that environmentally conscious trends such as a stronger demand for chemical-free cleaning and farming, recycling, alternative fuel and energy, energy efficiency, pollution control, or environmental cleanup/restoration will positively impact that company's future revenue (''Environmentally Conscious Companies''). Ecologically-focused companies also include those companies that the Adviser believes demonstrate sustainable environmental practices (''Other Environmental Companies''). Sustainable environmental practices include, but are not limited to, demonstrated progress in:

- Improving energy and resource efficiency;
- Reducing emissions from business operations;
- Financial and operational support of renewable materials and less pollutive energy sources; or
- Using or promoting the use of efficient buildings (measured by such labels as LEED or Energy Star).

The Fund's investment in the securities of Environmentally Conscious Companies and Other Environmental Companies will be limited to 10% of the Fund's total assets.

The strategy of investing in ecologically-focused companies may result in the Fund investing greater than 25% of its total assets in one or more market sectors. A sector is a large grouping of companies operating within the market that share similar characteristics. The ten most commonly recognized market sectors are: utilities, consumer staples, information technology, healthcare, financials, energy, consumer discretionary, materials, industrials, and telecommunication services. Sectors are comprised of multiple individual industries, and the Fund will not invest more than 25% of its total assets in an individual industry.

The Adviser will review company fundamentals and the composition of recognized environmentally-focused indices to identify a universe of

[7] ADRs are securities issued by a U.S. bank or trust company evidencing ownership of underlying securities issued by a foreign company. ADRs are designed for use in U.S. securities markets.

[8] The foreign equity securities, including any depositary receipts, in which the Funds may invest will be limited to securities that trade in markets that are members of the Intermarket Surveillance Group (''ISG''), which includes all U.S. national securities exchanges and certain foreign exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange. *See infra* note 12.

ecologically-focused companies. Company fundamentals include factors reflective of a company's financial condition, including balance sheets and income statements, asset history, product or service development, and management productivity. The Adviser also will examine annual sustainability reports from companies, as well as supplemental disclosures regarding environmental practices within corporate investor relations materials.

The Adviser will focus on ecologically-focused companies that it believes have better than average potential for growth in sales and profits. Historical financial statements (income, balance sheet, cash flow) will serve as quantitative guides in the selection process. Qualitative reviews of a company's competitive position and target market potential also will influence portfolio decisions. The Fund will, under most market conditions, include a blend of growth or cyclical stocks held for price appreciation potential and dividend growth stocks held for their potential to deliver a growing stream of income.[9] Factors regarding valuation such as price to sales ratios, price to earnings ratios, and price to book ratios will influence the size of the Fund's position in each company.

Other Permitted Investments, Investment Limitations, and Additional Information Applicable to Both Funds

Each Fund, to a lesser extent, may attempt to pursue its investment objective by employing other investment strategies and by investing in additional types of securities that are not otherwise part of its principal investment strategies as described above. To the extent a Fund's principal investment policies are satisfied, including but not limited to its 80% investment policy, such Fund may also invest up to 20% of its total assets in the securities described below. Each Fund, however, will also be subject to certain additional investment limitations, including those set forth below:

- A Fund may only purchase securities of any issuer only when consistent with the maintenance of such Fund's status as a diversified company under the 1940 Act, the rules or regulations thereunder, as such statute, rules, or regulations may be amended from time to time, or any applicable exemptive relief.[10]
- A Fund may not concentrate investments in a particular industry or group of industries as concentration is defined under the 1940 Act, the rules or regulations thereunder, as such statute, rules, or regulations may be amended from time to time, or any applicable exemptive relief.
- A Fund may not hold in the aggregate more than 15% of its net assets in illiquid investments, including Rule 144A securities and loan participations.
- In accordance with the Exemptive Order, the Funds will not invest in options, futures, or swaps.
- The Funds' investments will be consistent with the Funds' investment objectives and will not be used to enhance leverage.
- Each Fund will elect to be treated, and intends to qualify each year, as a regulated investment company under Subchapter M of the Internal Revenue Code.

Finally, each Fund may also invest up to 20% of total assets in fixed income securities issued by companies organized in the U.S., including convertible securities that may be exchanged for or converted into common stock, corporate debt securities, U.S. Government securities, money market instruments, and zero coupon bonds. Each Fund may invest in other investment company securities, including mutual funds, consistent with the 1940 Act, the rules thereunder or relief from the Commission, as well as repurchase and reverse repurchase agreements. The Funds may also participate in foreign currency transactions and purchase securities on a when-issued or delayed delivery basis.

Permitted Investments and Investment Limitations Applicable to Huntington US Equity Rotation Strategy ETF

The Fund may invest up to 20% of total assets in equity securities, other than common stock of Companies, including preferred stocks, exchange-traded funds, interests in other business organizations, real estate investment trusts, and other domestic equity securities which the Adviser believes have equity characteristics (''Other Domestic Equities'').

The Fund may invest up to 20% of its total assets in the following foreign securities which are issued by companies located outside of the U.S. and principally traded in foreign markets: (i) Equity securities and fixed income securities of foreign entities; (ii) obligations of foreign branches of U.S. banks and foreign or domestic branches of foreign banks including European Certificates of Deposit, European Time Deposits, Canadian Time Deposits, Canadian Yankee Bonds, Canadian Certificates of Deposit, and investments in Canadian commercial paper and europaper; (iii) depositary receipts including ADRs, European Depositary Receipts (''EDRs''), which are also known as Continental Depositary Receipts (''CDRs''), and Global Depositary Receipts (''GDRs'');[11] (iv) securities issued or guaranteed by foreign corporations or foreign governments, their political subdivisions, agencies, and instrumentalities (*e.g.,* fixed income securities supported by national, state, or provincial governments, or similar political subdivisions); (v) debt obligations of supranational entities, including international organizations designed or supported by governmental entities to promote economic reconstruction or development, international banking institutions, and related government agencies such as the International Bank for Reconstruction and Development (World Bank), the Asian Development Bank, the European Investment Bank, and the Inter-American Development Bank; and (vi) fixed income securities of quasi-governmental agencies that are either issued by entities owned by a national, state, or equivalent government, or are obligations of a political unit that are not backed by the national government's full faith and credit (collectively, ''Foreign Securities'').[12]

Permitted Investments and Investment Limitations Specific to Huntington EcoLogical Strategy ETF

The Fund may invest up to 20% of its total assets in Other Domestic Equities and Foreign Securities other than those issued by Foreign Companies permitted

[9] Growth stocks are shares in a company whose earnings are expected to grow at an above-average rate relative to the market. Cyclical stocks are shares in a company that rise quickly when economic growth is strong and fall rapidly when growth is slowing down.

[10] Under Section 5(b)(1) of the 1940 Act, the Exchange states that a fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. For purposes of determining a Fund's compliance with Section 5(b)(1), the issuer of the underlying security will be deemed to be the issuer of any respective depositary receipt.

[11] EDRs/CDRs are securities typically issued by a non-U.S. financial institution and evidence ownership interests in a security or a pool of securities issued by either a U.S. or foreign issuer. GDRs are issued globally and evidence a similar ownership arrangement. EDRs are designed for trading in European securities markets, and GDRs are designed for trading in non-U.S. securities markets.

[12] *See supra* note 8.

as part of the Fund's principal investment strategies.[13]

Additional information regarding the Funds, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, distributions, and taxes can be found in the Notice and Registration Statement, as applicable.[14]

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act[15] and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[17] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Funds and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[18] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value (''PIV''), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.[19] On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Funds will disclose on their Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the respective Fund's calculation of the net asset value (''NAV'') at the end of the business day.[20] The NAV per Share for each Fund will be calculated by the Trust's fund accountant and determined as of the close of the regular trading session on the NYSE Arca (ordinarily 4:00 p.m., Eastern Time) on each day that the Exchange is open. In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Web site for the Funds will include a form of the prospectus for the Funds, additional data relating to NAV, and other applicable quantitative information. The intra-day, closing, and settlement prices of the portfolio securities will be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[21] In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D), and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[22] The Exchange will consider the suspension of trading in or removal from listing of the Shares if the PIV is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.[23] The Adviser is affiliated with two broker-dealers and has implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to each Fund's portfolio.[24] The Commission notes that Adviser personnel who make decisions on a Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding that Fund's portfolio.[25] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures

[13] *See id.*

[14] *See supra* notes 3 and 4, respectively.

[15] 15 U.S.C. 78f.

[16] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[19] According to the Exchange, several major market data vendors display and/or make widely available PIVs published on the CTA or other data feeds.

[20] The Disclosed Portfolio will include, as applicable, for each portfolio security or other financial instrument of the Funds the following: Ticker symbol; name of security and financial instrument; the number of shares or dollar value of each security and financial instrument held in the portfolio; and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

[21] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[22] With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[23] *See* NYSE Arca Equities Rule 8.600(d)(2)(C)(ii).

[24] *See supra* note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[25] *See* Commentary .06 to NYSE Arca Equities Rule 8.600.

designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.[26] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Commission also notes that all of the primary equity investments to be held by each Fund, as well as the non-U.S.-listed equity securities, including any depositary receipts, held by each Fund will trade in markets that are ISG members or are parties to a comprehensive surveillance sharing agreement with the Exchange.[27]

The Exchange further represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance procedures applicable to derivative products, which include Managed Fund Shares, are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit (''ETP'') Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, each Fund will be in compliance with Rule 10A–3 under the Act,[28] as provided by NYSE Arca Equities Rule 5.3.

(6) Each Fund may not hold more than 15% of net assets in illiquid investments, including Rule 144A securities and loan participations.

(7) The Funds will not invest in options, futures, or swaps, and the Funds' investments will be consistent with each Fund's investment objective and will not be used to enhance leverage.

(8) All of the primary equity investments to be held by each Fund, as well as the non-U.S.-listed equity securities, including any depositary receipts, held by each Fund will trade in markets that are ISG members or are parties to a comprehensive surveillance sharing agreement with the Exchange.

(9) A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations and description of the Funds, including those set forth above and in the Notice.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[29] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (SR–NYSEArca–2012–34) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14192 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

[26] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[27] *See* Notice, *supra* note 3.

[28] *See* 17 CFR 240.10A–3.

[29] 15 U.S.C. 78f(b)(5).

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67147; File No. SR–Phlx–2012–72]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Implementation Date for its Excess Order Fee

June 6, 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 May 24, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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 a rule change to delay the implementation date for its Excess Order Fee. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com/,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx recently submitted a proposed rule change to introduce an Excess

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Order Fee,[3] aimed at reducing inefficient order entry practices of certain market participants that place excessive burdens on the systems of Phlx and its members and that may negatively impact the usefulness and life cycle cost of market data. In order to provide market participants with additional time to enhance their efficiency so as to avoid the fee, Phlx is delaying the implementation date of the fee until July 2, 2012.

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act,[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, Phlx believes that delaying the implementation date of the Excess Order Fee will provide market participants with additional time to enhance the efficiency of their systems, and that implementation of the fee on July 2, 2012 will benefit investors and the public interest by encouraging more efficient order entry practices by all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, Phlx believes that the fee will constrain market participants from pursuing certain inefficient and potentially abusive trading strategies. To the extent that this change may be construed as a burden on competition, Phlx believes that it is appropriate in order to further the purposes of Section 6(b)(5) of the Act.[6] Phlx further believes that the proposed delay of one month in the implementation of the fee will not have any effect on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–72. 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2012–72, and should be submitted on or before July 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14193 Filed 6–11–12; 8:45 am]

BILLING CODE 8011–01–P

[3] Securities Exchange Act Release No. 67004 (May 17, 2012), 77 FR 30581 (May 23, 2012) (SR–Phlx–2012–64).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(a)(i). [sic]

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee; Public Teleconference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Commercial Space Transportation Advisory Committee Teleconference.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 2), notice is hereby given of a teleconference of the Operations Working Group (OWG) of the Commercial Space Transportation Advisory Committee (COMSTAC). The teleconference will take place on Tuesday, July 17, 2012, starting at 1 p.m. Eastern Daylight Time. Individuals who plan to participate should contact Susan Lender, Designated Federal Officer (DFO), (the Contact Person listed below) by phone or email for the teleconference call in number. The proposed agenda for this teleconference is to follow up on issues raised during the May 10, 2012, OWG meeting. These issues include:

- Discussing the question of on-orbit authority for the FAA and the

jurisdiction and regulation aspects of this question; and

• Examining possible next steps for the white paper that discussed possible revisions to the requirements for launch site licensing.

Interested members of the public may submit relevant written statements for the COMSTAC working group members to consider under the advisory process. Statements may concern the issues and agenda items mentioned above or additional issues that may be relevant for the U.S. commercial space transportation industry. Interested parties wishing to submit written statements should contact Susan Lender, DFO, (the Contact Person listed below) in writing (mail or email) by July 10, 2012, so that the information can be made available to COMSTAC members for their review and consideration before the July 17, 2012, teleconference. Written statements should be supplied in the following formats: one hard copy with original signature or one electronic copy via email.

An agenda will be posted on the FAA Web site at *http://www.faa.gov/go/ast.*

Individuals who plan to participate and need special assistance should inform the Contact Person listed below in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Susan Lender (AST–5), Office of Commercial Space Transportation (AST), 800 Independence Avenue SW., Room 331, Washington, DC 20591, telephone (202) 267–8029; Email *susan.lender@faa.gov.* Complete information regarding COMSTAC is available on the FAA Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/.*

Dated: Issued in Washington, DC, June 5, 2012.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2012–14150 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–14]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before July 2, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0350 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas ARM–105, (202) 267–7626, FAA, Office of Rulemaking, 800 Independence Ave. SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on May 31, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0350.

Petitioner: Aircraft Owners and Pilots Association and Experimental Aircraft Association.

Section of 14 CFR Affected: 14 CFR 61.3(c) and 61.23(a).

Description of Relief Sought: The relief sought would allow the Aircraft Owners and Pilots Association and Experimental Aircraft Association members to conduct certain operations of aircraft without having to hold an FAA-issued medical certificate.

[FR Doc. 2012–14285 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–15]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before July 2, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0437 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in

Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tyneka Thomas ARM–105, (202) 267–7626, FAA, Office of Rulemaking, 800 Independence Ave SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on May 31, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0437.

Petitioner: Billy G. Witt.

Section of 14 CFR Affected: 14 CFR 61.23(a)(3)(vi) and 61.39(a)(4).

Description of Relief Sought: The relief sought would allow Billy G. Witt eligibility to take a private pilot practical test without holding an FAA third-class medical certificate.

[FR Doc. 2012–14283 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Request To Release Airport Property at Merrill Field Airport, Anchorage, AK

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Notice of intent to release airport property.

SUMMARY: The Federal Aviation Administration (FAA) is considering a proposal to authorize the release of approximately 3.37 acres of Merrill Field Airport (MRI) property located in Anchorage, Alaska. Said property will be replaced with 4.6 acres of land located adjacent to the east and north boundaries of the existing Airport.

DATES: Comments must be received on or before July 16, 2012.

ADDRESSES: Send comments on this document to Gabriel Mahns, Compliance Officer, Federal Aviation Administration, Alaska Region Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513–7587. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: Michelle Colby, Real Estate Services Manager, DOWL HKM, 4041 B Street, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Mr. Gabriel Mahns, Compliance Officer, Federal Aviation Administration, Alaska Region Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513–7587, telephone 907–271–3665, email *gabriel.mahns@faa.gov* or Michelle Colby, Real Estate Services Manager, DOWL HKM, 4041 B Street, Anchorage, AK 99503, telephone 907–562–2000, email *mcolby@dowlhkm.com*.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 2009, the State of Alaska, Department of Transportation and Public Facilities (DOT&PF) presented an official purchase offer to the Municipality of Anchorage (MOA) for the referenced 3.37 acres of MRI and other Municipal lands along with a proposal to provide for a ''Functional Replacement'' of MRI lands in accordance with Title 23, Part 710.509 of the Code of Federal Regulations and Section 6.13 of the State of Alaska Right of Way Manual. This purchase offer was predicated on DOT&PF's need for additional right of way to construct improvements to the Glenn Highway adjacent to MRI in conjunction with the State of Alaska project known as the Glenn Highway, Gambell Street to Airport Heights Reconstruction Project (IM–OA1–6(35)/58800).

Per the terms of the proposed exchange, the MOA MRI will dispose of approximately 3.37 acres of land and will receive title to approximately 4.6 acres in exchange as well as monetary compensation in the amount of $4,500,000. On June 2, 2009 and June 19, 2009, authorized representatives of the MOA and the DOT&PF executed a Land Exchange Agreement that set forth the terms of the purchase and exchange. On June 22, 2010, the Anchorage Assembly passed Assembly Ordinance No. 2010–49 which authorized the disposal of MOA lands and the acceptance of the offered additional monetary compensation amount of four million five hundred thousand dollars ($4,500,000).

A portion of the lands to be released and then disposed from MRI, containing approximately 8,986 square feet (SF) or 0.206 acres, was purchased for inclusion into MRI utilizing FAA Airport Improvement (AIP) Funds. Said lands, described as a portion of Lot One of the East Fifth Avenue Subdivision, according to Plat 68–20, Anchorage Recording District (ARD), Third Judicial District, State of Alaska, were acquired in December of 1992 under AIP No. 3–02–0015–16. In 1997, the lands within the area to be disposed and the remainder of Lot One were replatted with additional lands into Tract C–1 of Merrill Field Replat Addition No. 4, according to Plat 97–26, ARD.

In accordance with Title 49 of the United States Code (U.S.C.), Section 47107(h)(2), this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property described immediately above to be used for an aeronautical purpose. Other portions of the lands to be disposed from MRI, containing a combined area of 37,950 SF or 0.871 acres, were originally conveyed from the United States of America to the City of Anchorage in 1958 under the authority of Section 16 of the 1946 Federal Airport Act (60 Stat. 179; 49 U.S.C. 1115). Said lands were a portion of the lands within Tracts 22 and 24 of the Fourth Addition to the Townsite of Anchorage, as shown on the Plat of U.S. Survey No. 1456, accepted June 13, 1923, on file in the Bureau of Land Management, Department of the Interior.

Pursuant to section 16 of the Act, the conveyance of said lands was subject to a provision that the lands conveyed would revert to the U.S. in the event that they are not developed or cease be used for airport purposes. Per the terms of the Land Exchange Agreement, these lands will cease to be used for airport purposes once conveyed; however, since the function of said land is being replaced via the exchange, the FAA has determined that the reversionary provision of the Section 16 conveyance will be satisfied by their concurrence to the exchange. In regards to the proposed change in use of said lands, the FAA has determined that the proposed change should also be published for comment

via this notice before modification of the use provision.

The remaining 2.293 acres of MRI lands to be disposed are not subject to specific FAA public notice requirements; however, since these lands have historically been depicted on the MRI FAA-approved Airport Layout Plan, the airport is being compensated for the fair market value of the airport lands and infrastructure that are being purchased by the DOT&PF and that the lands are being replaced in ''like kind''. Upon the transfer of the replacement 4.6 acres, the aforementioned lands will no longer be needed for aeronautical use. There are no impacts to the airport by allowing the disposal of the property. A categorical exclusion for this project was prepared by HDR Alaska on behalf of the DOT&PF, issued August 19, 2005, and approved by the Federal Highway Administration, Department of Transportation, on August 22, 2005.

The following are legal descriptions of the property proposed to be release at the Merrill Field Airport: That portion of Lot One of the East Fifth Avenue Subdivision, according to Plat 68–20, Anchorage Recording District, Third Judicial District, State of Alaska, containing approximately 8,986 SF or 0.206 acres, more or less, which is now known as a portion of Tract C–1 of Merrill Field Replat Addition No. 4, according to Plat 97–26, filed in the Anchorage Recording District, Third Judicial District, State of Alaska, and also designated as a portion of Parcel No. 19 which lies adjacent to the right of way lines of Project No. IM–0A1–6(35)/58800; and Portions of Tracts 22 and 24 of the Fourth Addition to the Townsite of Anchorage, as shown on the Plat of U.S. Survey No. 1456, accepted June 13, 1923, on file in the Bureau of Land Management, Department of the Interior, containing combined area of 37,950 SF or 0.871 acres, more or less, which are now known as portions of Tract 5, Merrill Field Replat, according to Plat 85–23, filed in the Anchorage Recording District, Third Judicial District, State of Alaska, and also designated as portions of Parcel No. 22 which lies adjacent to the right of way lines of Project No. IM–0A1–6(35)/58800.

Issued in Anchorage, Alaska, on June 6, 2012.

Byron K. Huffman,

Division Manager, FAA, Alaskan Region.

[FR Doc. 2012–14157 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind the Notice of Intent To Develop the Environmental Impact Statement: Bronx County, NY

AGENCY: Federal Highway Administration (FHWA), United States Department of Transportation (DOT).

ACTION: Notice to rescind the notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for a proposed construction project for the Bruckner-Sheridan Expressway Interchange and for Improved Access to the Hunts Point Peninsula in Bronx County, New York is being rescinded. In Vol. 68, No. 34/February 20, 2003/Notices, page 8327–8328 [03–4029], the Federal Highway Administration (FHWA) issued a NOI to advise the public that an EIS would be prepared for a proposed construction project for the Bruckner-Sheridan Expressway Interchange and for Improved Access to the Hunts Point Peninsula, in Bronx County, New York.

FOR FURTHER INFORMATION CONTACT: Jonathan D. McDade, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 11A Clinton Avenue, Suite 719, Albany, New York 12207, Telephone: (518) 431–4127; or

Mr. Joseph T. Brown, P.E., Acting Regional Director, New York State Department of Transportation, Hunters Point Plaza, 47–40 21st Street, Long Island City, New York 11101, Telephone: (718) 482–4526.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the New York State Department of Transportation (NYSDOT) intended to prepare an EIS on the proposal to improve safety and traffic flow at the Bruckner Expressway (I–278) at its interchange with the Arthur V. Sheridan Expressway (I–895) as well as to improve access in and out of the Hunts Points Peninsula from the Expressway System.

The purpose of the project was to improve safety and traffic flow at the Bruckner Expressway (I–278) at its interchange with the Arthur V. Sheridan Expressway (I–895) and to reduce traffic, especially trucks from the local streets and to enhance commerce by providing a direct access from the expressway system to the Hunts Point Peninsula.

An Expanded Project Proposal (EPP) was issued in 2002 and the project was programmed with a construction cost estimate of $205 million. The Environmental Impact Statement for this project (X730.39) started in 2003. NEPA Scoping, which was completed in September 2007, included four conceptual build alternatives, in addition to the No-build alternative. In year 2008, after the geometric design for the project's alternatives were completed, two Design Refinements to the four build alternatives were envisioned, and with consensus from the stakeholders, were advanced as follows:

Alternative 1E: Reconstruct the Bruckner Expressway at existing elevation over the Bronx River, remove the Sheridan Expressway and construct full ramp connections from Bruckner Expressway to Hunts Point at Oak Point. Alternative 2E: Reconstruct the Bruckner Expressway at existing elevation over the Bronx River, reconstruct the ramps between the Bruckner and Sheridan Expressways, and construct full ramp connections from the Bruckner Expressway to Hunts Point at Oak Point.

It is proposed to terminate the EIS for the following reason:

The Bruckner viaduct, from the RFK Bridge to the Sheridan Expressway, is in very poor condition. Several sections of the deck are very poorly rated; bridge bearings and other members need repair. The conditions of the viaduct require NYSDOT Region 11 to reprioritize the available funding to address more critical work in the corridor. The Region therefore will advance a state of good repair that will address the deck deterioration, steel members and joints repair.

The state of good repair of the Bruckner Expressway remains an operational and safety priority for NYSDOT. Improvements at this location can be accomplished without significant environmental impacts. To address repairs at the Bruckner Expressway, reduced scope projects will be progressed.

Issued on June 5, 2012.

Chris Gatchell,

Director, Office of Engineering, Federal Highway Administration.

[FR Doc. 2012–14233 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA 2012–0006–N–5]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking approval for the new Safety Appliance Standards Guidance Checklist form listed below. Before submitting information collection requirements (ICRs) for clearance by the Office of Management and Budget (OMB), FRA is required to solicit public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than August 13, 2012.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 25, Washington, DC 20590, or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE. Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–0565.'' Alternatively, comments may be transmitted via facsimile to (202) 493–6216 or (202) 493–6479, or via email to Mr. Brogan at *Robert.Brogan@dot.gov*, or to Ms. Toone at *Kimberly.Toone@dot.gov*. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 21, Washington, DC 20590 (telephone: (202) 493–6292) or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(I)–(iv); 5 CFR 1320.8(d)(1)(I)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of the currently approved ICRs that FRA will submit for clearance by OMB as required under the PRA:

Title: Safety Appliance Concern Recommendation Report; Safety Appliance Standards Guidance Checklist Forms.

OMB Control Number: 2130–0565.

Abstract: Sample car/locomotive inspections are performed as a courtesy to the car manufacturers to ensure that the equipment is built in accordance with all applicable Federal regulations and requirements. Car builders that desire to have FRA review their equipment for compliance with safety standards are to submit their safety appliance arrangement drawings, prints, etc., to the FRA Office of Safety Assurance and Compliance for review at least 60 days prior to construction. The sample car inspection program is designed to provide assurance that rolling stock equipment is compliant within the Code of Federal Regulations for use on the general railroad system. Although a sample car inspection is not required, most builders today request FRA to perform the inspection. The goal of the sample car inspection program is to reduce risk to railroad employees and improve passenger safety for the general public by ensuring rolling stock is fully compliant with all applicable regulations.

In an ongoing effort to conduct more thorough and more effective inspections of freight railroad equipment and to further enhance safe rail operations, FRA has developed a safety concern recommendation report form and a group of guidance checklist forms that facilitate railroad, rail car owner, and rail equipment manufacturer compliance with agency Railroad Safety Appliance Standards regulations. New form FRA F 6180.EZ is designed to reduce burden on respondents. When a request for sample car inspection incoming letter is provided by the customer, an abundant of amount of information is submitted to FRA for review that may require a formal on-site inspection. The information contained in the letter includes several paragraphs to explain the cited Code of Federal Regulations that the customer believes related to the construction of the car. Since many cars today are considered a car of special construction, the type of car to be reviewed, many times the amount of details of information are supplied to support why the customer believes the car submitted is the nearest car to construction. An abundance of factors with justification to support the car type is included in the request. Some examples would be a Logo, Company Name, and signature block, specific drawings, reflectorization, engineering information such as test or modeling of components. Also, the request may include car reporting marks, the amount of cars that would be constructed in the car series. In addition, the request would provide the location of the inspection, contact person, title, and contact information.

Currently, each request is written differently, but contains most of the information to process the request to completion. The F6180.EZ Form provides specific blocks that contain a standardized format to provide specific information that is in an easy to fill-in the form arrangement. This would greatly reduce the amount of time to complete the form instead of a long form letter and additional sample car inspection request of similar car orders would be minimized by the information provided previously. By having a form of this nature, the customer will have the information visually that would be required, to eliminate the potential of missing information that then causes additional letters to complete the incoming package. FRA could potentially be able to provide a cursory review of the provided information to ensure the package is complete without having to constantly compare the request letter to the supplied documents.

The FRA region responsible for the sample car field sample car inspection is obliged to formally inspect the car for compliance. All the information in the customer request is forwarded to the region for review. Once the inspection is completed, the assigned inspector provides his report in a memorandum to the MP&E Specialist. The MP&E Specialist reviews the documents and provides a memo to the Regional Administrator who sends a response by memorandum to FRA Headquarters of the finding from the field inspection. The additional memorandums would be eliminated by the F6180.4 EZ just by a grid sign-off, reducing the amount of additional paperwork and filing documents.

FRA Headquarters is responsible for gathering all the information from the request from the customer as well as assigning and forwarding the information to the Region. All the information is reviewed by the MP&E Specialist at Headquarters. The MP&E Specialist prepares a grid letter response for the MP&E Staff Director who then offers the response letter to the Director, Office of Safety Assurance and Compliance. The formal response letter is then sent to the customer through the Control Correspondence Management (CCM) system. The filing system and folders today are already large in size, and would be reduced by having a form that is on one piece of paper with all the information necessary to complete the process from the initial request for sample car inspection to the formal response letter provided.

Form Number(s): New Form FRA F 6180.4EZ; current Forms FRA 6180.4(a)–(q).

Affected Public: Businesses.

Respondent Universe: 130 Federal and State Inspectors.

Frequency of Submission: Annually.

REPORTING BURDEN

Form	Respondent universe	Total annual responses (forms)	Average time per response (minutes)	Total annual burden hours (hours)
New Form FRA F 6180.4EZ	130 Federal and State Inspectors	70	70	82
Current Form FRA F 6180.4a	130 Federal and State Inspectors	20	60	20
Current Form FRA F 6180.4b	130 Federal and State Inspectors	30	60	30
Current Form FRA F 6180.4c	130 Federal and State Inspectors	20	60	20
Current Form FRA F 6180.4d	130 Federal and State Inspectors	3	60	3
New Form FRA F 6180.4e	130 Federal and State Inspectors	15	60	15
New Form FRA F 6180.4f	130 Federal and State Inspectors	3	60	3
New Form FRA F 6180.4g	130 Federal and State Inspectors	30	60	30
New Form FRA F 6180.4h	130 Federal and State Inspectors	3	60	3
New Form FRA F 6180.4i	130 Federal and State Inspectors	3	60	3
New Form FRA F 6180.4j	130 Federal and State Inspectors	3	60	3
New Form FRA F 6180.4K	130 Federal and State Inspectors	10	60	10
New Form FRA F 6180.4l	130 Federal and State Inspectors	5	60	5
New Form FRA F 6180.4m	130 Federal and State Inspectors	7	60	7
New Form FRA F 6180.4p	130 Federal and State Inspectors	5	60	5
New Form FRA F 6180.4q	130 Federal and State Inspectors	5	60	5

Total Responses: 232.

Estimated Total Annual Burden: 244 hours.

Status: Revision of a Currently Approved Collection.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on June 6, 2012.

Rebecca Pennington,

Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. 2012–14286 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2012–0042]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated March 22, 2012, CSX Transportation (CSX) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR Part 236. FRA assigned the petition Docket Number FRA–2012–0042.

CSX seeks relief from the requirements of 49 CFR Part 236, Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances; and Section 236.109, Time releases, timing relays and timing devices. CSX requests relief from 49 CFR 236.109 as it applies to variable timers within the program logic of the operating software of microprocessor-based equipment.

CSX states that timing devices contained within microprocessor-based equipment are typically nonvariables and are within the program logic of the operating software. However, CSX notes that some microprocessor-based equipment have variable timers. CSX is requesting relief from the requirement of checking the actual time interval of microprocessor-based variable timers. Such variable timers will use verification of the cyclic redundancy check/check sum/universal control number of the existing location specific application logic to the previously tested version.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by July 27, 2012 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on June 5, 2012.

Ron Hynes,

Acting Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2012–14167 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[FRA Emergency Order No. 27, Notice No. 1]

Gulf, Colorado & San Saba Railway; Emergency Order To Prevent Operation of Trains Over the Highway-Rail Grade Crossing at U.S. Highway 87 (DOT Crossing No. 024816B, Milepost 66.65) in Brady, TX

The Federal Railroad Administration (FRA) of the United States Department of Transportation (DOT) has determined that public safety compels issuance of this Emergency Order requiring the Gulf, Colorado & San Saba Railway (GCSR) of Brady, Texas, to discontinue operation of any train or rail vehicle under any circumstances over the highway-rail grade crossing at U.S. Highway 87 (DOT Crossing No. 024816B, milepost 66.65) on the GCSR rail line until GCSR implements and complies with procedures for safe operation over the crossing as approved by FRA, or restores the proper functioning of the grade crossing warning system at U.S. Highway 87 and brings the grade crossing warning system into full compliance with FRA regulations, as determined by FRA.

Authority

Authority to enforce Federal railroad safety laws has been delegated by the Secretary of Transportation to the Federal Railroad Administrator. 49 CFR 1.49. Railroads are subject to FRA's safety jurisdiction under the Federal railroad safety laws, 49 U.S.C. 20102, 20103. FRA is authorized to issue emergency orders where an unsafe condition or practice ''causes an emergency situation involving a hazard of death or personal injury.'' 49 U.S.C. 20104. These orders may impose such ''restrictions and prohibitions * * * that may be necessary to abate the situation.'' *Ibid.*

Background

GCSR is subject to the jurisdiction of FRA. The railroad operates on 67.5 miles of main line track between Lometa, Texas, and Brady, Texas. In addition to its main line track, GCSR operates on the Sand House Spur in Brady, which is approximately two miles in length. The American Railroads Corporation, headquartered in Barrington, Illinois, owns and operates GCSR. The railroad solely transports freight, and its primary commodities include sand and agricultural products. GCSR has designated all track over which it operates as excepted track. *See* 49 CFR 213.4. By regulation and posted notice, train speeds are restricted to 10 m.p.h. This includes the trackage over the highway-rail grade crossing at U.S. Highway 87. However, even trains traveling through a grade crossing at slow speeds are not able to stop suddenly to avoid vehicles in the crossing. FRA has promulgated regulations to protect and adequately warn highway users attempting to cross a grade crossing about a train's approach to, or occupancy of, the crossing so that a potentially deadly accident can be prevented. *See* 49 CFR part 234.

U.S. Highway 87 is a busy four-lane highway in Brady, which GCSR has acknowledged in a June 4, 2012, letter to FRA's Regional Administrator for Region 5. The posted highway speed limit is 55 m.p.h. As of 2010, the annual average daily traffic was approximately 4,200 vehicles. Moreover, the Texas Department of Transportation (TXDOT) estimates that approximately 16 school buses currently traverse the crossing daily, Monday through Friday. The track adjacent to U.S. Highway 87 is routinely used to service a nearby industry. During an inspection in April 2012, FRA inspectors found freight cars ''spotted'' on the industry track immediately on both sides of the crossing that either did not have handbrakes applied or had insufficient handbrakes applied to prevent them from rolling free.

The active warning system for the highway-rail grade crossing at U.S. Highway 87 consists of mast-mounted flashing lights and audible warning bells. According to the information available to FRA, the active warning system at U.S. Highway 87 has been without power and out-of-service since at least April 1, 2010. In GCSR's June 4th letter, the railroad contends that the crossing has been out-of-service since the railroad was purchased by the current owners, and that the line was rarely used. Only in the last 24 months, according to GCSR, has business

expanded requiring the regular use of the U.S. Highway 87 grade crossing.

Federal grade crossing signal system safety regulations require that ''[w]hen any essential component of a highway-rail grade crossing warning system fails to perform its intended function, the cause shall be determined and the faulty component adjusted, repaired, or replaced without undue delay.'' 49 CFR 234.207(a). Further, the railroad must take appropriate action, such as stopping and flagging the crossing, until the repair of an essential component has been made. 49 CFR 234.207(b).

FRA and TXDOT safety inspectors have taken exception several times to the condition of the active warning system at the U.S. Highway 87 grade crossing. However, GCSR has repeatedly failed to institute necessary repairs to restore the proper functioning of the active warning system. On July 6, 2011, a TXDOT inspector cited GCSR for its failure to repair the warning system without undue delay. On January 25, 2012, FRA and TXDOT conducted a re-inspection and again cited GCSR for its failure to repair the warning system without undue delay. At this time, GCSR representatives were provided a detailed explanation of the requirements of the Federal regulations. Yet, follow-up inspections by FRA on March 20 and April 17, 2012, revealed that nothing had been done to bring the active warning system back into proper functioning.

On May 21, 2012, FRA sent a letter to GCSR notifying the railroad of the need to restore the active warning devices at the U.S. Highway 87 highway-rail grade crossing as well as those at a separate crossing (FM 3533) to proper functioning within 10 days of the date of the letter. FRA clearly stated that failure to act within the time prescribed would result in the issuance of an emergency order ceasing operations over the identified crossings because of the serious safety concerns about the condition of the crossing warning systems. GCSR failed to respond within the time prescribed, but did respond by letter dated June 4, 2012. GCSR noted that the crossing at FM 3533 had been repaired prior to the receipt of FRA's May 21st letter, but the railroad recognized that it had failed to restore the active warning system to its proper functioning at the U.S. Highway 87 highway-rail grade crossing. GCSR contended that it has not restored the warning system to proper functioning at U.S. Highway 87 because it has been waiting for TXDOT to approve a crossing upgrade. The railroad also stated that it has used safe flagging procedures with crews on the ground facing traffic in both directions. Although GCSR states that it has stop and flag procedures in place, TXDOT has received multiple reports concerning GCSR trains passing through the crossing at U.S. Highway 87 without flagmen present. While FRA understands the desire to upgrade the crossing, this circumstance cannot prevent GCSR from taking the necessary steps to protect its employees and the general public from the serious hazards created by the out-of-service active warning systems at the U.S. Highway 87 grade crossing. As of June 5, 2012, FRA confirmed that still nothing has been done to bring the active warning system back into proper functioning.

Finding and Order

The results of inspections performed by FRA and TXDOT inspectors of the active warning devices installed at the U.S. Highway 87 grade crossing at milepost 66.65 on GCSR line have led FRA to conclude that continued use of this highway-rail grade crossing by the railroad poses an imminent and unacceptable threat to public safety. Furthermore, a past pattern of failure by GCSR to comply with Federal grade crossing signal system safety regulations persuades FRA that reliance upon the cooperation of GCSR to provide alternate protection for highway users until completion of an anticipated upgrade to the active warning devices at the U.S. Highway 87 grade crossing is inadequate to protect public safety. I, therefore, find that the unsafe conditions discussed above create an emergency situation involving a hazard of death or injury to persons. Accordingly, pursuant to the authority of 49 U.S.C. 20104, delegated to me by the Secretary of Transportation (49 CFR 1.49), it is ordered that Gulf, Colorado & San Saba Railway shall discontinue, and shall not permit under any circumstances, the operation of trains over the U.S. Highway 87 grade crossing (DOT Crossing No. 024816B) at milepost 66.65 while this Emergency Order remains in effect. I direct that a copy of this order be posted in a public location at the railroad's office and a copy of the order be provided to each employee of the railroad.

Relief

The GCSR may obtain full relief from this Emergency Order by taking the following actions:

(1) Restore to their proper function the active warning devices currently installed, or complete installation of upgraded active warning devices, at the U.S. Highway 87 grade crossing at milepost 66.65 to ensure proper functioning of such devices as they are relied upon by highway users.

(2) Submit written certification to FRA's Regional Administrator for Region 5 that all necessary repairs and inspections of the active warning devices at the U.S. Highway 87 grade crossing have been performed and that all required tests are up-to-date.

(3) Obtain approval from the Federal Railroad Administrator that all of the requirements of this Emergency Order have been met and properly performed. To obtain relief, GCSR should inform the Federal Railroad Administrator in writing, with a copy to FRA's Regional Administrator for Region 5, that it believes all of the requirements of this Emergency Order have been met. FRA will conduct inspections of the active warning devices at the U.S. Highway 87 grade crossing and will inform GCSR in writing whether this Emergency Order will be lifted. If FRA does not lift the order, the written response will specifically describe what additional measures need to be taken to meet all of the requirements of this Emergency Order.

Partial Relief

In order for FRA to consider granting partial relief from this Emergency Order, the GCSR must submit a written plan for approval to FRA's Regional Administrator for Region 5 to provide alternate protection for highway users at the U.S. Highway 87 grade crossing. GCSR shall not resume any rail operations over U.S. Highway 87 until obtaining approval of its written plan to provide temporary alternate protection to highway users of the U.S. Highway 87 grade crossing by the Regional Administrator for FRA's Region 5. Any partial relief provided will, however, remain subject to GCSR compliance with its approved written plan to provide alternate protection to highway users of the U.S. Highway 87 grade crossing. Failure to comply with any approved plan will result in the partial relief being revoked.

Penalties

Any violation of this order or the terms of any approved written plan pursuant to this order to provide alternate protection to highway users of the U.S. Highway 87 grade crossing shall subject the person committing the violation to a civil penalty of up to $100,000 before June 25, 2012, and $105,000 on or after June 25, 2012. 49 U.S.C. 21301. Any individual who willfully violates a prohibition stated in this order is subject to civil penalties under 49 U.S.C. 21301. In addition, such an individual whose violation of

this order demonstrates the individual's unfitness for safety-sensitive service may be removed from safety-sensitive service on the railroad under 49 U.S.C. 20111. If appropriate, FRA may pursue criminal penalties under 49 U.S.C. 522(a) and 49 U.S.C. 21311(a), as well as 18 U.S.C. 1001, for the knowing and willful falsification of a report required by this order. FRA may, through the Attorney General, also seek injunctive relief to enforce this order. 49 U.S.C. 20112.

Effective Date and Notice to Affected Persons

This Emergency Order shall take effect at 12:01 a.m. C.S.T. on June 7, 2012, and apply to all operations of trains or vehicles on or after that time. Notice of this Emergency Order will be provided by publishing it in the **Federal Register.** Copies of this Emergency Order will be sent by mail or email prior to publication to the Gulf, Colorado & San Saba Railway and the American Railroads Corporation.

Review

Opportunity for formal review of this Emergency Order will be provided in accordance with 49 U.S.C. 20104(b) and section 554 of title 5 of the United States Code. Administrative procedures governing such review are found at 49 CFR part 211. *See* 49 CFR 211.47, 211.71, 211.73, 211.75, and 211.77.

Issued in Washington, DC, on June 6, 2012.

Joseph C. Szabo,

Administrator.

[FR Doc. 2012–14239 Filed 6–7–12; 4:15 pm]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0071]

Agency Information Collection Activity Under OMB Review: Production Plan Reports

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: The Department of Transportation (DOT) invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a renewal of an information collection. The collection involves vehicle manufacturers submitting updated future product plans, as well as production data through the recent past, including data about engines and transmissions for model year (MY) 2012 through MY 2025 passenger cars and light trucks and the assumptions underlying those plans.

The information to be collected will be used to assist NHTSA with the setting of future fuel economy standards for light duty vehicles. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

DATES: Written comments should be submitted by August 13, 2012.

ADDRESSES: You may submit comments [identified by Docket No. NHTSA–2012–0071] through one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1 (202) 493–2251
- *Mail or Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Katz, Fuel Economy Division, Office of International Policy, Fuel Economy and Consumer Programs, NVS–132, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590. Phone: (202) 366–4936.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2127–0655.

Title: 49 CFR Parts 531 and 533 Passenger Car Average Fuel Economy Standards—Model Years 2016–2025; Light Truck Average Fuel Economy Standards—Model Years 2016–2025; Production Plan Data.

Type of Review: Extension of existing collection.

Background: In this collection of information, NHTSA is requesting updated future product plans from vehicle manufacturers, as well as production data through the recent past, including data about engines and transmissions for model year MY 2012 through MY 2025 passenger cars and light trucks and the assumptions underlying those plans.

NHTSA requests information for MYs 2012–2025 to aid NHTSA in developing a realistic forecast of the MY 2016–2025 vehicle market. Information regarding earlier model years may help the agency to better account for cumulative effects such as volume-and time-based reductions in costs, and also may help to reveal product mix and technology application trends during model years for which the agency is currently receiving actual corporate average fuel economy (CAFE) compliance data. Information regarding later model years helps the agency gain a better understanding of how manufacturers' plans through MY 2025 relate to their longer-term expectations regarding Energy Independence and Security Act requirements, market trends, and prospects for more advanced technologies.

NHTSA will also consider information from model years before and after MYs 2016–2025 when reviewing manufacturers' planned schedules for redesigning and freshening their products, in order to examine how manufacturers anticipate tying technology introduction to product design schedules. In addition, the agency is requesting information regarding manufacturers' estimates of the future vehicle population, and fuel economy improvements and incremental costs attributed to this notice.

Respondents: Automobile manufacturers.

Estimated Number of Respondents: Thirty.

Estimated Number of Responses: Thirty.

Estimated Total Annual Burden: Reports are requested from each of the thirty automotive manufacturers. For each manufacturer who supplies product plan reports, NHTSA has made available a product plan template, which can be found at: *http://www.nhtsa.gov/Laws+&+Regulations/CAFE+-+Fuel+Economy/Current+and+past+product+plan+requests.* NHTSA currently has a clearance for 16,000 hours, based on reports being received from 22 manufacturers. Including reports from eight additional manufacturers, most of which produce approximately 500 vehicles per year, results in an additional reporting burden of 500 hours. Adding that burden to the existing burden of 16,000, results in a total reporting burden of 16,500 hours. The information requested in the templates may change from request to request as new fuel economy technologies are implemented, which may increase the amount of information requested, and as older technologies are phased out, which may decrease the amount of information requested. Therefore, the time needed to complete the templates may vary for each product plan request. Although the reporting burden may not be precisely 16,500 hours for each specific product plan request, NHTSA believes that, based on prior experience, that this

burden is representative and accurate for the purposes of this clearance.

Estimated Frequency: Manufacturer product plans are requested each time that NHTSA initiates a rulemaking for light-duty fuel economy standards. These standards may be issued for a one to five year time frame, thus manufacturers would be expected to provide these reports every one to five years. Recent NHTSA rulemakings have typically ranged between three and five years. NHTSA generally requests products plans prior to issuing a notice of proposed rulemaking and prior to the issuance of a final rule. Since the gap between the two rules generally is less than a year, manufacturers would be expected to provide two reports for each rulemaking cycle.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the Department's performance; (b) the accuracy of the estimated burden; (c) ways for the Department to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued on: June 6, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–14213 Filed 6–11–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2012–0069]

Reports, Forms, and Record Keeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before August 13, 2012.

ADDRESSES: You may submit comments [identified by DOT Docket No. NHTSA–2012–0069] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov*.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*. or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Timothy M. Pickrell, NHTSA, 1200 New Jersey Avenue SE., W55–204, NVS–421,Washington, DC 20590. Mr. Pickrell's telephone number is (202) 366–2903. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5CFR 1320.8(d), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) How to enhance the quality, utility, and clarity of the information to be collected;

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title: The National Survey on the Use of Booster Seats.

OMB Control Number: 2127–0644.

Affected Public: Motorists in passenger vehicles at gas stations, fast food restaurants, and other types of sites frequented by children during the time in which the survey is conducted.

Form Number: NHTSA Form 1010.

Abstract

The National Survey of the Use of Booster Seats is being conducted to respond to the Section 14(i) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000. The act directs the Department of Transportation to reduce the deaths and injuries among children in the 4 to 8 year old age group that are caused by failure to use a booster seat by 25%. Conducting the National Survey of the Use of Booster Seats provides the Department with invaluable information on who is and is not using booster seats, helping the Department better direct its outreach programs to ensure that children are

protected to the greatest degree possible when they ride in motor vehicles. The OMB approval for this survey is scheduled to expire on October 31, 2012. NHTSA seeks an extension to this approval in order to obtain this important survey data, save more children and help to comply with the TREAD Act requirement.

Estimated Annual Burden: 320 hours.

Estimated Number of Respondents: Approximately 4,800 adult motorists in passenger vehicles at gas stations, fast food restaurants, and other types of sites frequented by children during the time in which the survey is conducted.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: June 7, 2012.

Terry Shelton,

Associate Administrator, National Center for Statistics and Analysis, National Highway Traffic Safety Administration, U.S. Department of Transportation.

[FR Doc. 2012–14264 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition To Modify an Exemption of a Previously Approved Antitheft Device; Ford Motor Company

AGENCY: National Highway Traffic Safety Administration (NHTSA) Department of Transportation (DOT).

ACTION: Grant of petition to modify an exemption of a previously approved antitheft device.

SUMMARY: On January 13, 2011, the National Highway Traffic Safety Administration (NHTSA) granted in full Ford Motor Company's (Ford) petition for an exemption in accordance with § 543.9(c)(2) of 49 CFR part 543, *Exemption from the Theft Prevention Standard* for the Ford Fusion vehicle line beginning with its model year (MY) 2012 vehicles. On February 16, 2012, Ford submitted a petition to modify its previously approved exemption for the Ford Fusion vehicle line beginning with model year (MY) 2013. Ford also requested confidential treatment of specific information in its petition by letter dated April 25, 2012. The agency will address Ford's request for confidential treatment by separate letter. NHTSA is granting Ford's petition to modify the exemption in full because it has determined that the modified device is also likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The modification granted by this notice is effective beginning with the 2013 model year (MY).

FOR FURTHER INFORMATION CONTACT: Ms. Carlita Ballard, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Ballard's telephone number is (202) 366–5222. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: On January 13, 2011, NHTSA published in the **Federal Register** a notice granting in full a petition from Ford for an exemption from the parts-marking requirements of the Theft Prevention Standard (49 CFR 541) for the Fusion vehicle line beginning with its MY 2012 vehicles. The 2012 Ford Fusion is currently equipped with the SecuriLock immobilizer device as standard equipment. The SecuriLock device is a passive antitheft device and is offered with an optional perimeter alarm system (See 76 FR 2444).

On February 16, 2012, Ford submitted a petition to modify its previously approved exemption for the Fusion vehicle line. This notice grants in full Ford's petition to modify the exemption for the Fusion vehicle line beginning with its MY 2013 vehicles. Ford's submission is a complete petition, as required by 49 CFR part 543.9(d), in that it meets the general requirements contained in 49 CFR Part 543.5 and the specific content requirements of 49 CFR Part 543.6. Ford's petition provides a detailed description and diagram of the identity, design, and location of the components of the antitheft device proposed for installation beginning with the 2013 model year.

The MY 2012 passive antitheft device installed as standard equipment on the Ford Fusion is a passive transponder-based electronic powertrain immobilizer system (SecuriLock). Features of the antitheft device include an electronic key, ignition lock, and a transponder-based electronic passive immobilizer. The MY 2012 device also incorporates a separate perimeter alarm system that monitors all the doors, decklid and hood of the vehicle. If unauthorized access is attempted to any of those protected areas, a visible and audible alarm is activated.

Ford stated that integration of the transponder into the normal operation of the ignition key assures activation of the device. When the ignition key is turned to the start position, the transceiver module reads the ignition key code and transmits an encrypted message to the cluster. Once validation of the key is determined, the engine can be started once a separate encrypted message is sent to the powertrain's electronic control module (PCM). The powertrain will function only if the key code matches the unique identification key code previously programmed into the PCM. If the codes do not match, the powertrain engine starter will be disabled.

In its 2012 modification, Ford stated that the Fusion vehicles will be available with the Intelligent Access with Push Button Start (IAwPB) system as optional equipment on its Fusion S and SE trim vehicles but would continue to be equipped with the SecuriLock antitheft system as standard equipment. Ford also stated that the Fusion Titanium trim and Fusion Hybrid vehicles will be equipped with the IAwPB system as standard equipment.

Ford further stated that the IAwPB system being offered on the 2013 Fusion vehicles is of the same design and performance as that being installed on the MY 2011 Ford Explorer vehicles. Ford was granted an exemption for the Explorer vehicle line on May 28, 2010 by NHTSA (See 75 FR 30103). The agency's most current theft rate information for the Ford Explorer using two MYs data (2004–2005) is 1.6477.

Key components of the IAwPB system is an electronic keyfob, remote function actuator, body control module, power train control module and a passive immobilizer. Ford stated that both devices are always active and require no other operator action. Ford stated that in addition to a programmed electronic key, there are two modules, the Body Control Module (BCM), and the PCM, that must be matched together to start the vehicle. These matched modules will not function in other vehicles if separated from each other, adding even an additional level of security to the IAwPB device. Specifically, in the SecuriLock device, when the ignition key is turned to the ''start'' position, the transceiver module reads the ignition key code and transmits an encrypted message from the keycode to the control

module, which then determines key validity and authorizes engine starting by sending a separate encrypted message to the PCM. In the IAwPB device, when the ''start'' button is pressed, and the brake pedal is depressed, the BCM triggers the Remote Function Actuator (RFA) to search for a key inside the vehicle. If a key is detected, the RFA compares the keycode to the stored valid codes in the RFA and reports back to the BCM whether a valid key was found. In both devices, if the codes do not match, the vehicle will be inoperable. Additionally, Ford stated that in both systems, an electronic key has to be programmed to the vehicle via a secure diagnostic method. If this programmed key is not present in the vehicle, the engine will be inoperable.

Ford previously stated in its MY 2011 petition that reliability and durability of the devices are supported by the incorporation of several features in both the SecuriLock and IAwPB device. Specifically, some of those features include: encrypted communication between the transponder, control function and the power train control module; no moving parts; inability to mechanically override the device to start the vehicle; and the BCM/RFA remote function actuator and the power train control module share security data that during vehicle assembly form matched modules that if separated from each other will not function in other vehicles.

Ford believes that the planned addition of the optional IAwPB electronic engine immobilizer system will render ineffective, conventional theft methods, such as hot-wiring, attacking the ignition lock cylinder and drive-away thefts.

Ford also believes that installation of the SecuriLock system and IAwPB system are an effective deterrent against vehicle theft. Since the same aspects of performance (*i.e.,* arming and the immobilization feature) are still provided, the agency believes that the same level of protection is being met. Since the agency granted Ford's exemption for its MY 2012 Fusion vehicle line, there is no available theft rate information for this vehicle.

The agency has evaluated Ford's MY 2012 petition to modify the exemption for the Fusion vehicle line from the parts-marking requirements of 49 CFR part 541, and has decided to grant it. The agency believes that the proposed device will continue to provide four of the five types of performance listed in § 543.6(a)(3): promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

If Ford decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: June 6, 2012.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–14216 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 279 (Sub-No. 6X)]

Canadian National Railway Company—Abandonment Exemption—in Niagara County, NY

On May 23, 2012, Canadian National Railway Company (CNR) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon the entire U.S. portion of its Grimsby Subdivision. The rail line extends from approximately milepost 0.20 to approximately milepost 0.35 in the City of Niagara Falls, Niagara County, N.Y., a distance of 0.15 mile.[1] Specifically, 0.10 mile of the rail line is located on the upper deck of the U.S. portion of the Whirlpool Rapids Bridge.[2] The remaining 0.05 mile of the rail line consists of single track in Niagara Falls, extending between the eastern end of the Bridge and the beginning of the Niagara Branch of CSX Transportation, Inc. The line traverses United States Postal Service Zip Code 14305.

In addition to an exemption from the provisions of 49 U.S.C. 10903, CNR seeks exemption from 49 U.S.C. 10904 (offer of financial assistance (OFA) procedures) and 49 U.S.C. 10905 (public use conditions). In support, CNR states that, upon consummation of the abandonment authority it seeks, the line is expected to be used for continued rail passenger service as part of Niagara Falls' plans to develop enhanced rail passenger and intermodal service, and that there is no overriding public need for continued freight rail service. CNR also seeks expedited action in this proceeding. CNR states that expedited handling is being requested so that Federal funding for the proposed Niagara Falls International Railway Station and International Transportation Center may be released in time to permit construction during the 2012 construction season. These requests will be addressed in the final decision.

According to CNR, the line does not contain Federally granted rights-of-way. Any documentation in CNR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by September 10, 2012.

Any OFA under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than July 2, 2012. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 279 (Sub-No.6X), and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) David A. Hirsh, Harkins Cunningham LLP, 1700 K Street NW., Suite 400, Washington, DC 20006. Replies to CNR's petition are due on or before July 2, 2012.

Persons seeking further information concerning abandonment procedures

[1] CNR states that its Grimsby Subdivision lies partly in Canada and partly in the United States. The U.S. portion of the Subdivision is one of only a few CNR segments that extend briefly into the United States and that are owned and operated by CNR, rather than by one of CNR's U.S. operating affiliates.

[2] The Whirlpool Rapids Bridge is an international rail/highway bridge that crosses the Niagara River between Niagara Falls, N.Y., and Niagara Falls, Ontario, Canada, and is owned by the bi-national Niagara Falls Bridge Commission.

may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR pt. 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV.*''

Decided: June 7, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Raina S. White,

Clearance Clerk.

[FR Doc. 2012–14254 Filed 6–11–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entity Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of 1 newly-designated entity whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.''

DATES: The designation by the Director of OFAC of the 1 entity identified in this notice pursuant to Executive Order 13382 is effective on May 30, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in the Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On May 30, 2012, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated 1 entity whose property and interests in property are blocked pursuant to Executive Order 13382.

The additional designee is as follows:

Entity

SYRIA INTERNATIONAL ISLAMIC BANK (a.k.a. SIIB; a.k.a. SYRIAN INTERNATIONAL ISLAMIC BANK), Syria International Islamic Building, Main Highway Road, Al Mazzeh Area, P.O. Box 35494, Damascus, Syria; PO Box 35494, Mezza'h Vellat Sharqia'h, beside the Saudi Arabia Consulate, Damascus, Syria; SWIFT/BIC SIIB SY DA; all offices worldwide [NPWMD]

Dated: May 30, 2012.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2012–14281 Filed 6–11–12; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New]

Agency Information Collection (NCA PreNeed Burial Planning) Activity Under OMB Review

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the National Cemetery Administration (NCA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 2, 2012.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316.

Please refer to ''OMB Control No. 2900—New'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7479, fax (202) 632–7583 or email *denise.mclamb@va.gov*. Please refer to ''OMB Control No. 2900—New'' In any correspondence.

SUPPLEMENTAL INFORMATION:

Title: NCA PreNeed Burial Planning, VA Form 40–10007.

OMB Control Number: 2900—New.

Type of Review: New collection.

Abstract: VA Form 40–10007 will be used to collect information to assist Veterans, service members, and their eligible family members with planning for burial in a VA national cemetery. This information will be reviewed by VA for completeness and will remain on file for an eligibility determination at the time of need.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 1, 2011, at page 31683. One comment was received. The commenter stated that the scope of the pre-need burial program should be extended to all Veterans and service members, and not limited to those with terminal illnesses. VA agrees and has revised the form to include all Veterans, service members, and their potentially eligible family members.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,000.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 8,000.

Dated: June 6, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–14131 Filed 6–11–12; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 113 June 12, 2012

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog); Final Rule and Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2010–0024; 4500030114]

RIN 1018–AW89

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the dusky gopher frog under the Endangered Species Act. In previous publications, we used the common name ''Mississippi gopher frog'' for this species. We are taking this action to fulfill our obligations under the Act. Land in St. Tammany Parish, Louisiana, and Forrest, Harrison, Jackson, and Perry Counties, Mississippi, is being designated under a court approved settlement agreement to finalize critical habitat for the species. The effect of this regulation is to conserve the habitat upon which dusky gopher frog depends.

DATES: This rule becomes effective on July 12, 2012.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; telephone: 601–321–1122; facsimile: 601–965–4340.

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; telephone: 601–321–1122; facsimile: 601–965–4340. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, we are required to designate critical habitat for any endangered or threatened species if prudent and determinable and we must issue a rule to designate critical habitat. Designation of critical habitat for the dusky gopher frog was found to be prudent and a proposed rule to designate critical habitat was published on June 3, 2010. We subsequently reproposed critical habitat on September 27, 2011, and announced the availability of an economic analysis. Pursuant to a court-approved settlement agreement, we must deliver to the **Federal Register** our final designation of critical habitat for the dusky gopher frog on or before May 30, 2012. This action fulfills our obligations under the Act and the settlement agreement.

This rule designates critical habitat for the dusky gopher frog.

- Approximately 625 hectares (1,544 acres) are designated as critical habitat in St. Tammany Parish, Louisiana.
- Approximately 1,996 hectares (4,933 acres) are designated as critical habitat in Forrest, Harrison, Jackson, and Perry Counties, Mississippi.
- In total, approximately 2,621 hectares (ha) (6,477 acres (ac)) are designated as critical habitat for the dusky gopher frog.

Peer reviewers support our methods. We solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from six of the peer reviewers. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule.

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the dusky gopher frog under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of the dusky gopher frog, refer to the final listing rule published in the **Federal Register** on December 4, 2001 (66 FR 62993). For additional information on dusky gopher frog critical habitat, refer to the revised proposed rule to designate critical habitat for the dusky gopher frog published in the **Federal Register** on September 27, 2011 (76 FR 59774) and the announcement of the public hearing for the revised proposed rule published in the **Federal Register** on January 17, 2012 (77 FR 2254).

Taxonomy and Nomenclature

Subsequent to the listing of the dusky gopher frog (=Mississippi gopher frog), taxonomic research was completed that indicated that the entity (which we listed as a DPS of the dusky gopher frog (*Rana capito* [sic] *sevosa*)) is different from other gopher frogs and warrants acceptance as its own species (Young and Crother 2001, pp. 382–388). The herpetological scientific community accepted this taxonomic change and the scientific name for the species was changed to *Rana sevosa.* In addition, all comments on taxonomy that we received during the comment periods for the revised critical habitat proposal were in agreement that the frog warrants acceptance as its own species. Therefore, listing as a DPS is no longer appropriate. The taxonomic change meant that a change in the common name from Mississippi gopher frog to dusky gopher frog was appropriate (Crother *et al.* 2003, p. 197). Most comments we received on this subject indicated that we should change the common name to dusky gopher frog from Mississippi gopher frog. Therefore, although in the revised proposed critical habitat rule (76 FR 59774) we stated that we would continue to use the common name ''Mississippi gopher frog'' we now believe the common name dusky gopher frog should be used to describe the listed species rather than Mississippi gopher frog and, in this rule, we use the common name ''dusky gopher frog'' for this species.

We received other comments on changes that have been proposed in the scientific literature regarding removing the genus name *Rana* from a group of North American frogs and replacing it with the genus *Lithobates* (*see* Crother 2008, p. 7). There is still reluctance by some in the scientific community to accept this change (Hillis 2007, p. 331; Pauly *et al.* 2009, p. 115; Wiens *et al.* 2009, p. 1220). Until there is a clear consensus within the scientific community, we will continue to use the scientific name of *Rana sevosa* for the dusky gopher frog.

Previous Federal Actions

The dusky gopher frog was listed as an endangered species under the Act on December 4, 2001 (66 FR 62993). The species was at that time identified as the Mississippi gopher frog, *Rana capito sevosa,* a distinct population segment of the dusky gopher frog (*Rana capito*) (see Taxonomy and Nomenclature discussion above). At the time of listing, the Service found that designation of critical habitat was prudent. However, the development of a designation was

deferred due to budgetary and workload constraints.

On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands (plaintiffs) filed a lawsuit against the Service and the Secretary of the Interior for our failure to timely designate critical habitat for the dusky gopher frog (*Friends of Mississippi Public Lands and Center for Biological Diversity* v. *Kempthorne* (07–CV–02073)). In a court-approved settlement, the Service agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat by May 30, 2010, and a final designation by May 30, 2011. Designation of critical habitat for the dusky gopher frog was again found to be prudent, and a proposed rule to designate critical habitat for the dusky gopher frog was published on June 3, 2010 (75 FR 31387).

During the comment period for the June 3, 2010, proposed rule, the peer reviewers and other commenters indicated their belief that the amount of critical habitat proposed was insufficient for the conservation of the dusky gopher frog and that additional habitat should be considered throughout the historic range of the species. Specifically, information was provided that pointed to limitations in the data we used to determine the size of individual critical habitat units and that there was additional habitat in Louisiana that would aid in the conservation of dusky gopher frogs. Based on this new information, we asked the plaintiffs to agree to an extension of the deadline that was established by the original settlement. Plaintiffs agreed, and in a modification to the original settlement signed on May 4, 2011, the court agreed to the Service's timeline to send a revised proposed critical habitat rule to the **Federal Register** by September 15, 2011, and a final critical habitat rule to the **Federal Register** by May 30, 2012. A revised proposed critical habitat rule was published in the **Federal Register** on September 27, 2011 (76 FR 59774) and replaced our June 3, 2010 (75 FR 31387), proposed critical habitat rule in its entirety.

Summary of Comments and Recommendations

We requested written comments from the public on the revised proposed designation of critical habitat for the dusky gopher frog during two comment periods. The first comment period, associated with the publication of the revised proposed rule and notification of the availability of the associated draft economic analysis (76 FR 59774), opened on September 27, 2011 and closed on November 28, 2011. The second comment period, associated with a public hearing held on January 31, 2012, in Gulfport, Mississippi, opened on January 17, 2012 and closed on March 2, 2012. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and invited them to comment on the revised proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received 46 comment letters directly addressing the revised critical habitat designation or the draft economic analysis. During the second comment period, we received 57 comment letters directly addressing the revised proposed critical habitat designation or the draft economic analysis. During the January 31, 2012, public hearing, 19 individuals or organizations made comments on the proposed designation. All substantive information provided during comment periods has either been incorporated directly into this final determination or is addressed in our responses below. Public comments we received were grouped into six general categories.

Peer Review

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from six of the peer reviewers.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding critical habitat for the dusky gopher frog. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

Comment 1: All peer reviewers agreed that although *Rana capito sevosa* was listed as a distinct population segment of *Rana capito,* the listed entity has now been accepted by the scientific community as a unique species, *Rana sevosa.* All but one of the peer reviewers agreed with our proposed change of the common name of the listed entity from Mississippi gopher frog to dusky gopher frog. Two of the peer reviewers suggested changing the scientific name of *Rana sevosa* to *Lithobates sevosus* based on recent publications in the scientific literature. However, one of these peer reviewers stated that although the four major herpetological societies require authors submitting papers to their publications to use the standard English names of Crother (2008, p. 8) [=dusky gopher frog], authors may use their discretion on the scientific name used (within scientific reason and with citation when needed).

Our Response: See ''Taxonomy and Nomenclature'' above. The Service is changing the name of the listed entity to *Rana sevosa,* the dusky gopher frog. However, because disagreement exists in the scientific community regarding the taxonomic support for replacing *Rana* with *Lithobates,* the Service believes it is not yet appropriate to make this change for the listed entity.

Comment 2: All of the peer reviewers agreed that it was appropriate that the Service had increased the size of the critical habitat units in the September 27, 2011 revised proposed rule. Nevertheless, there was some disagreement among the peer reviewers about whether the increase was adequate for the conservation of the dusky gopher frog, and this was reflected in their comments regarding the methods used to define the individual units. All of the peer reviewers approved of combining the maximum distance movements of the two species of gopher frogs for use in the determination of the size of individual critical habitat units; however, two of the peer reviewers, and others, provided specific comments on our use of these data. The comments included: Combining movement data from studies of the same population; deleting anecdotal observations from single frogs not incorporated into larger studies; using the mean rather than the median to calculate the value used to define the area around each breeding pond; and increasing the area of critical habitat beyond the value calculated from the movement data to account for areas of poor upland habitat quality. One peer reviewer stressed the need to maximize the size of critical habitat units due to the uncertainty of habitat suitability when creating circular areas of protection and due to the reduction in dusky gopher frog genetic variability resulting from the species' habitat isolation and small population size.

Our Response: In our January 17, 2012, publication (77 FR 2254), we reopened the comment period and

announced a public hearing on the revised proposed critical habitat designation. We also proposed changes in the data analysis that had been used in creating the critical habitat units in the revised proposed rule, and requested comments on these changes. The changes included combining movement data from individual sites and removing one anecdotal gopher frog movement record from our maximum distance dataset. The Service did not receive any comments on these changes from peer reviewers or the public. We continue to believe, as was expressed by one of the peer reviewers, that the use of the median distance value in our calculations is more appropriate than using the mean. The use of the mean would yield a higher value because the maximum distance values are skewed toward larger values and the mean is more influenced by these values when compared to the median. To illustrate the possible bias in using the mean rather than the median, one reviewer pointed out that the greatest maximum distance movement was on a site where burrow habitat in the uplands was severely limited and the frogs had to move long distances to find appropriate fossorial (underground) habitat. We believe the use of the median long distance movement value provides a better estimate of central tendency in our dataset, and we consider its use more appropriate than the mean. The Service agrees that there are likely differences in habitat suitability in the various critical habitat units, and we have tried to account for that by using the median maximum distance value, plus a buffer, in calculating the area to include in critical habitat surrounding each occupied or unoccupied breeding pond (see ''*Criteria Used To Identify Critical Habitat*'' below).

Comments From States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' The only comment received from a State agency was from an employee of a State agency that was a peer reviewer of the revised proposed rule. This comment was in support of the revised proposal as written.

Public Comments

General Comments Issue 1: Critical Habitat Delineation Methodology

Comment 3: If the delineation of critical habitat for the dusky gopher frog is based on the best available science, there is no biological reason to include movement data from other gopher frogs (*Rana capito*) and not include movement data from crawfish frogs (*R. areolata*). The two gopher frog species and crawfish frogs share derived morphological and behavioral characters that separate them from all other frog species. One of their shared behavioral traits is an affinity for small terrestrial cavities.

Our Response: The two species of gopher frogs (*Rana capito* and *R. sevosa*) share similar habitat within different geographic areas of the longleaf pine ecosystem in the southeastern United States. As adults, all gopher frogs occupy below-ground habitat within the forested uplands, typically stump holes, small mammal burrows, and when they are available, gopher tortoise burrows. Crawfish frogs occur outside the range of gopher frogs and are distributed to the east and west of the Mississippi River in an arc from the eastern Gulf Coast of Texas north to southern Iowa, Illinois, Indiana, and Kentucky, and south across western Tennessee, north and central Mississippi, and northeastern Louisiana (Parris and Redmer 2005, p. 526). Crawfish frogs occupy a wide variety of habitats including open wet woodlands, wooded valleys, prairies, river floodplains, pine forest, wet pastures, and grasslands (Parris and Redmer 2005, p. 527). Adult crawfish frogs use fossorial habitats, commonly occupying abandoned crayfish burrows (Parris and Redmer 2005, p. 527). Although adult dusky gopher frogs also use fossorial habitats (abandoned mammal burrows, stump holes), the Service considers the differences in geography and habitat between the two species to be too great to include crawfish frog movement data in our critical habitat calculations.

Comment 4: The amount of area designated as critical habitat around occupied or unoccupied dusky gopher frog breeding ponds should be increased. One commenter requested a general increase in area only around the four occupied sites. Another commenter wanted the Service to go back to using a 650-m (2,133-ft) radius around all sites as was used to construct critical habitat units in our September 27, 2011, revised proposed rule (76 FR 59774). In addition, that commenter requested the radius be increased to 1,000 m (3,281 ft) around Glen's Pond when constructing the critical habitat unit at that site.

Our Response: see Section ''*Criteria Used To Identify Critical Habitat''* below for a discussion of our rationale for constructing individual critical habitat units. The Service used the best available scientific information on gopher frog movements to quantify the areas we are designating as critical habitat. We have found no scientific justification for using a larger radius when constructing some units over others. In the future, if such data become available, under the authority of section 4(a)(3)(A)(ii) the Secretary could revise the designation, as appropriate.

General Comments Issue 2: Procedural and Legal Issues

Comment 5: The Endangered Species Act and the proposed designation of critical habitat are unconstitutional and the Service lacks authority to regulate the dusky gopher frog under the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution. The U.S. Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that ''substantially affect(s)'' interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce. The Service did not cite any link whatsoever between the designation of critical habitat for the frog and commerce, be it travel, tourism, scientific research, or agriculture. Designation of critical habitat will ''result in a significant impingement of the States' traditional and primary power over land and water use'' and this effective control is not justified because there is no Federal interest in regulation of interstate commerce relative to the dusky gopher frog.

Our Response: The constitutionality of the Act in authorizing the Services' protection of endangered and threatened species has consistently been upheld by the courts. see*, e.g., GDF Realty Investments, Ltd.* v. *Norton,* 326 F .3d 622 (5th Cir. 2003); *Gibbs* v. *Babbitt,* 214 F.3d 483 (4th Cir. 2000); *National Association of Homebuilders* v. *Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied,* 524 U.S. 937 (1998); *Rancho Viejo* v. *Norton,* 323 F.3d 1062 (D.C. Cir. 2003); and *United States* v. *Hill,* 896 F. Supp. 1057 (D. Colo. 1995). The courts have held that regulation under the Act to protect species that live only in one State is within Congress' Commerce Clause power and that loss of animal diversity has a substantial effect on interstate commerce. *National Ass'n of Home Builders,* 130 F.3d at 1050–51; see *Rancho Viejo,* 323 F.3d at 310, n. 5. Thus, although the dusky gopher frog is currently known to occur only within the State of Mississippi, the Service's application of the Act to designate critical habitat for this species is constitutional.

Comment 6: Designation of private property as critical habitat constitutes a ''taking'' of private property under the 5th Amendment of the U.S. Constitution by depriving landowners of the economically beneficial use of their land. As a result of the designation, the property will be pressed into ''public service'' without compensation to the landowners.

Our Response: The Service analyzed the potential takings implications of designating critical habitat for the dusky gopher frog and included this analysis in our administrative record. Determining whether a constitutional taking will occur is a matter for the courts. However the process is generally fact-specific and involves weighing the character of the government action, the economic impact of that action, and the reasonableness of the property owner's investment-backed expectations. We have identified two ''taking'' scenarios that are relevant to the designation of critical habitat. The first is a physical taking when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a practical ouster of the owner's possession. The proposed designation of critical habitat for the dusky gopher frog would not result in physical occupation or invasion of private property. On non-Federal lands, activities that lack Federal involvement, such as timber management and oil and gas extraction, would not be affected by the critical habitat designation. However, a second scenario concerns activities of an economic nature that are likely to occur on non-Federal lands in the area encompassed by this designation, and where Federal involvement may occur, and includes construction of utilities, residential or commercial development, and road construction and maintenance. This second scenario is where a regulation may potentially deny all economically beneficial or productive use of land, commonly referred to as a categorical taking. However, the mere promulgation of a regulation designating critical habitat does not on its face deny property owners all economically viable use of their land. The Act does not automatically restrict all uses of lands that have been designated as critical habitat, but only imposes restrictions under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of critical habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02).

Comment 7: The Service has no delegated authority to regulate or confiscate private land.

Our Response: When prudent, the Service is required to designate critical habitat under the Act. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation (see further explanation under Comment 6 above).

Comment 8: The Service did not comply with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). The Ninth Circuit's holding that NEPA does not apply to critical habitat designations rested in part on supposition that the action at issue does not alter the natural, untouched physical environment at all. Therefore, as maintenance of critical habitat requires special management, which can be interpreted as human interference with the environment, a NEPA review is required.

Our Response: Environmental assessments and environmental impact statements, as defined under NEPA, are not required for regulations enacted under section 4 of the Act (see 48 FR 49244, October 25, 1983). The Service has determined that, outside of the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, a NEPA analysis is not required for critical habitat designation.

The fact that a physical or biological feature requires special management considerations or protection to meet the definition of ''critical habitat'' does not mean that the designation of critical habitat would include ''special management'' requiring active maintenance or any other form of human interference with property. In the case of unoccupied habitat, the ''physical/biological features/special management'' part of the definition simply does not apply. Thus, the designation of critical habitat does not constitute the sort of human interference that would require a NEPA analysis.

Comment 9: In order to determine what is ''essential to the conservation of the species,'' the Service must first identify ''the point'' when the species will no longer be ''endangered'' or ''threatened''. That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. These threshold determinations are missing from the proposed rule. The failure to articulate a basis for designating each unit as critical habitat is a violation of the law that must be corrected.

Our Response: During the process of developing a recovery plan, as required by Section 4(f) of the Act, the Service determines the threshold that must be met to establish when a species is no longer ''endangered'' or ''threatened''. The Service has not yet completed a recovery plan for the dusky gopher frog, and thus, this threshold has not been defined. However, the Act does not require that recovery criteria be established as a precondition to designating critical habitat. Section 3(5)(A) of the Act defines the term ''critical habitat'' as (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * * on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination that such areas are essential for the conservation of the species. The Act does not provide additional guidance on how to determine what habitat is essential for the conservation of the species, nor does it require a minimum population and habitat viability analysis for critical habitat designation. In this case, the Secretary has discretion in determining what is essential for the conservation of a species. The Service has studied the one dusky gopher frog population known at the time of listing to determine the habitat attributes essential to the conservation of the species, and determined that the primary constituent elements (PCEs) specific to the dusky gopher frog are: (1) Ephemeral wetland habitat (PCE 1); (2) upland forested nonbreeding habitat (PCE 2); and (3) upland connectivity habitat (PCE 3) (see *''Criteria Used To Identify Critical Habitat''* below). With regard to units/subunits not known to be occupied at the time of listing, we have determined that these areas are essential to the conservation of the dusky gopher frog because this species is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.

Therefore, the Service believes that all the areas designated as critical habitat meet the definition under section 3(5)(A) of the Act. If the Service gains knowledge of additional areas that meet the definition of critical habitat, then under section 4(a)(3)(A)(ii) of the Act, the Secretary may revise the designation, as appropriate. The Service has articulated a basis for designating each unit as critical habitat under the individual unit descriptions in Final Critical Habitat Designation.

Comment 10: The Service has failed to meet the ''prudent and determinable'' standard of section 4(a)(3) of the Act. In fact, the Service was required to immediately ''find'' critical habitat for the dusky gopher frog as a result of a court settlement with the Center for Biological Diversity.

Our Response: see ''*Previous Federal Actions.*'' The dusky gopher frog was listed as an endangered species under the Act on December 4, 2001 (66 FR 62993), and at that time the Service found that designation of critical habitat was prudent. On November 27, 2007, the Center for Biological Diversity and Friends of Mississippi Public Lands (plaintiffs) filed a lawsuit against the Service and the Secretary of the Interior for our failure to timely designate critical habitat for the dusky gopher frog. In a court-approved settlement, the Service agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat by May 30, 2010, and a final designation by May 30, 2011. A new prudency determination was included in our proposed rule to designate critical habitat for the dusky gopher frog published on June 3, 2010 (75 FR 31387). Based on new scientific information we received during the comment period for this proposed rule, the Service requested and received a modification to the settlement agreement, signed on May 4, 2011. The Service complied with the settlement agreement and made another prudency determination in our revised proposed rule to designate critical habitat for the dusky gopher frog (76 FR 59774, September 27, 2011) which replaced the 2010 proposed rule in its entirety. Thus, the settlement agreement did not force the Service to ''find'' critical habitat for the dusky gopher frog, but rather complete a new prudency determination and only proceed with a proposed, and ultimately, a final designation of critical habitat if deemed prudent.

Comment 11: The Service did not contact all landowners potentially affected by the proposed designation of critical habitat.

Our Response: The Act requires that we publish the proposed regulation in the **Federal Register**, give actual notice of the proposed regulation to each affected state and county (i.e., those in which the species is believed to occur), appropriate professional organizations, and publish a summary of the proposed regulation in a newspaper of general circulation in each area of the U.S. where the species is believed to occur. It also requires that we promptly hold one public hearing if any person files a request within 45 days of the publication (in the **Federal Register**). When we were able to identify the landowners of a proposed critical habitat unit, we contacted them directly. In addition, we attempted to ensure that as many people as possible would be aware of the revised proposed critical habitat designation, draft economic analysis, and public hearing by issuing press releases to all major media in the affected area, submitting newspaper notices for publication within areas of revised proposed critical habitat, and directly notifying affected State and Federal agencies, environmental groups, State Governors, Federal and State elected officials, and county commissions. We accepted comments from September 27, 2011, through November 28, 2011, and from January 17, 2012, through March 2, 2012, for a total of 105 days. We sent out notifications of the second comment period to commenters from the first comment period when they had supplied their contact information. By these actions, we have complied with or exceeded all of the notification requirements of the Act and the Administrative Procedure Act (5 U.S.C. subchapter II).

Comment 12: One commenter expressed opposition to Federal acquisition of 16th Section land unless the land is purchased at full replacement value or fair market lease without loss and hardship to schools and without increasing local homeowners' tax burden to recoup the losses from such a transaction.

Our Response: Designation of critical habitat on land does not constitute ''Federal acquisition'' of that land. The Service has no plans to acquire ownership of any land designated as critical habitat. The commenter referred to ''16th section'' lands. This designation is based on the original surveys of the country in the late 1700's when land was systematically surveyed into square townships, 9.656 km (6 miles) on a side. The townships were subdivided into 36 sections of 2.59 km^2 (1 mi^2). Section 16 in each township was reserved for the maintenance of public schools. This system remains in place in Mississippi and funds derived from ''16th section'' lands are used to support county funding for public schools. Our intention is to work with existing landowners, including the State of Mississippi, which owns 16th Section lands, to further the recovery of the dusky gopher frog.

Comment 13: Critical habitat designation may limit conservation actions in other areas.

Our Response: The Service will work on actions to support the recovery of the dusky gopher frog wherever possible, including outside the geographic area designated as critical habitat.

General Comments Issue 3: Critical Habitat Designation on Private Land—General

Comment 14: Critical habitat designation on private land will prevent future timber management and development within the designated area. Property owners within one mile of critical habitat could be affected by the designation. Private property owners will be burdened with consultation under section 7 of the Act as a result of the critical habitat designation. The Service should restrict critical habitat on private land to landowners that voluntarily participate in the recovery of endangered and threatened species.

Our Response: The selection of sites to be included in critical habitat is based, first and foremost, on the needs of the species. Before we determine land ownership, we consider what is needed for species conservation based on the best available scientific and commercial information. This ensures that the best locations to support species' conservation are identified and increases awareness among all potential partners of the best known sites to support the conservation of the species.

The designation of critical habitat does not impose a legally binding duty on private parties. Activities that do not involve a Federal agency, Federal action, Federal funding, or Federal permitting, will be unaffected by the designation of critical habitat. Private land use activities, such as farming and silviculture, would be unaffected. Federal activities, or actions permitted, licensed, or funded by Federal agencies, will require consultation with the Service if they are likely to adversely modify critical habitat. Consultation is a process by which Federal agencies use the Service's expertise to evaluate the potential effects of a proposed action on species listed under the Act and their critical habitats. The Service works with Federal agencies to identify alternatives where activities or projects may proceed

without adverse modification to critical habitat. For example, if private landowners wish to develop their property and are required by the U.S. Army Corps of Engineers (Corps) to obtain a wetlands dredge and fill permit, this would trigger consultation under section 7 of the Act between the Corps and the Service if critical habitat is designated on the property; however, the Service would work with the Corps to identify strategies to avoid adverse modification of critical habitat. Based on our experience with section 7 consultations for other listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. Reasonable and prudent alternatives must, by definition, be economically feasible and within the scope of authority of the Federal agency involved in consultation.

If there is no activity on private property involving a Federal agency, Federal action, Federal funding, or Federal permitting, participation in the recovery of endangered and threatened species is voluntary. Critical habitat designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species. There is no effect to landowners whose property is outside the specific area designated as critical habitat, no matter the ownership (see response to Comment 6).

General Comments Issue 4: Critical Habitat Designation on Private Land—Louisiana

Comment 15: The dusky gopher frog has not been seen in Louisiana since 1965, and the habitat designated as Critical Habitat Unit 1 (Unit 1) has none of the primary constituent elements (PCEs) described in the revised proposed rule; the ponds in Unit 1, in their present condition, do not constitute suitable dusky gopher frog habitat under the definition of PCE 1. Although the Service's interest in Unit 1 is caused in part by the perceived difficulty in establishing ephemeral ponds for the dusky gopher frog, artificial ponding has supported gopher frog reproduction. Unit 1 will never have PCEs due to on-going timber management of the site, which precludes burning or planting longleaf pine trees to improve the upland habitat for the gopher frog. The dusky gopher frog will never be present on site because the landowners object to moving them there. The Service cannot designate critical habitat on the grounds that the PCEs will be present in the future.

Our Response: The site in Louisiana identified as Unit 1 contains at least two historic breeding sites for the dusky gopher frog. Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed. For such areas, which are outside the geographical area occupied by a species at the time it is listed, section 3(5)(A)(ii) of the Act requires simply that critical habitat be designated based on a determination that such areas are essential for the conservation of the species. Due to the importance of ephemeral ponds to the recovery of the dusky gopher frog (see ''*Criteria Used To Identify Critical Habitat*''), the Service determined that the area of Unit 1 is essential for the conservation of the dusky gopher frog. The only pond occupied at the time of listing is being designated and we determined that this one location is not sufficient to conserve the species. Additional areas that were not known to be occupied at the time of listing are essential for the conservation of the species. Although the presence of the PCEs is not a necessary element for this determination, the Service believes Unit 1 contains the PCE described as Primary Constituent Element 1—Ephemeral wetland habitat (see Section ''*Primary Constituent Elements for the Dusky Gopher Frog*'') based on the best available data, which include the visits made to the site by Service personnel and other gopher frog experts. During these visits, the Service assessed the habitat quality of ephemeral wetlands in this area and found that a series of five ponds contained the habitat requirements for PCE 1 (see response to Comment 16 below).

The Service is aware borrow pits and other sites constructed by man have been used for breeding by other species of gopher frogs outside the range of the dusky gopher frog. Nevertheless, these sites need to contain the same features that are present in natural ponds in order for them to provide the proper environment for successful development of metamorphic dusky gopher frogs. Ephemeral, isolated ponds are very difficult to establish in the landscape due to their short and specific hydrology. The ponds have to hold water long enough to allow for tadpole development and metamorphosis, but if they hold water too long they become permanent ponds and no longer have value for ephemeral pond-breeding amphibians. The U.S. Forest Service, in cooperation with the Service and our partners, constructed a pond on the DeSoto National Forest with the goal of creating a dusky gopher frog breeding site. It has taken 10 years to reach the point where we consider this pond ready to be used as a reintroduction site, and its value as a breeding site has not yet been proven. It is highly unlikely that five ponds, similar to those that currently exist in Unit 1, could be created in the landscape within a timeframe that would provide near-term conservation benefits to the dusky gopher frog.

During the process of delineating critical habitat, the Service assesses habitat to determine if it is essential for the conservation of a listed species. Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there. According to the landowners, the timber lease on their property does not expire until 2043. The Service has a number of tools, such as habitat conservation plans, that could be used to formalize the timber management goals of the landowners and work towards recovery of the dusky gopher frog. There are also programs, such as the Healthy Forests Initiative administered through the U.S. Department of Agriculture's Natural Resources Conservation Service, that provide funding to private landowners for habitat management. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.

Comment 16: The Service has not provided sufficient support for the argument that Unit 1 is ''essential for the conservation'' of the dusky gopher frog, only a ''more is better'' statement that Unit 1 provides additional habitat for population expansion. ''Essential for conservation of the species,'' the standard for designating critical habitat on unoccupied sites, is a more exacting standard than that for determining critical habitat designation of occupied habitat. The Act requires a demonstration that the designation of unoccupied habitat is essential for conservation, not essential to decreasing the risk of extinction of the species. The Service must provide a factual basis supporting the conclusion that Unit 1 is essential to recovery of the dusky gopher frog.

Our Response: The scientific peer reviewers that responded to our original proposed critical habitat rule were

united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog and that we should look within the species' historic range outside the state of Mississippi for additional habitat for the designation. As a result of the peer review, we conducted a reanalysis of current and historic data for the species, including data from Alabama and Louisiana, to determine if we could find additional habitat that would meet the definition of critical habitat (see Comment 17, below, for discussion of habitat in Alabama). As a result of the rarity of open-canopied, isolated, ephemeral ponds within the historic range of the dusky gopher frog, and their importance to survival of the species, identifying more of these ponds was the primary focus of our reanalysis (see ''*Criteria Used To Identify Critical Habitat*'', below).

The Service visited the area designated as Unit 1 in St. Tammany Parish, Louisiana, in 2011. We conducted a habitat assessment in this specific area because at least two historic breeding ponds for the dusky gopher frog occur there, including the one where the species was last seen in 1965. We determined that five isolated, ephemeral wetlands in that area are similar to ponds where dusky gopher frogs currently breed in Mississippi. The five ponds are in close proximity to each other, which provides metapopulation structure and increases the unit's value to the long-term survival and recovery of the frogs over an area with a single breeding pond (see ''Space for Individual and Population Growth and for Normal Behavior'', below).

The role of critical habitat is to support the life-history needs of the species and provide for conservation. Conservation is defined in section 3(3) of the Act as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (recovery). Recovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery. Based on the best scientific information available to the Service, the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog.

The isolated populations of the dusky gopher frog face many threats, including droughts and disease. These environmental and biological threats are likely to occur at the same time at sites near each other. Habitat in Louisiana is distant from the extant populations of the dusky gopher frog. For this reason, the Louisiana site would likely be affected by different environmental variables than sites in Mississippi. Thus, Unit 1 provides a refuge for the frog should the other sites be negatively affected by environmental threats or catastrophic events. An example of one of these threats is climate change. Climate change will undoubtedly affect amphibians throughout the world in the coming decades (Lawler *et al.* 2010, p. 38). For species such as the dusky gopher frog, one of the greatest threats posed by climate change is water availability. The amount and timing of precipitation can have dramatic effects on ephemeral breeding ponds, resulting in mortality of eggs and larvae. In addition, post-metamorphic survivorship may be reduced by increased desiccation risk. Dusky gopher frogs will be susceptible to the effects of rapid climate change due to their limited natural ability to move through the landscape, and habitat fragmentation. Hydrological changes to ponds at the currently occupied sites could mean extinction for this species. The designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change.

In summary, the Service believes Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Comment 17: The site in Louisiana (Unit 1) was chosen without regard to available habitat for the dusky gopher frog in Alabama. Alabama contains habitat that provides more of the PCEs needed for the dusky gopher frog to survive than in Unit 1, and the Service provided no assertion that Alabama ponds are not essential for the conservation of the dusky gopher frog. The standard the Service applied to designating critical habitat areas was that they would provide ''additional habitat'' and this standard could just as easily be applied to Alabama as to Louisiana. Nevertheless, critical habitat may only include areas ''essential to the conservation of the species.'' The Service's failure to apply a consistent or correct standard for determining critical habitat is arbitrary and prohibited by the Administrative Procedure Act.

Our Response: Peer reviewers of our original proposed rule indicated that critical habitat for the dusky gopher frog in the proposal (76 FR 59774, September 27, 2011) was inadequate for the conservation of the dusky gopher frog. Thus, the Service conducted a habitat reassessment, which included areas outside of Mississippi that are within the species' historic range in Louisiana and Alabama (see Comment 16 and ''*Criteria Used To Identify Critical Habitat*'', below). In Alabama, the only record for the dusky gopher frog, as currently described, is from 1922 at a location in Mobile County near Mobile Bay. The upland terrestrial habitat at this site has been destroyed and replaced by a residential development (Bailey 1994, p. 5). A breeding site that might have been used by these frogs has never been found. Two remote sensing studies (Hart 2004, pp. 1–9: Bailey 2009, pp. 1–14) have been conducted to search for ponds and terrestrial habitat that might support dusky gopher frog populations. Those ponds identified using aerial photography which were visited did not contain habitat that provides a conservation benefit for dusky gopher frogs. Habitat was poor because of a number of factors which limited its suitability for dusky gopher frogs. For example, ponds contained woody shrubs and trees, were occupied by fish, occurred within agricultural fields, and/or were surrounded by trailers and houses (Hart 2004, pp. 8–9). As there are no data supporting the occurrence of historic or current dusky gopher frog breeding sites in Alabama, nor any habitat of a quality certain to support conservation of the frog, the Service could not identify areas in Alabama that we believed essential for the conservation of the species in Alabama (see ''*Criteria Used To Identify Critical Habitat*'', below). The Service does not have data, nor did any commenter provide data, to support the assertion that habitat in Alabama provides more of the PCEs needed for the dusky gopher frog to survive than in Unit 1.

Comment 18: Unit 1 is not ''essential'' to the survival of the frog because most of the proposed critical habitat occurs

on the DeSoto National Forest where the frogs can thrive.

Our Response: Critical habitat is a conservation tool. Conservation measures are a means to reach recovery and the point at which the measures provided under the Act are no longer necessary. This is a broader standard than simply survival and requires the Service to designate critical habitat that will support recovery of the species. DeSoto National Forest (DNF) represents only one area of the historic distribution of the dusky gopher frog. Although DNF is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution. Critical habitat will support recovery of the dusky gopher frog by protecting sites across a large area of the species' historic range and providing space for population expansion, including in areas that will provide protection from the effects of local catastrophic events. See also our response to Comment 16.

General Comments Issue 5: Critical Habitat Designation on Lands Leased to the Military

Comment 19: The Department of Defense, Army National Guard (DOD) opposes designation of critical habitat in areas within the Camp Shelby training site on DeSoto National Forest (DNF), Forrest County, Mississippi. DOD is concerned that the designation may negatively impact convoy and dismounted infantry training, and that the designation will be an additional financial burden on the military because DOD reimburses the U.S. Forest Service (USFS) for habitat management in the Special Use Permit (SUP) area. Although there are restrictions to military use of the SUP based on guidelines set up for red-cockaded woodpecker population recovery and protection, DOD believes training limitations would be more restrictive for a terrestrial (ground-dwelling) species. Additionally, DOD believes the proposed designation may affect plans to develop new training facilities within the proposed critical habitat areas, which are outlined in long-range planning documents. DOD believes that Camp Shelby training site should be excluded from the critical habitat designation, as authorized by section 4(b)(2) of the Act, due to significant national security concerns.

Our Response: DOD has a SUP from USFS to conduct military exercises in Units 10, 11, and 12 of critical habitat for the dusky gopher frog in DNF. Permitted use by the military includes driving military vehicles on existing roads, and bivouacking or orienteering in the forested areas. No live ammunition can be used in the area, and wetlands are excluded from military use. This area of the DNF is also designated as the Leaf River Wildlife Management Area and is actively used by the public for hunting and other recreational activities. The area is managed by the USFS for timber and to benefit the recovery of the red-cockaded woodpecker. The Service has been working with our USFS partners for many years on habitat improvements in this area to benefit the recovery of the dusky gopher frog. The Service anticipates that no additional restrictions on military use of the area will result from the designation of critical habitat for the dusky gopher frog. Under terms of the SUP, DOD management responsibilities relative to the training area involve reimbursing USFS for damage to habitat within the DNF that is incurred during military exercises, whether or not critical habitat is designated there. However, additional incremental impacts to military activities are not expected because areas we designated as dusky gopher frog critical habitat areas used by Camp Shelby are located within a habitat management area (HMA) already established and managed for the red-cockaded woodpecker. The Service believes that the existing limitations to military activities occurring within the HMA are sufficiently protective of the gopher frog. A further discussion of the existing limitations to military activities occurring within the HMA has been added to the final economic analysis (FEA).

General Comments Issue 6: Science

Comment 20: The Service failed to consider sound science when developing the revised proposed rule. The designation of Unit 1 as critical habitat is deeply flawed for scientific reasons and violates the Presidential Memorandum of Scientific Integrity. The agency actions for this designation are wholly devoid of sound science and undermine public trust.

Our Response: Comments questioning aspects of the methodology and data used in our revised proposed designation of critical habitat for the dusky gopher frog have been addressed above under Comments 2, 3, 4, 8, 15, 16, 17, and 18. Scientific peer review of our revised proposed rule supported the science that we used in developing the document. The commenter did not provide specifics about why the Service might be in violation of the President's March 9, 2009, Memorandum concerning Scientific Integrity; however, as illustrated below, we believe our rulemaking meets the standards set forth in the President's memorandum.

In accordance with section 4 of the Act, we are required to use, and we used, the best available scientific and commercial information to make this critical habitat decision. Further, we followed the criteria, established procedures, and guidance from our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines.

In order to meet these ''best available scientific and commercial information'' standards, we found information from many different sources, including articles in peer-reviewed journals, scientific status surveys and studies, other unpublished materials, and experts' opinions or personal knowledge. Also, in accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. Additionally, we requested comments or information from other concerned governmental agencies, the scientific community, industry, and other interested parties concerning the revised proposed rule. We accepted comments during two open comment periods for a total of 105 days. All of the comments and information we received were considered in finalizing this critical habitat designation for the dusky gopher frog. All the supporting materials used for the final rule, including literature cited and comments from the public and peer reviewers, were made available for public inspection at the Web site: *http://www.regulations.gov.*

In conclusion, we believe that we have used the best available scientific and commercial information for the designation of critical habitat for the dusky gopher frog, in compliance with the Act and in accordance with the President's March 9, 2009, Memorandum concerning Scientific Integrity (see Critical Habitat).

General Comments Issue 7: Economic Analysis

Comment 21: Two commenters state that the estimated $36.2 million impact to development activities in proposed Unit 1 should be attributed to that unit and not viewed as an economic impact of the entire 7,015-acre proposed critical habitat area.

Our Response: Exhibit ES–2 in the draft economic analysis (DEA) presents the incremental impacts of gopher frog conservation by unit and subunit. The impacts presented in this exhibit were revised in the final economic analysis (FEA) due to the reduction in acreage proposed in the **Federal Register** on January 17, 2012 (77 FR 2254). The FEA's Exhibit ES–2 includes incremental impacts attributable to the areas within proposed Unit 1 ranging from $0 to $33.9 million (assuming a 7 percent discount rate). This range reflects uncertainty regarding future land use and gopher frog conservation and recovery recommendations in Unit 1. These impacts are described further in the text following this exhibit (paragraphs 12 and 13 in the FEA's Executive Summary), where the FEA notes that ''under scenarios 2 and 3, the greatest incremental impacts are forecast to occur within Unit 1 where present value impacts are equal to $20.4 million or $33.9 million, respectively (99.5 and 99.7 percent of overall incremental impacts), applying a seven percent discount rate.'' Also refer to the *''Economic Analysis''* section of this rule.

Comment 22: Multiple commenters assert that controlled burns necessary to properly manage habitat for the gopher frog within proposed Unit 1 will imperil homes and businesses in the vicinity. The commenters note that such burnings may halt development of adjacent lands resulting in the loss of revenue to the landowners and tax revenue to St. Tammany Parish and the State of Louisiana. In addition, burnings are a safety hazard for drivers along LA Highway 36, which runs through proposed critical habitat Unit 1.

Our Response: In paragraph 78, the DEA acknowledges landowner concern that burning may lead to negative impacts in proposed Unit 1. However, as explained in footnote 76, critical habitat designation does not allow the Service to require burning of land parcels. If activities undertaken in Unit 1 have a Federal nexus (as assumed in scenarios 2 and 3 in the DEA), the Service may request burning through the section 7 consultation. Burning would be undertaken by experts following the issuance of a permit based on environmental conditions. In particular, wind conditions are considered when issuing a burning permit to ensure that smoke will not drift onto other properties or across roads. There is considerable uncertainty surrounding the frequency of future burns that may be requested by the Service and whether these burns would lead to any economic impacts; therefore incremental impacts associated with burns are not quantified in the DEA.

Comment 23: One commenter describes the potential for oil and gas development in Unit 1 and questions why the DEA does not quantify economic impacts for oil and gas activities. In particular, the commenter indicates that consultation on oil and gas development activities under section 7 of the Act would lead to negative economic impacts. The commenter concludes that the DEA ignores the negative economic impact of consultation on oil and gas activities and is therefore fatally flawed.

Our Response: Paragraph 79 of the DEA summarizes the potential for economic impacts to oil and gas activities in proposed Unit 1. The DEA concludes that it is possible that ''in the case oil and gas development occurs on this land, and a Federal nexus is present triggering section 7 consultation, that there may be economic impacts of critical habitat designation for the gopher frog on this activity.'' As summarized on pages ES–4 and ES–5, the DEA assumes that a Federal nexus is present under scenarios 2 and 3 because of the need for a Corps Clean Water Act Section 404 permit. The DEA assumes that there is no Federal nexus triggering section 7 consultation under scenario 1. Despite the fact that the DEA assumes a Federal nexus is present under scenarios 2 and 3, and the DEA indicates that economic impacts to oil and gas activities may be ''possible,'' the DEA does not quantify these impacts due to considerable uncertainty surrounding the likelihood, timing, and extent of oil and gas development within Unit 1 over the foreseeable future. Instead, the DEA qualitatively discusses the impacts that may occur, such as increased operational costs due to the need to use directional drilling to access oil and gas resources within proposed critical habitat areas.

Comment 24: One comment indicates that the DEA underestimates adverse economic impacts in proposed Unit 1 by failing to quantify potential impacts to forestry activities. The commenter notes that in light of recent litigation and Federal agency initiatives, the likelihood of a Federal nexus for forestry activities is not zero and therefore costs associated with future consultation on these activities should be included in the analysis.

Our Response: The DEA includes a section on potential impacts to forestry activities. Paragraph 95 of the DEA explains that, ''in general, normal silvicultural activities are exempt from section 404 permitting requirements.'' Although this statement is currently true, recent litigation and Federal agency initiatives could create a circumstance in which silviculture operations are no longer exempt from section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) permitting requirements. A section has been added to the FEA in Chapter 4 to describe the recent and potential future changes. Nevertheless, considerable uncertainty surrounds these rulings and whether they will in fact change the permitting requirements for silvicultural operations in Mississippi and Louisiana within the next 20 years. It follows that the likelihood for these activities to be subject to section 7 consultation considering the gopher frog and its habitat is likewise uncertain. Therefore, the FEA discusses this potential impact qualitatively.

Comment 25: One comment asserts that the Service fails to seriously consider the burden that section 7 consultation will place on the landowners of proposed Unit 1. The commenter expresses concern that the consultation process itself, as well as the outcome of consultation on development within proposed Unit 1, will have negative economic impacts.

Our Response: The DEA estimates a range of possible incremental economic impacts to development in Unit 1. Two of the possible scenarios include the administrative cost of section 7 consultation, as well as a range of impacts associated with the lost value of that land for development assuming that consultation leads to the Service recommending that development be avoided within all or part of the unit. The administrative costs of consultation applied in this analysis are summarized in Exhibit 2–2 and are based on a review of consultation records from several Service field offices across the country conducted in 2002, and the Federal Government Schedule rates. Costs associated with lost development value of the land within proposed Unit 1 are described in the DEA's section 4–1. The DEA also includes a scenario which assumes that development occurring within Unit 1 avoids impacts on jurisdictional wetlands, and therefore the landowners will not be required to consult with the Service regarding gopher frog critical habitat. This low-

end impact estimate is included due to uncertainty regarding the likelihood of a Federal nexus for development activities in Unit 1 and the conservation measures that the Service may recommended if consultation does occur.

Comment 26: Multiple commenters assert that designation would lead to lost tax revenues for the local government and State.

Our Response: The designation of critical habitat is not expected to have an effect on broader regional real estate demand and supply in St. Tammany Parish due to the existence of substitute sites for development activities. As a result, impacts to the regional construction industry and loss in revenue associated with home and business sales are not anticipated to occur. In addition, a reduction in housing supply is unlikely due to the existence of substitute sites, and, in turn, a measurable loss of tax revenue is not expected. A discussion of the potential effect on the regional real estate market has been added to the FEA.

Comment 27: One commenter states that the DEA fails to consider the incremental impacts to future activities in Unit 1 that would be borne by future landowners residing within the unit after it has been developed for residential and commercial uses.

Our Response: As described in section 4.1 of the DEA, under scenario 1, no Federal nexus compelling section 7 consultation would occur and therefore no additional economic burdens would be expected for those families and businesses that purchase developed lands. Under scenario 3, no development would occur and thus impacts would be expected to be limited to the existing landowners. Therefore, scenario 2 is the only scenario in which both development and a Federal nexus would be expected to occur. Under this scenario, there is the potential that additional economic impacts could be incurred by landowners who purchase this developed property; however, this would occur only if the landowners undertake activities that result in a Federal nexus. The extent of these impacts would depend on the type and timing of future projects. In general, consultation with the Service at sites that have already been developed are rare. Given the inherent uncertainty, impacts to future landowners cannot be quantified in scenario 2.

Comment 28: One commenter asserts that the Service unjustly ignores the negative economic impacts in Unit 1 on the landowners and St. Tammany Parish by deeming the impacts ''insignificant.''

Our Response: In the revised proposed rule published in the **Federal Register** on September 27, 2011 (76 FR 59774), the Service states that, ''if promulgated, the proposed designation would not directly have a significant effect on a substantial number of small business entities.'' This certification is based on the screening level analysis of the potential for gopher frog critical habitat designation to affect small entities contained in Appendix A of the DEA. The results of this screening analysis were revised in the FEA due to the reduction in acreage proposed in the **Federal Register** on January 17, 2012 (77 FR 2254). The screening analysis in the FEA finds that five small entities will be affected by the designation of critical habitat for the gopher frog, accounting for 3.9 percent of the total small Land Subdividers within the counties containing critical habitat. In addition, this screening analysis finds that the annualized impact of the proposed designation of critical habitat within Unit 1 represents from zero to 44.7 percent of the average annual revenue for the four small entities affected in Unit 1. Based on these findings in the screening analysis and the tests set forth under the Small Business Regulatory Enforcement Fairness Act (SBREFA), we certified that, ''if promulgated, the proposed designation would not directly have a significant effect on a substantial number of small business entities.''

Comment 29: One commenter states that the benefits of designating proposed Unit 1 as critical habitat are vague and highly speculative and not quantified in the DEA on page 5–2.

Our Response: As stated in paragraph 53 of the DEA, the ''primary purpose of the rulemaking (i.e., the direct benefit) is the potential to enhance conservation of the species.'' OMB acknowledges in its guidance for implementing Executive Order 12866 that it may not be feasible to monetize or quantify the benefits of environmental regulations due to either an absence of studies or a lack of resources on the implementing agency's part to conduct new research. Instead of relying on economic measures, the Service believes that the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking.

Comment 30: One commenter asks whether having a Federal home loan or insurance would constitute a Federal nexus.

Our Response: No. Federal home loans are not made directly to individuals by the Federal government. Transactions are made with member banks and decisions about lending are then made by member banks; therefore there is no Federal action agency with regard to critical habitat. With regard to Federal flood insurance, if the Federal Emergency Management Agency (FEMA) were to undertake an action or fund an action that could impact critical habitat, it would need to consult with the Service on that action. However, when FEMA simply makes decisions regarding who receives Federal flood insurance, there is no action that would trigger consultation under the Act.

Comment 31: Multiple commenters assert that the DEA fails to analyze all impacts of critical habitat designation, regardless of whether those impacts are co-extensive with those of the listing. These commenters cite the ruling in *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001), in which the Court ruled that economic analyses must consider the co-extensive impacts of critical habitat designation.

Our Response: The identification and estimation of incremental impacts is consistent with direction provided by the Office of Management and Budget (OMB) to Federal agencies for the estimation of the costs and benefits of Federal regulations (see OMB, Circular A–4, 2003). It is also consistent with several recent court decisions, including *Cape Hatteras Access Preservation Alliance* v. *U.S. Department of the Interior,* 344 F. Supp. 2d 108 (D.D.C.) and *Center for Biological Diversity* v. *U.S. Bureau of Land Management,* 422 F. Supp. 2d 1115 (N.D. Cal. 2006). Those decisions found that estimation of incremental impacts, i.e., those stemming solely from the designation, is proper.

Comment 32: One commenter states that the proposed designation of critical habitat in southern Forrest County, Units 8 and 9, will prevent future development and timber management in the area. The commenter believes that the economic costs to Forrest County and its citizens outweigh the benefits of designation.

Our Response: As presented in Exhibit 1–1 of the DEA, all but 5 acres of the land proposed for designation within Units 8 and 9 are federally managed. As described in section 3–1 of the DEA, the portions of proposed Units 8 and 9 that fall within the DNF are actively managed by the USFS for the benefit of the gopher frog. Costs associated with the designation of critical habitat within these areas are limited to the administrative cost of a programmatic consultation with USFS on their gopher frog management activities. Because the USFS has worked

closely with the Service to develop their current management practices on these lands, no additional project modifications are expected to result from the consultation. Therefore, the DEA does not anticipate that future development or timber management will be affected by the designation of critical habitat. Therefore, the DEA does not estimate any costs to Forrest County or private landowners within Units 8 and 9.

Comment 33: Multiple comments state that all privately owned lands, with the exception of those owned by supporters of the designation, should be excluded from the designation of critical habitat. These commenters assert that the proposed designation will negatively affect property values, the livelihood of landowners, and thus the local economy.

Our Response: All known reasonably foreseeable economic impacts on privately owned lands are quantified in the DEA. In particular, section 4.1 of the DEA quantifies potential impacts to land value within Unit 1. In addition to these direct impacts to land value, paragraph 51 of the DEA describes the potential indirect stigma effect that the designation of critical habitat may have on property values. Measurable stigma effects are unlikely, and thus they are quantified in the DEA.

Summary of Changes From Revised Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers that we received in response to our revised proposed rule designating critical habitat for the dusky gopher frog published in the **Federal Register** on September 27, 2011 (76 FR 59774). Based on information we received from peer reviewers, we amended the methodology we used in constructing critical habitat units. This change is described in detail in our January 17, 2012 publication announcing a public hearing in the **Federal Register** (77 FR 2254). Proposed changes included: combining all movement data from different studies conducted at the same site; discarding one field observation from the movement data because it did not provide specific information on breeding pond or upland habitat use; and standardizing all movement data to reflect straight-line distances between breeding ponds and uplands. As a result of these changes, proposed critical habitat for the dusky gopher frog was reduced by 193 ha (477 ac).

During a review of aerial photography prior to making the final maps of critical habitat for this final rule, we identified an agricultural field within critical habitat Unit 10 as it was described in the revised proposed rule. Because this agricultural area does not contain habitat suitable for the dusky gopher frog, it has been removed from the critical habitat designation. This change resulted in a further reduction of critical habitat of 35 ha (87 ac).

As a result of these two changes, there is a total reduction of 228 ha (564 ac) from the critical habitat we proposed on September 27, 2011, (76 FR 59774). In this rule we are designating approximately 2,621 ha (6,477 ac) of critical habitat for the dusky gopher frog.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species; and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographic area occupied by the species at the time it was listed are included in a critical habitat designation if they contain the physical and biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographic area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the dusky gopher frog from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the revised proposed rule to designate critical habitat published in the **Federal Register** on September 27, 2011 (76 FR 59774), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on December 4, 2001 (66 FR 62993). We have determined that the dusky gopher frog requires the following physical or biological features.

Space for Individual and Population Growth and for Normal Behavior

Dusky gopher frogs are terrestrial amphibians endemic to the longleaf pine ecosystem. They spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine (naturally occurring slash pine (*Pinus elliottii*) in wetter areas). Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds (Hedman *et al.* 2000, p. 233; Kirkman *et al.* 2000, p. 373). Historically, fire-tolerant longleaf pine dominated the uplands; however, much of the original habitat has been converted to pine (often loblolly (*P. taeda*) or slash pine) plantations and has become a closed-canopy forest unsuitable as habitat for dusky gopher frogs and other species of gopher frogs (Roznik and Johnson 2009a, p. 265).

During the breeding season, dusky gopher frogs leave their subterranean retreats in the uplands and migrate to their breeding sites during rains associated with passing cold fronts. Breeding sites are ephemeral (seasonally flooded), isolated ponds (not connected to other water bodies) located in the uplands. Both forested uplands and isolated wetlands (see ''*Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*'' for further discussion of isolated wetlands) are needed to provide space for individual and population growth and for normal behavior.

After breeding, adult dusky gopher frogs leave pond sites during major rainfall events; metamorphic frogs follow, after their development is complete. Limited data are available on the distance between the wetland breeding and upland terrestrial habitats of post-larval and adult dusky gopher frogs. Richter *et al.* (2001, pp. 316–321) used radio transmitters to track a total of 13 adult frogs at Glen's Pond, the primary dusky gopher frog breeding site, located in Harrison County, Mississippi. The farthest movement recorded was 299 meters (m) (981 feet (ft)) by a frog tracked for 63 days from the time of its exit from the breeding site (Richter *et al.* 2001, p. 318). Tupy and Pechmann (2011, p. 1) conducted a more recent radio telemetry study of 17 dusky gopher frogs captured at Glen's Pond. The maximum distance traveled by these frogs to underground refuges was 240 m (787 ft).

Studies of a closely related gopher frog (*Rana capito*) in Florida, Georgia, and North Carolina, have documented surprisingly long movements between their breeding ponds and upland refugia. In a study in the sandhills of North Carolina, the post-breeding movements of 17 gopher frogs were tracked (Humphries and Sisson 2011, p. 1). The maximum distance a frog was found from its breeding site was 3.5 kilometers (km) (2.2 miles (mi)). In Florida, gopher frogs have been found up to 2 km (1.2 mi) from their breeding

sites (Franz *et al.* 1988, p. 82). The frequency of these long-distance movements is not known (see discussion in Roznik *et al.* 2009, p. 192). A number of other gopher frog studies have either generated data on radio-tracked frogs, or provided observations of them, in upland habitat at varying distances from their breeding ponds. We assessed these studies, and when multiple studies were conducted on a single population, we combined data for each site (we also combined the two data sets for dusky gopher frog). In the additional gopher frog studies, the maximum straight-line distances from pond to upland refugia are: 300 m (984 ft) (Georgia; Rostal 1999, p. 1); 525 m (1,722 ft) (Georgia; Neufeldt and Birkhead 2001, p. 10); 571 m (1,873 ft) (Florida; Blihovde 2006, p. 267); and 862 m (2,828 ft) (Florida; Roznik 2007, p. 10).

It is difficult to interpret specific habitat use for the dusky gopher frog from the limited available data. Movements are generally between breeding sites and belowground refugia, and distances moved are likely to be tied to the abundance and distribution of appropriate refugia. We have assumed that the dusky gopher frog can move farther distances, and may use a larger area, than the existing data for the species indicate. For this reason, we used data from the dusky gopher frog and other species of gopher frogs to estimate the potential distance a dusky gopher frog may move between its breeding pond and upland refugia. These seven values included the longest movement recorded for the dusky gopher frog, 299 m (981 ft), and the six values for other species of gopher frogs as described in the paragraph above. We then took the median value of all the dusky gopher frog and gopher frog movement data available to us (571 m (1,873 ft)), and used this value to construct the area of critical habitat around each occupied or unoccupied dusky gopher frog breeding pond. See also Summary of Changes from Revised Proposed Rule, above.

Due to the low number of occupied sites for the species, and with the cooperation of our Federal, State, and nongovernmental agency partners, management has been conducted at specific sites to improve habitat for dusky gopher frogs with the hope of establishing new populations at the sites (see *''Criteria Used To Identify Critical Habitat''*). When possible, we are managing wetlands in these areas within 1,000 m (3,281 ft) of each other as a block in order to create multiple breeding sites and metapopulation structure (defined as neighboring local populations close enough to one another that dispersing individuals could be exchanged (gene flow) at least once per generation) in support of recovery (Marsh and Trenham 2001, p. 40; Richter *et al.* 2003, p. 177).

Due to fragmentation and destruction of habitat, the current range of naturally occurring dusky gopher frogs has been reduced to three sites (Glen's Pond, Mike's Pond, and McCoy's Pond). In addition, optimal terrestrial habitat for gopher frogs is considered to be within burrows of the gopher tortoise (*Gopherus polyphemus*), a rare and declining species that is listed as threatened under the Act within the range of the dusky gopher frog. Therefore, this specialized microhabitat has been reduced as well. Fragmentation and loss of the dusky gopher frog's habitat has subjected the species' small, isolated populations to genetic isolation and reduction of space for reproduction, development of young, and population maintenance; thus, the likelihood of population extinction has increased (U.S. Fish and Wildlife Service 2001, pp. 62993–63002). Genetic variation and diversity within a species are essential for recovery, adaptation to environmental changes, and long-term viability (capability to live, reproduce, and develop) (Harris 1984, pp. 93–107). Long-term viability is founded on the existence of numerous interbreeding, local populations throughout the range (Harris 1984, pp. 93–107).

Connectivity of dusky gopher frog breeding and nonbreeding habitat within the geographic area occupied by the species must be maintained to support the species' survival. Additionally, connectivity of these sites with other areas outside the geographic area occupied currently by the dusky gopher frog is essential for the conservation of the species. Research on other species of pond-breeding amphibians demonstrates the importance of connectivity of breeding and nonbreeding habitat, as well as occupied and unoccupied sites (Semlitsch 2002, p. 624; Harper *et al.* 2008, p. 1205). Connectivity allows for gene flow among local populations within a metapopulation, which enhances the likelihood of metapopulation persistence and allows for recolonization of sites that are lost due to drought, disease, or other factors (Hanski and Gilpin 1991, pp. 4–6).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Dusky gopher frog tadpoles eat periphyton (microscopic algae, bacteria, and protozoans) from surfaces of emergent vegetation or along the pond bottom, as is typical of pond-type tadpoles (Duellman and Trueb 1986, p. 159). Juvenile and adult gopher frogs are carnivorous. Insects found in their stomachs have included carabid (*Pasimachus* sp.) and scarabaeid (genera *Canthon* sp. and *Ligyrus* sp.) beetles (Netting and Goin 1942, p. 259) and *Ceuthophilus* crickets (Milstrey 1984, p. 10). Dusky gopher frogs are gape-limited (limited by the size of the jaw opening) predators with a diet probably similar to that reported for other gopher frogs, including other frogs, toads, beetles, hemipterans, grasshoppers, spiders, roaches, and earthworms (Dickerson 1969, p. 196; Carr 1940, p. 64). Within the pine uplands, a diverse and abundant herbaceous layer consisting of native species, maintained by frequent fires, is important to maintain the prey base for juvenile and adult dusky gopher frogs. Wetland water quality and an open canopy (Skelly *et al.* 2002, p. 983) are important to the maintenance of the periphyton that serves as a food source for dusky gopher frog tadpoles.

Cover or Shelter

Amphibians need to maintain moist skin for respiration (breathing) and osmoregulation (controlling the amounts of water and salts in their bodies) (Duellman and Trueb 1986, pp. 197–222). Because dusky gopher frogs disperse from their aquatic breeding sites to the uplands where they live as adults, desiccation (drying out) can be a limiting factor in their movements. Thus, it is important that areas connecting their wetland and terrestrial habitats are protected in order to provide cover and appropriate moisture regimes during their migration. Richter *et al.* (2001, pp. 317–318) found that during migration, dusky gopher frogs used clumps of grass or leaf litter for refuge. Protection of this connecting habitat may be particularly important for juveniles as they move out of the breeding pond for the first time. Studies of migratory success in post-metamorphic amphibians have demonstrated the importance of high levels of survival of these individuals to population maintenance and persistence (Rothermel 2004, pp. 1544–1545).

Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands (Richter *et al.* 2001, p. 318). Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees (Richter *et al.* 2001, p. 318). Availability of appropriate underground sites is especially

important for juveniles in their first year. Survival of juvenile gopher frogs in north-central Florida was found to be dependent on their use of underground refugia (Roznik and Johnson 2009b, p. 431). Gopher frogs that did not occupy an underground refuge experienced much higher levels of mortality when compared with those that did occupy underground refuges (Roznik and Johnson 2009b, p. 434).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Dusky gopher frog breeding sites are isolated ponds that dry completely on a cyclic basis. Faulkner (U.S. Fish and Wildlife Service 2001, p. 62994) conducted hydrologic research at the Glen's Pond site in DNF, Harrison County, Mississippi. He described the pond as a depressional feature on a topographic high. The dominant source of water to the pond is rainfall within a small, localized watershed that extends 61 to 122 m (200 to 400 ft) from the pond's center. Substantial winter rains are needed to ensure that the pond fills sufficiently to allow hatching, development, and metamorphosis (change to adults) of larvae. The timing and frequency of rainfall are critical to the successful reproduction and recruitment of dusky gopher frogs. Adult frogs move to wetland breeding sites during heavy rain events, usually from January to late March (Richter and Seigel 2002, p. 964).

Studies at Glen's Pond indicate that this breeding pond is approximately 1.5 ha (3.8 ac) when filled and attains a maximum depth of 1.1 m (3.6 ft) (Thurgate and Pechmann 2007, p. 1846). The pond is hard-bottomed, contains emergent and submergent vegetation, and has an open canopy cover. It is especially important that a breeding pond have an open canopy; although the mechanism is unclear, it is believed an open canopy is critical to tadpole development. Experiments conducted by Thurgate and Pechmann (2007, pp. 1845–1852) demonstrated the lethal and sublethal effects of canopy closure on dusky gopher frog tadpoles. Canopy closure reduced the number of tadpoles that survived to metamorphosis and reduced the growth rates of those that did survive so that they were smaller at metamorphosis (Thurgate and Pechmann 2007, pp. 1845). The general habitat attributes of the other three dusky gopher frog breeding ponds are similar to those of Glen's Pond. Female dusky gopher frogs attach their eggs to rigid vertical stems of emergent vegetation (Young 1997, p. 48). Breeding ponds typically dry in early to mid-summer, but on occasion have remained wet until early fall (Richter and Seigel 1998, p. 24). Breeding ponds of closely related gopher frogs in Alabama (east of the Mobile River drainage) and Florida have similar structure and function to those of the dusky gopher frog (Bailey 1990, p. 29; Palis 1998, p. 217; Greenberg 2001, p. 74).

An unpolluted wetland with water free of predaceous fish, suspended sediment, pesticides, and chemicals associated with road runoff is important for egg development, tadpole growth and development, and successful mating and egg-laying by adult frogs. For further information see our December 4, 2001, listing rule (66 FR 62993).

Primary Constituent Elements for the Dusky Gopher Frog

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features (discussed above) and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the dusky gopher frog are:

(1) Primary Constituent Element 1—*Ephemeral wetland habitat.* Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 ha (<1 to 10 ac)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of dusky gopher frogs are:

(a) An open canopy with emergent herbaceous vegetation for egg attachment;

(b) An absence of large, predatory fish that prey on frog larvae;

(c) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and

(d) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(2) Primary Constituent Element 2—*Upland forested nonbreeding habitat.* Forests historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the dusky gopher frog depends upon for food, shelter, and protection from the elements and predation.

(3) Primary Constituent Element 3—*Upland connectivity habitat.* Accessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites. This habitat is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

With this designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species through the identification of the elements of the features, the primary constituent elements, that support the life-history processes of the species. The Service has determined that Unit 2a contained all of the PCEs, Units 2b through 12 are essential to the conservation of the species and also contain all of the PCEs, and Unit 1 is essential to the conservation of the species and contains one of the PCEs.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection.

All areas occupied at the time of listing will require some level of management to address the current and future threats to the dusky gopher frog and to maintain or restore the PCEs. Unoccupied areas will also require management to complete restoration. The features essential to the conservation of this species may require special management considerations or protection to reduce various threats to critical habitat that may affect one or more of the PCEs. Special management of ephemeral wetland habitats ((breeding sites (PCE 1)) will be needed to ensure that these areas provide water

quantity, quality, and appropriate hydroperiod; cover; and absence from levels of predation and disease that can affect population persistence. In nonbreeding upland forested habitat (PCEs 2 and 3), special management will be needed to ensure an open canopy and abundant herbaceous ground cover; underground habitat for adult and subadult frogs to occupy; and sufficient cover as frogs migrate to and from breeding sites. A detailed discussion of activities influencing the dusky gopher frog and its habitat can be found in the final listing rule (66 FR 62993; December 4, 2001). Activities that may warrant special management of the physical or biological features that define essential habitat (appropriate quantity and distribution of PCEs) for the dusky gopher frog include, but are not limited to: (1) Land use conversions, primarily urban development and conversion to agriculture and pine plantations; (2) stump removal and other soil-disturbing activities that destroy the belowground structure within forest soils; (3) fire suppression and low fire frequencies; (4) wetland destruction and degradation; (5) random effects of drought or floods; (6) off-road vehicle use; (7) maintenance of gas, water, electrical power, and sewer easements; and (8) activities that disturb underground refugia used by dusky gopher frogs for foraging, protection from predators, and shelter from the elements.

Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are designating critical habitat in areas within the geographic area occupied by the species at the time of listing in 2001. We also are designating specific areas outside the geographic area occupied by the species at the time of listing, including those that are currently occupied, and others which are currently unoccupied. Most of the unoccupied areas designated as critical habitat are part of ongoing recovery initiatives for this species. We have determined that all areas designated as critical habitat outside the area occupied by the species at the time of listing are essential for the conservation of the species.

Dusky gopher frogs require small, isolated, ephemeral, acidic, depressional standing bodies of freshwater for breeding; upland pine forested habitat that has an open canopy maintained by fire (preferably) for nonbreeding habitat; and upland connectivity habitat areas that allow for movement between nonbreeding and breeding sites. Dusky gopher frog populations are likely to function as metapopulations when occupied habitat is improved and that option is available to them since other species of gopher frogs behave in this way. In certain years and under certain conditions, dusky gopher frogs may move from ponds that become unsuitable to others that are suitable. Or in some years, if ponds fail to fill with water, local extirpations may occur and dusky gopher frogs from adjacent ponds may recolonize those sites when they fill with water again. The range of the dusky gopher frog has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small and at risk of extirpation and extinction from stochastic events that occur as periodic natural events or existing or potential human-induced events (U.S. Fish and Wildlife Service 2001, pp. 62993–63002). To reduce the risk of extinction through these processes, it is important to establish multiple protected subpopulations across the landscape (Soulé and Simberloff 1986, pp. 25–35; Wiens 1996, pp. 73–74). We considered the following criteria in the selection of areas that contain the essential features for the dusky gopher frog when designating units: (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

We began our determination of which areas to designate as critical habitat for the dusky gopher frog with an assessment of the critical life-history components of the dusky gopher frog, as they relate to habitat. We then evaluated the dusky gopher frog in the context of its historic (Alabama (west of the Mobile River drainage), Louisiana, and Mississippi) and current (Mississippi) distribution to establish what portion of its range still contains the physical and biological features that are essential to the conservation of the species. We reviewed the available information pertaining to historic and current distributions, life histories, and habitat requirements of this species. We focused on the identification of ephemeral wetland habitats in our analysis because they are requisite sites for population survival and conservation and their rarity in the environment is one of the primary reasons that the frog is endangered. Our sources included surveys, unpublished reports, and peer-reviewed scientific literature prepared by the Alabama Department of Conservation and Natural Resources, Alabama Natural Heritage Program, Louisiana Department of Wildlife and Fisheries, Natural Heritage Program, Mississippi Department of Wildlife, Fisheries, and Parks, and dusky gopher frog researchers and other herpetologists that specialize in frogs; Service data and publications such as the final listing rule for the dusky gopher frog; and Geographic Information System (GIS) data (such as species occurrence data, habitat data, land use, topography, digital aerial photography, and ownership maps).

In Alabama, we were unable to identify habitat that met the requirements for sustaining the essential life-history functions of the species. No historical breeding sites for the species are known in Alabama. The only dusky gopher frog (as currently described) record from Alabama was an observation by Löding in 1922, and summarized in Wright and Wright (1949, p. 539). Löding found three gopher frogs under drift logs on the beach of Mobile Bay just south of the mouth of Dog River, Mobile County,

Alabama. Bailey (1994, pp. 4–5) visited this area in 1993, and found it to be a residential development, although large longleaf pine trees in lawns and vacant lots indicated the area could have formerly been suitable upland habitat for gopher frogs. Neither Löding nor Bailey located a possible breeding site in the vicinity of the record. Researchers have conducted two studies in southwestern Alabama to look for habitat that could support dusky gopher frogs. Hart (2004, pp. 1–9) initiated a remote sensing study using aerial photography of Mobile and Washington Counties, Alabama, to find open, isolated ponds in proximity to forested terrain. This technique was used to identify sites with the potential for supporting dusky gopher frog populations. Hart (2004, pp. 1–9) conducted field assessments of 41 ponds in Mobile County, Alabama, but habitat quality at these ponds was limited. Ponds were overgrown with woody vegetation and lacked the emergent vegetation necessary for dusky gopher frog egg attachment (Hart 2004, p. 9). Additional ponds were identified remotely in Washington County, Alabama, but were not visited, and their habitat quality is unknown. Bailey (2009, pp. 1–14) used a similar remote sensing technique to locate a total of 21 ponds in Choctaw, Mobile, and Washington Counties, Alabama. However, this was a coarse filter approach, and field assessments were not possible due to drought conditions and inaccessibility resulting from site isolation. No areas suitable for conservation of the dusky gopher frog were identified in either of the remote sensing studies. No dusky gopher frog populations in Alabama were discovered during field assessments associated with Hart's (2004, pp. 1–9) study. At this time, the Service has not been able to identify suitable areas in Alabama that are essential for the conservation of the dusky gopher frog; thus, none are being designated as critical habitat.

In Louisiana, the dusky gopher frog was last observed in 1965. The Service visited the area of historic dusky gopher frog occurrence in St. Tammany Parish, Louisiana, and conducted a habitat assessment in March 2011. The area is managed for timber by a company conducting industrial forestry. Although the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs, we visited at least five ephemeral ponds, including the last known record of the species in Louisiana. These ponds were intact and of remarkable quality. This same area was surveyed for gopher frogs in the 1990s and 2000s. During those visits, the ephemeral ponds were considered similar in appearance (water clarity, depth, vegetation) to ponds in Mississippi used for breeding by the dusky gopher frog (Thomas and Ballew 1997, p. 6; Leonard *et al.* 2003, pp. 7–8; Pechmann *et al.* 2006, pp. 8, 10). Our observations in 2011 indicated the Louisiana ponds were little changed from the descriptions provided by the previous surveyors. In addition, the ponds are in close proximity to each other, which would allow movement of adult gopher frogs between them. In fact, no group of five ponds such as these was found in any of the areas of historical occurrence that we have searched in Mississippi. Dusky gopher frogs exhibit high larval and juvenile mortality. Multiple breeding sites protect against catastrophic loss at any one site and provide opportunity for recolonization. This is an especially important aspect of critical habitat for dusky gopher frogs due to their limited population numbers. The multiple ponds present at the St. Tammany Parish site provide metapopulation structure that supports long-term survival and population resiliency. As a result, the Service determined that this area of St. Tammany Parish (Unit 1) is essential for the conservation of the dusky gopher frog.

In Mississippi, we identified ephemeral wetland habitat throughout the coastal counties within the historic distribution of the dusky gopher frog using U.S. Geological Survey topographic maps, National Wetland Inventory maps, Natural Resource Conservation Service county soil survey maps, and satellite imagery. Because we had previously identified existing sites with habitat essential for the conservation of the dusky gopher frog in our 2010 proposed rule (75 FR 31387), we searched for additional habitat with the best potential of restoring the physical and biological features essential for the conservation of the dusky gopher frog. We found these areas were concentrated on the DNF in Forrest, Harrison, and Perry Counties in southern Mississippi. Some additional sites were found in Jackson County on Federal land being managed by the State as a Wildlife Management Area and on private land being managed as a wetland mitigation bank. Once these areas were identified, we coordinated with our partners in the U.S. Forest Service, the U.S. Army Corps of Engineers, the Mississippi Department of Wildlife, Fisheries, and Parks, and The Nature Conservancy as they worked on habitat restoration efforts at the sites. The habitat quality of isolated ephemeral wetlands and the upland pine forests surrounding them were improved to benefit the recovery of the dusky gopher frog. The habitat restoration efforts have been successful in establishing or improving the quality of the three PCEs required to sustain the dusky gopher frog's life-history processes on each of these sites. Therefore, the Service has determined that these unoccupied sites are essential for the conservation of the species.

Only one subunit (Unit 2, subunit A) is known to have been occupied at the time of listing. We believe this occupied area contains sufficient PCEs to support life-history functions essential to the conservation of the species; however, this lone area is not sufficient to conserve the species. Therefore, sites not known to be occupied at the time of listing have also been designated as critical habitat. Three units/subunits (Unit 4, subunit A; Unit 5, subunit A; and Unit 7) are currently occupied by the dusky gopher frog, but were discovered or established subsequent to the listing of the species. Eleven units/subunits, not known to be occupied at the time of listing but within the historic range of the species, are also currently unoccupied. The inclusion of these eleven areas will provide habitat for population translocation and support recovery efforts for the dusky gopher frog. One of the unoccupied units (Unit 1) represents an historic record for the dusky gopher frog. The historic occupancy status of the other 10 units/subunits is unknown. All 14 units/subunits not known to be occupied at the time of listing have been designated as critical habitat because the Service has determined they are essential for the conservation of the species. The dusky gopher frog is at high risk of extirpation from stochastic events, such as disease or drought, and from demographic factors such as inbreeding depression. The establishment of additional populations beyond the single site known to be occupied at listing is critical to protect the species from extinction and provide for the species' eventual recovery.

We have determined that, with proper protection and management, the areas we are designating as critical habitat are essential for the conservation of the species based on our current understanding of the species' requirements. However, as discussed in the Critical Habitat section above, we recognize that designation of critical habitat may not include all habitat areas that we may eventually determine are necessary for the recovery of the species

and that, for this reason, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

We delineated the critical habitat unit boundaries using the following steps:

(1) We used digital aerial photography using ArcMap 9.3.1 to map

(a) The specific location of the breeding site occupied by the dusky gopher frog at the time of listing, and

(b) Those locations of breeding sites outside the geographic area occupied by the species at the time it was listed, that are currently occupied and not occupied, that were determined to be essential for the conservation of the species;

(2) We delineated critical habitat units by buffering the above locations by a radius of 621 m (2,037 ft). We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat and incorporate all primary constituent elements within the critical habitat unit. We chose the value of 621 m (2,037 ft) by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog group (see ''*Space for Individual and Population Growth and for Normal Behavior*'') and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use (see discussion in Semlitsch and Bodie 2003, pp. 1222–1223);

(3) We used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure (see ''*Space for Individual and Population Growth and for Normal Behavior*'').

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures, because such lands lack physical or biological features for the dusky gopher frog. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are designating as critical habitat twelve units, three of which are divided into two subunits each, based on sufficient elements of physical or biological features present to support dusky gopher frog life processes. Some units/subunits contain all of the identified elements of physical or biological features and support multiple life processes. Other units contain only some elements of the physical or biological features necessary to support the dusky gopher frog's particular use of that habitat.

Final Critical Habitat Designation

We are designating 15 units/subunits as critical habitat for the dusky gopher frog. The critical habitat areas described below constitute our current best assessment at this time of areas that meet the definition of critical habitat. Table 1 below shows the specific occupancy status of each unit/subunit at the time of listing and currently, based on the most recent data available.

TABLE 1—OCCUPANCY OF DUSKY GOPHER FROG BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Parish/county	Occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently occupied	Not occupied at the time of listing, currently unoccupied
LOUISIANA				
1	St. Tammany			X
MISSISSIPPI				
2, Subunit A	Harrison	X		
2, Subunit B	Harrison			X
3	Harrison			X
4, Subunit A	Jackson		X	
4, Subunit B	Jackson			X
5, Subunit A	Jackson		X	
5, Subunit B	Jackson			X
6	Jackson			X
7	Jackson		X	
8	Forrest			X
9	Forrest			X
10	Perry			X
11	Perry			X
12	Perry			X

Table 2 provides the approximate area and ownership of each critical habitat unit. Hectare and acre values were individually computer-generated using GIS software, rounded to nearest whole number, and then summed.

TABLE 2—DESIGNATED CRITICAL HABITAT UNITS FOR DUSKY GOPHER FROG BY LAND OWNERSHIP

[Area estimates (hectares (ha) and acres (ac)) reflect all land within critical habitat unit boundaries]

Unit	Parish/county	Ownership			Total area
		Federal	State	Private	
LOUISIANA					
1	St. Tammany			625 ha (1,544 ac)	625 ha (1,544 ac)
MISSISSIPPI					
2, Subunit A	Harrison	100 ha (247 ac)		21 ha (52 ac)	121 ha (299 ac)
2, Subunit B	Harrison	425 ha (1,050 ac)		3 ha (7 ac)	428 ha (1,057 ac)
3	Harrison	121 ha (299 ac)			121 ha (299 ac)
4, Subunit A	Jackson			121 ha (299 ac)	121 ha (299 ac)
4, Subunit B	Jackson	48 ha (119 ac)		109 ha (269 ac)	157 ha (388 ac)
5, Subunit A	Jackson			121 ha (299 ac)	121 ha (299 ac)
5, Subunit B	Jackson			54 ha (133 ac)	54 ha (133 ac)
6	Jackson	121 ha (299 ac)			121 ha (299 ac)
7	Jackson		107 ha (264 ac)	14 ha (35 ac)	121 ha (299 ac)
8	Forrest	121 ha (299 ac)			121 ha (299 ac)
9	Forrest	120 ha (297 ac)		1 ha (2.5 ac)	121 ha (299 ac)
10	Perry	127 ha (314 ac)		20 ha (49 ac)	147 ha (363 ac)
11	Perry	119 ha (294 ac)		2 ha (5 ac)	121 ha (299 ac)
12	Perry	115 ha (284 ac)		6 ha (15 ac)	121 ha (299 ac)
Total	All Parishes and Counties.	1,417 ha (3,501 ac)	107 ha (264 ac)	1,097 ha (2,711 ac)	2,621 ha (6,477 ac)

Note: Area sizes may not sum due to rounding.

We present below brief descriptions of all units and reasons why they meet the definition of critical habitat for the dusky gopher frog.

Unit 1: St. Tammany Parish, Louisiana

Unit 1 encompasses 625 ha (1,544 ac) on private lands managed for industrial forestry in St. Tammany Parish, Louisiana. This unit is located north and south of State Hwy. 36, approximately 3.1 km (1.9 mi) west of State Hwy. 41 and the town of Hickory, Louisiana. Unit 1 is not within the geographic area occupied by the species at the time of listing. It is currently unoccupied; however, the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within this unit.

Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands. If dusky gopher frogs are translocated to the site, the five ponds are in close enough proximity to each other that adult frogs could move between them and create a metapopulation, which increases the chances of the long-term survival of the population. Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining the five ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery. Therefore, we have determined this unit is essential for the conservation of the species because it provides important breeding sites for recovery. It includes habitat for population expansion outside of the core population areas in Mississippi, a necessary component of recovery efforts for the dusky gopher frog.

Unit 2: Harrison County, Mississippi

Unit 2 comprises two subunits encompassing 549 ha (1,356 ac) on Federal and private lands in Harrison County, Mississippi. This unit, between U.S. Hwy. 49 and Old Hwy. 67, is approximately 224 m (735 ft) northeast of the Biloxi River. It is located approximately 2.8 km (1.8 mi) east of U.S. Hwy. 49 and approximately 2.3 km (1.4 mi) west of Old Hwy. 67. Within this unit, approximately 525 ha (1,297 ac) are in the DNF and 24 ha (59 ac) are in private ownership.

Subunit A

Unit 2, Subunit A encompasses 121 ha (299 ac) around the only breeding pond (Glen's Pond) known for the dusky gopher frog when it was listed in 2001; as a result, it is within the geographic area of the species occupied at the time of listing. In addition, this subunit contains all elements of the essential physical or biological features of the species. The majority of this subunit (100 ha (247 ac)) is in the DNF, with the remainder (21 ha (52 ac)) in private ownership. This subunit is being designated as critical habitat because it was occupied at the time of listing, is currently occupied, and contains sufficient primary constituent elements (ephemeral wetland habitat (PCE 1), upland forested nonbreeding habitat (PCE 2), and upland connectivity habitat (PCE 3)) to support life-history functions essential to the conservation of the species.

Glen's Pond and the habitat surrounding it, consisting of forested uplands used as nonbreeding habitat and upland connectivity habitat between breeding and nonbreeding habitat, support the majority of the dusky gopher frogs that currently exist in the wild. Within Unit 2, Subunit A, the dusky gopher frog and its habitat may require special management considerations or protection to address potential adverse effects caused by: Fire suppression and low fire frequencies; detrimental alterations in forestry practices that could destroy belowground soil structures, such as stump removal; hydrologic changes resulting from ditches, and/or adjacent highways and roads that could alter the ecology of the breeding pond and surrounding terrestrial habitat; wetland degradation; random effects of drought or floods; off-road vehicle use; gas, water, electrical power, and sewer easements; and agricultural and urban development.

Subunit B

Unit 2, Subunit B encompasses 428 ha (1,057 ac) adjacent to Subunit A and the area surrounding Glen's Pond. The majority of this subunit (425 ha (1,050 ac)) is in the DNF, with the remainder (3 ha (7 ac)) in private ownership. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of areas, within the dispersal range of the dusky gopher frog (from Subunit A), which we believe provide important breeding sites for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This unoccupied area consists of three ponds and their associated uplands in the DNF. These ponds were named Reserve Pond, Pony Ranch Pond, and New Pond during our ongoing recovery initiatives. The USFS is actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and the severely restricted range of the dusky gopher frog, the species is at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Unit 3: Harrison County, Mississippi

Unit 3 encompasses 121 ha (299 ac) on Federal land in Harrison County, Mississippi. This unit is located in the DNF approximately 7.9 km (4.9 mi) east of the community of Success at Old Hwy. 67 and 4 km (2.5 mi) south of Bethel Road.

Unit 3 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area surrounds a pond on the DNF that was given the name of Carr Bridge Road Pond during ongoing recovery initiatives when it was selected as a dusky gopher frog translocation site. The USFS is actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species resulting from stochastic events and to provide for the species' eventual recovery. Therefore, this unit is being designated as critical habitat because it is essential for the conservation of the species.

Unit 4: Jackson County, Mississippi

Unit 4 encompasses 278 ha (687 ac) on Federal and private land in Jackson County, Mississippi. This unit borders the north side of Interstate 10 approximately 1.1 km (0.7 mi) west of State Hwy. 57. Within this unit, approximately 48 ha (119 ac) are in the Mississippi Sandhill Crane National Wildlife Refuge and 230 ha (568 ac) are in private ownership.

Subunit A

Unit 4, Subunit A encompasses 121 ha (299 ac) on private land. It is currently occupied as a result of translocation efforts conducted in 2004, 2005, 2007, 2008, 2009, and 2010; however, it was not occupied at the time of listing. We believe this subunit is essential for the conservation of the dusky gopher frog because of the presence of a proven breeding pond (egg masses have been deposited here in 2007 and 2010 by gopher frogs translocated to the site) and its associated uplands (upland forested nonbreeding habitat and upland connectivity habitat). We also believe that metapopulation structure, which will further protect the dusky gopher frog from extinction, is possible when the whole area of Unit 4 is considered. The private owners of this property are actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs can continue to be translocated is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Subunit B

Unit 4, Subunit B encompasses 157 ha (388 ac) on Federal and private land adjacent to Subunit A. The majority of this subunit (109 ha (269 ac)) is on private land, with the remainder of the unit (48 ha (119 ac)) in the Mississippi Sandhill Crane National Wildlife Refuge. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of an area, within the dispersal range of the dusky gopher frog (from Subunit A), which provides two important breeding sites and their associated upland for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This area is actively managed to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the potential risk of

extinction of the species and provide for the species' eventual recovery.

Unit 5: Jackson County, Mississippi

Unit 5 encompasses 175 ha (432 ac) on private land in Jackson County, Mississippi. This unit is located approximately 10.6 km (6.6 mi) north of Interstate 10. It is 124 m (407 ft) north of Jim Ramsey Road and 5.7 km (3.6 mi) west of the community of Vancleave located near State Hwy. 57.

Subunit A

Unit 5, Subunit A encompasses 121 ha (299 ac) on private land. It is currently occupied, but was not known to be occupied at the time of listing. This subunit contains a breeding site where dusky gopher frogs were discovered in 2004, subsequent to the listing of the dusky gopher frog.

We believe this subunit is essential for the conservation of the dusky gopher frog because of the presence of a proven breeding pond, named Mike's Pond (ephemeral wetland habitat), and its associated uplands (upland forested nonbreeding habitat and upland connectivity habitat). We also believe that metapopulation structure, which will further protect the dusky gopher frog from extinction, is possible when the whole area of Unit 5 is considered. The owners of this property are actively managing this area to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the risk of extinction of the species resulting from stochastic events and provide for the species' eventual recovery.

Subunit B

Unit 5, Subunit B encompasses 54 ha (133 ac) on private land adjacent to Subunit A. This subunit is not within the geographic area of the species occupied at the time of listing and is currently unoccupied. However, we believe this subunit is essential for the conservation of the dusky gopher frog because it consists of an area, within the dispersal range of the dusky gopher frog (from Subunit A), which provides an important breeding site and associated forested uplands for recovery and metapopulation structure that will protect the dusky gopher frog from extinction. This unoccupied area consists of a single pond and its associated uplands. This area is actively managed to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 6: Jackson County, Mississippi

Unit 6 encompasses 121 ha (299 ac) on Federal land in Jackson County, Mississippi. This unit is located on the Ward Bayou Wildlife Management Area (WMA) approximately 4.8 km (3 mi) northeast of State Hwy. 57 and the community of Vancleave. This land is owned by the U.S. Army Corps of Engineers (Corps) and managed by the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) to benefit the recovery of the dusky gopher frog.

Unit 6 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and its associated uplands on the WMA and has been given the name of Mayhaw Pond during ongoing recovery initiatives. We believe this area is essential for the conservation of the dusky gopher frog because it provides an important breeding site and associated forested uplands for recovery. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area of suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 7: Jackson County, Mississippi

Unit 7 encompasses 121 ha (299 ac) on State and private land in Jackson County, Mississippi. This unit is located approximately 4.2 km (2.6 mi) east of the intersection of State Hwy. 63 and State Hwy. 613; it is 3.8 km (2.4 mi) west of the Escatawpa River, and 3.2 km (2 mi) northeast of Helena, Mississippi. The portion of this unit in State ownership (107 ha (264 ac)) is 16th section land held in trust by the State of Mississippi as a local funding source for public education in Jackson County. The Jackson County School board has jurisdiction and control of the land. The balance of this unit is on private land (14 ha (35 ac)).

Unit 7 is currently occupied, but was not known to be occupied at the time of listing. The area, discovered in 2004 subsequent to the listing of the dusky gopher frog, contains a breeding pond named McCoy's Pond and associated uplands. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog. Currently, the State-owned portion of the area is managed for timber production by the Mississippi Forestry Commission for the Jackson County School Board. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, it may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area of currently occupied habitat for dusky gopher frogs is essential to decrease the risk of extinction of the species and provide for the species' eventual recovery.

Unit 8: Forrest County, Mississippi

Unit 8 encompasses 121 ha (299 ac) on Federal land in Forrest County, Mississippi. This unit is located in the DNF approximately 1.9 km (1.2 mi) east of U.S. Hwy. 49, approximately 1.7 km (1.1 mi) south of Black Creek, and approximately 3.1 km (1.9 mi) southeast of the community of Brooklyn, Mississippi.

Unit 8 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Unit 8 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 9: Forrest County, Mississippi

Unit 9 encompasses 121 ha (299 ac) on Federal land and private land in Forrest County, Mississippi. The majority of this unit (120 ha (297 ac)) is located in the DNF and the balance (1

ha (2.5 ac)) on private land. This unit is located approximately 3.9 km (2.4 mi) east of U.S. Hwy. 49, approximately 4.3 km (2.7 mi) south of Black Creek, and approximately 6.1 km (3.8 mi) southeast of the community of Brooklyn, Mississippi, at the Perry County line.

Unit 9 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the species because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 9 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 10: Perry County, Mississippi

Unit 10 encompasses 147 ha (363 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (127 ha (314 ac)) is located in the DNF and the balance (20 ha (49 ac)) is located on private land. This unit is located at the intersection of Benndale Road and Mars Hill Road, approximately 2.6 km (1.6 mi) northwest of the intersection of the Perry County, Stone County, and George County lines and approximately 7.2 km (4.5 mi) north of State Hwy. 26.

Unit 10 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of two ponds and their associated uplands that have been selected as future dusky gopher frog translocation sites during ongoing recovery initiatives. It provides the habitat for establishing new breeding ponds and metapopulation structure that will protect the dusky gopher frog from extinction. We believe this area is essential for the conservation of the dusky gopher frog because it provides two important breeding sites and their associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 10 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at high risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the risk of extinction of the species and provide for the species' eventual recovery.

Unit 11: Perry County, Mississippi

Unit 11 encompasses 121 ha (299 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (119 ha (294 ac)) is located in the DNF and the balance (2 ha (5 ac)) is located on private land. This unit borders the north side of Benndale Road northeast of the intersection of the Perry County, Stone County, and George County lines, approximately 6.4 km (4 mi) north of State Hwy. 26.

Unit 11 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the gopher dusky frog because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 11 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events, such as disease or drought. Maintaining this area as suitable habitat, into which dusky gopher frogs could be translocated, is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Unit 12: Perry County, Mississippi

Unit 12 encompasses 121 ha (299 ac) on Federal land and private land in Perry County, Mississippi. The majority of this unit (115 ha (284 ac)) is located in the DNF and the remaining balance (6 ha (15 ac)) is located on private land. This unit is located approximately 1.2 km (0.75 mi) east of Mars Hill Road, approximately 3.9 km (2.4 mi) north of the intersection of the Perry County, Stone County, and George County lines, and approximately 10.2 km (6.4 mi) north of State Hwy. 26.

Unit 12 is not within the geographic range of the species occupied at the time of listing and is currently unoccupied. This area consists of a pond and its associated uplands that have been selected as a future dusky gopher frog translocation site during ongoing recovery initiatives. We believe this area is essential for the conservation of the dusky gopher frog because it provides an important breeding site and associated forested uplands for recovery of the dusky gopher frog.

Most of Unit 12 is being actively managed by the USFS to benefit the recovery of the dusky gopher frog. Due to the low number of remaining populations and severely restricted range of the dusky gopher frog, the species may be at risk of extirpation from stochastic events such as disease or drought. Maintaining this area as suitable habitat into which dusky gopher frogs could be translocated is essential to decrease the potential risk of extinction of the species and provide for the species' eventual recovery.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action

agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for the dusky gopher frog. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the dusky gopher frog. These activities include, but are not limited to:

(1) Actions that would alter the hydrology or water quality of dusky gopher frog wetland habitats. Such activities could include, but are not limited to, discharge of fill material; release of chemicals and/or biological pollutants; clearcutting, draining, ditching, grading, or bedding; diversion or alteration of surface or ground water flow into or out of a wetland (i.e., due to roads, fire breaks, impoundments, discharge pipes, etc.); discharge or dumping of toxic chemicals, silt, or other pollutants (i.e., sewage, oil, pesticides, and gasoline); and use of vehicles within wetlands. These activities could destroy dusky gopher frog breeding sites; reduce hydroperiod below what is necessary for successful larval metamorphosis; and/or eliminate or reduce the habitat necessary for the growth and reproduction, and affect the prey base, of the dusky gopher frog.

(2) Forestry management actions in pine habitat that would significantly alter the suitability of dusky gopher frog terrestrial habitat. Such activities could include, but are not limited to, conversion of timber land to another use and timber management, including clearcutting, site preparation involving ground disturbance, prescribed burning, and unlawful pesticide application. These activities could destroy or alter the uplands necessary for the growth and development of juvenile and adult dusky gopher frogs.

(3) Actions that would significantly fragment and isolate dusky gopher frog wetland and upland habitats from each other. Such activities could include, but are not limited to, constructing new structures or new roads and converting forested habitat to other uses. These activities could limit or prevent the dispersal of dusky gopher frogs from breeding sites to upland habitat or vice versa due to obstructions to movement caused by structures, certain types of curbs, increased traffic density, or inhospitable habitat.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no DOD lands with a completed INRMP within the critical habitat designation. Therefore, we are

not exempting any lands owned or managed by the DOD from this designation of critical habitat for the dusky gopher frog under section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor in making that determination.

Under section 4(b)(2) of the Act, the Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion will not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation and related factors (Industrial Economics 2011, pp. 1–87). The draft analysis, dated August 17, 2011, was made available for public comment from September 27, 2011, through November 28, 2011 (76 FR 59774, 77 FR 2254) and again from January 17, 2012 through March 2, 2012 (77 FR 2254). Following the close of the comment periods, a final analysis ((FEA) dated April 6, 2012) of the potential economic effects of the designation was developed taking into consideration the public comments and any new information (Industrial Economics 2012, entire).

The intent of the FEA is to quantify the economic impacts of all potential conservation efforts for the dusky gopher frog; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated economic impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at baseline costs that have been incurred since 2001 (year of the species' listing) (66 FR 62993), and uses this information to inform the economic analysis which quantifies those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe.

The FEA quantifies economic impacts of dusky gopher frog conservation efforts associated with the following categories of activity: Active species management, residential and commercial development, timber management, and military activities. The FEA estimates present value incremental impacts of critical habitat designation of $102,000, $20.5 million, or $34.0 million according to three scenarios (applying a 7 percent discount rate). This equates to $9,610, $1.93 million, and $3.21 million in annualized impacts (applying a 7 percent discount rate). This approach was taken because most of the estimated incremental impacts are related to possible lost development value in Unit 1; considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities there; and potential exists for the Service to recommend conservation measures if consultation were to occur.

Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. Therefore, all incremental economic costs will be attributed to the administrative costs of future section 7 consultations in all other units. Total present value of incremental impacts of critical habitat designation of the remaining units are $102,000 ($9,610 in annualized impacts) over the timeframe of the analysis (2012 to 2031), applying a 7 percent discount rate.

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7

consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

The FEA also discusses the potential economic benefits associated with the designation of critical habitat. However, because the Service believes that the direct benefits of the designation are best expressed in biological terms, this analysis does not quantify or monetize benefits; only a qualitative discussion of economic benefits is provided.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Mississippi Ecological Services Field Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the DOD where a national security impact might exist. The Mississippi Army National Guard (MANG) conducts training in an area of the DNF where Units 10, 11, and 12 are located and has requested exclusion under section 4(b)(2) due to significant impacts to national security. The current training is authorized by a Special Use Permit with the USFS. The lands covered by the permit are part of the Leaf River WMA, which is open to the public for hunting and other recreational activities. The USFS manages the Leaf River WMA for timber production and as part of a habitat management area (HMA) to support recovery efforts for the red-cockaded woodpecker. As a result of the HMA, there are existing limitations to training activities in this area. Permitted use by the military includes driving military vehicles on existing roads bivouacking or orienteering in the forested areas. No live ammunition is used in the area, and wetlands are excluded from military use. In preparing this final rule, we have determined that lands within the designation of critical habitat for the dusky gopher frog are not owned or managed by DOD (*See* Comment 19 for further information). Consequently, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts to national security.

Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs or other management plans for the dusky gopher frog, and this final designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from the final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the dusky gopher frog will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations such as

independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to the typical operations of a small business.

To determine if the rule could significantly affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as timber operations, and residential and commercial development, along with the accompanying infrastructure associated with such projects, including construction of roads, storm water drainage, and bridges and culverts and the maintenance of these structures. We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the dusky gopher frog. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification'' Standard*).

In our FEA of the critical habitat designation, we evaluated the potential economic effects on small entities resulting from conservation actions related to the listing of the dusky gopher frog and the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 1 through 5 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Species management; (2) development; (3) timber management; and (4) military activities.

The FEA indicates that the incremental impacts potentially incurred by small entities are limited to development activities on Tradition Properties in Subunits 2a and 2b (where 59 acres of critical habitat overlap a planning area for a large-scale development), and potential future development within 1,544-acre Unit 1 owned by four small businesses and an individual. Of the 129 small businesses in this sector, there are five small businesses, considered small Land Subdividers, which represent approximately 3.9 percent of the total within the counties containing proposed critical habitat for the dusky gopher frog. At the national scale this percentage is much less. Incremental costs of dusky gopher frog critical habitat to Tradition Properties are anticipated to result in an annualized impact of $127 (which would represent less than 0.01 percent of Tradition Properties' average annual revenues). Annualized impacts to the four small businesses in Unit 1 were evaluated according to the three scenarios described above in the *Economic Impacts* section. Under Scenario 1, there would be no impact to small businesses. Under scenario 2, an impact of $1.93 million was calculated, approximately 26.8 percent of annual revenues; under scenario 3, an impact of $3.21 million was calculated, approximately 44.7 percent of annual revenues.

Our analysis constitutes an evaluation of not only potentially directly affected parties, but those also potentially indirectly affected. Under the RFA and following recent case law, we are only required to evaluate the direct effects of a regulation to determine compliance. As the regulatory effect of critical habitat is through section 7 of the Act, which applies only to Federal agencies, we have determined that only Federal agencies are directly affected by this rulemaking. Other entities, such as small businesses, are only indirectly affected. However, to better understand the potential effects of a designation of critical habitat, we frequently evaluate the potential impact to those entities that may be indirectly affected, as was the case for this rulemaking. In doing so, we focus on the specific areas being designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the regional area, versus comparing the entities in the area of designation with entities nationally—which is more commonly done. This results in a estimation of a higher proportion of small businesses potentially affected. In this rulemaking, we calculate that the proportion of small businesses potentially affected is 3.9 percent of those regionally. If we were to calculate that value based on the proportion nationally, then our estimate would be significantly lower than 1 percent.

Following our evaluation of potential effects to small business entities from this rulemaking, we do not believe that the five small businesses, representing 3.9 percent of the small businesses in the affected sector, constitutes a substantial number. However, we recognize that the potential effects to these small businesses under Scenarios 2 and 3 may be significant, but still would not represent a substantial number of affected entities in the sector nationally.

In summary, we considered whether this designation will result in a significant economic impact on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule will not result in a significant economic impact on a substantial number of small business entities. Therefore, we are certifying that the designation of critical habitat for the dusky gopher frog will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration:

- Reductions in crude oil supply in excess of 10,000 barrels per day;
- Reductions in fuel production in excess of 4,000 barrels per day;
- Reductions in coal production in excess of 5 million tons per year;
- Reductions in natural gas production in excess of 25 million thousand cubic feet per year;
- Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity;
- Increases in energy use required by the regulatory action that exceed the thresholds above;
- Increases in the cost of energy production in excess of one percent;
- Increases in the cost of energy distribution in excess of one percent; or
- Other similarly adverse outcomes.

While the landowner of Unit 1 has expressed interest in developing the land for oil and gas, the Service does not anticipate critical habitat designation will result in the complete loss of oil and gas development in Unit 1. In addition, the level and timing of such development is significantly uncertain regardless, as no oil and gas development has occurred within the region to date. Consequently, this analysis does not anticipate the rule will affect the production, distribution, or use of energy according to the above criteria. Thus, based on information in the economic analysis, no energy-related impacts associated with dusky gopher frog conservation activities within critical habitat are expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid for Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the dusky gopher frog occurs primarily on Federal and privately owned lands. The designation of critical habitat imposes no obligations on State or local governments. By definition Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the critical habitat designation will significantly or uniquely affect small government entities. Accordingly, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), the Service analyzed the potential takings implications of designating critical habitat for the dusky gopher frog and included this analysis in our administrative record. To a property owner, the designation of critical habitat becomes important when viewed in the context of section 7 of the Act, which requires all Federal agencies to ensure, in consultation with us, that any action authorized, funded, or carried out by the agency does not result in the destruction or adverse modification of designated critical habitat. If, after consultation, the Service's biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of the critical habitat (16 U.S.C. 1536(b)(3)(A)). If we do not suggest acceptable reasonable and prudent alternatives, the agency (or the applicant) may apply for an exemption from the Endangered Species Committee under section 7(e)–(n) of the Act.

We have identified two ''taking'' scenarios that are relevant to the designation of critical habitat. The first is a physical taking when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a practical ouster of the owner's possession. The proposed designation of critical habitat for the dusky gopher frog would not result in physical occupation or invasion of private property. On non-Federal lands, activities that lack Federal involvement would not be affected by the critical habitat designation; these activities are likely to include timber management and oil and gas extraction. However, activities of an economic nature that are likely to occur on non-Federal lands in the area encompassed by this designation, and where Federal involvement may occur, consist of construction of utilities, residential or commercial development, and road construction and maintenance. The second scenario is where a regulation denies all economically beneficial or productive use of land, commonly referred to as a categorical taking. However, the mere promulgation of a regulation designating critical habitat does not on its face deny property

owners all economically viable use of their land. The Act does not automatically restrict all uses of critical habitat, but only imposes restrictions under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of critical habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of critical habitat. Such alternatives must be economically, as well as technologically, feasible (50 CFR 402.02). Based on information contained in the final economic analysis assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. The takings implications assessment concludes that this designation of critical habitat for the dusky gopher frog does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Louisiana and Mississippi. We received no comments responsive to the critical habitat designation from a state agency except for a response from one of the peer reviewers who is employed by a state agency. The peer reviewer's comments were incorporated in the final rule (*See* Section ''Summary of Comments and Recommendations''). The designation of critical habitat in areas currently occupied by the dusky gopher frog imposes no additional restrictions beyond those currently in place, although the designation of areas currently unoccupied by the dusky gopher frog may impose nominal additional regulatory restrictions. In total, the critical habitat designation has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the elements of the features necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the dusky gopher frog within the designated areas to assist the public in understanding the habitat needs of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, (Government-to-Government Relations with Native American Tribal Governments; (59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands occupied by the dusky gopher frog at the time of listing that contain the features essential for the conservation of the species, and no tribal lands unoccupied by the dusky gopher frog that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the dusky gopher frog on tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Mississippi Ecological Services Field Office (see **ADDRESSES**).

Author

The primary author of this rulemaking is Linda LaClaire of the Mississippi Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h), the List of Endangered and Threatened Wildlife, as follows:

■ a. By removing the entry for ''Frog, Mississippi gopher'' under ''AMPHIBIANS''; and

■ b. By adding an entry for ''Frog, dusky gopher'' in alphabetical order under ''AMPHIBIANS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Frog, dusky gopher	*Rana sevosa*	U.S.A. (AL, LA, MS)	Entire	E	718	17.95(d)	NA
*	*	*	*	*	*		*

§ 17.95—[Amended]

■ 3. In § 17.95, amend paragraph (d) by adding an entry for ''Dusky Gopher Frog (*Rana sevosa*),'' in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Dusky Gopher Frog *(Rana sevosa)*

(1) Critical habitat units are depicted for St. Tammany Parish, Louisiana, and Forrest, Harrison, Jackson, and Perry Counties in Mississippi, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the dusky gopher frog are:

(i) *Ephemeral wetland habitat.* Breeding ponds, geographically isolated from other waterbodies and embedded in forests historically dominated by longleaf pine communities, that are small (generally <0.4 to 4.0 hectares (<1 to 10 acres)), ephemeral, and acidic. Specific conditions necessary in breeding ponds to allow for successful reproduction of dusky gopher frogs are:

(A) An open canopy with emergent herbaceous vegetation for egg attachment;

(B) An absence of large, predatory fish that prey on frog larvae;

(C) Water quality such that frogs, their eggs, or larvae are not exposed to pesticides or chemicals and sediment associated with road runoff; and

(D) Surface water that lasts for a minimum of 195 days during the breeding season to allow a sufficient period for larvae to hatch, mature, and metamorphose.

(ii) *Upland forested nonbreeding habitat.* Forests historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover and gopher tortoise burrows, small mammal burrows, stump holes, or other underground habitat that the dusky gopher frog depends upon for food, shelter, and protection from the elements and predation.

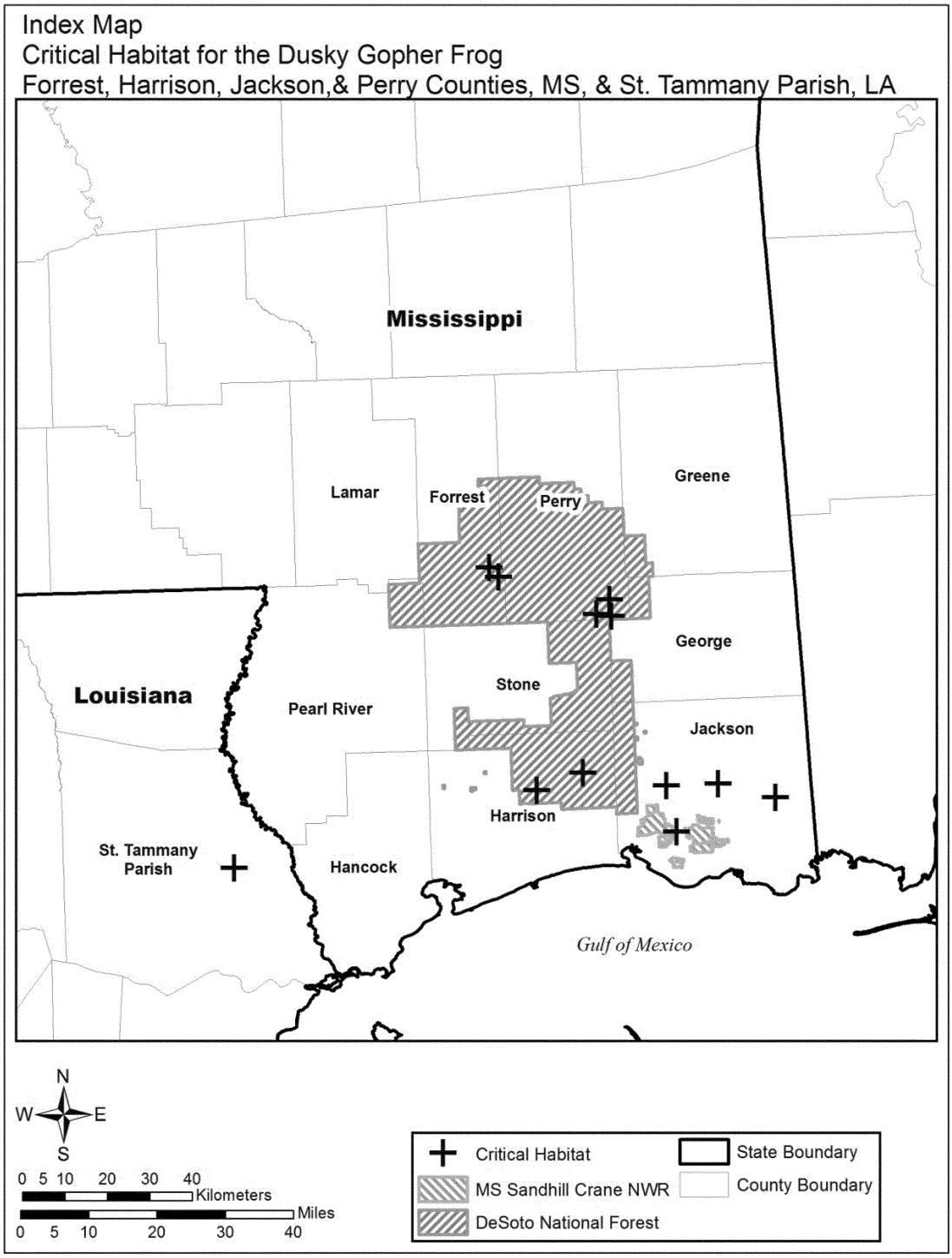
(iii) *Upland connectivity habitat.* Accessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites. This habitat is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements, such as that created by deep litter cover, clumps of grass, or burrows.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat unit maps.* Data layers defining map units were developed from USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) **Note:** Index map of the critical habitat units for the dusky gopher frog follows:

BILLING CODE 4310–55–P

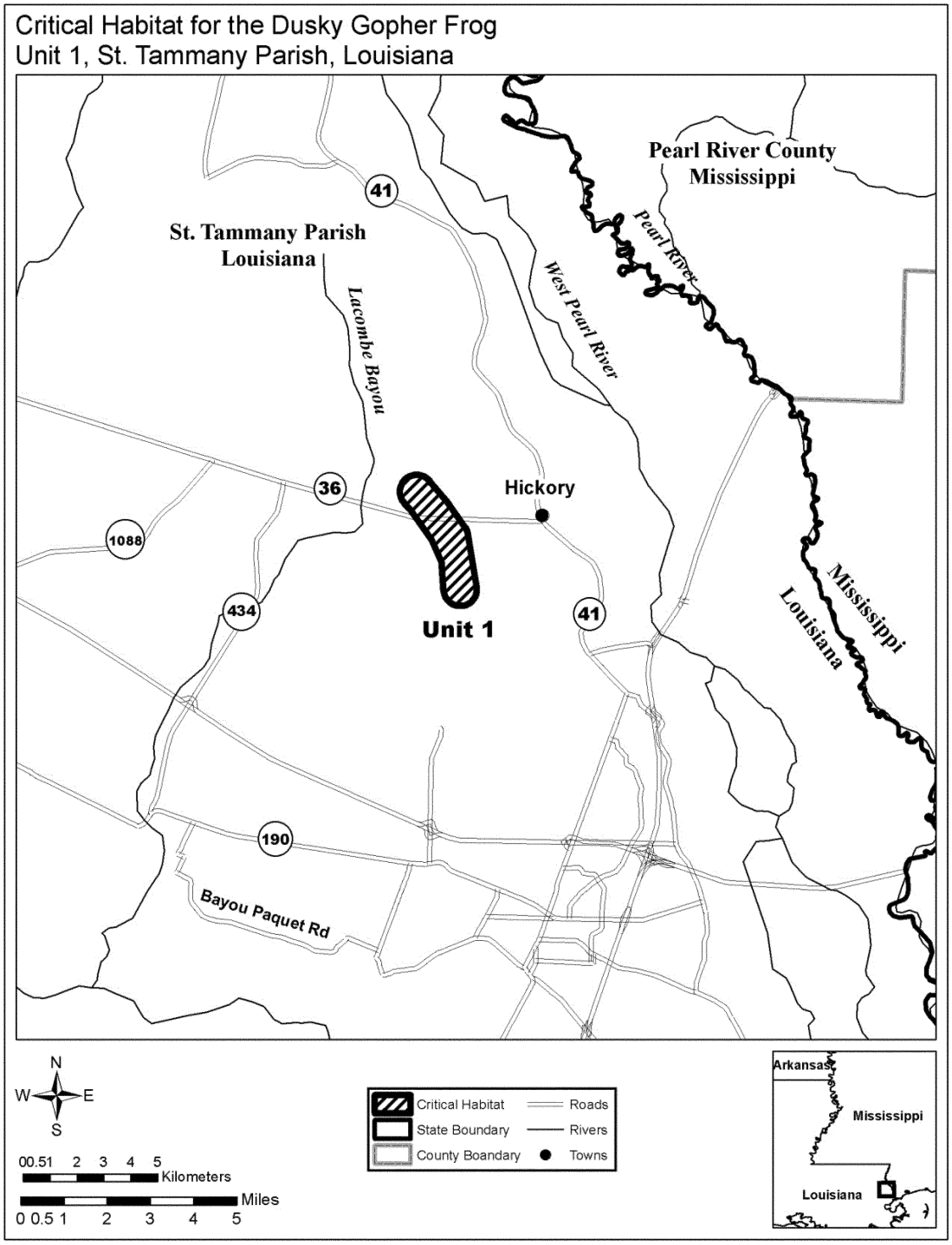


(6) Unit 1: St. Tammany Parish, Louisiana.

(i) From USGS 1:24,000 quadrangle map Hickory, Louisiana. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 228777, 3368004; 229406, 3365105; 229384, 3365104; 229362, 3365105; 229339, 3365106; 229317, 365108; 229295, 3365110; 229273, 3365114; 229252, 3365118; 229230, 3365123; 229209, 3365129; 229188, 3365136; 229167, 3365143; 229146, 3365151; 229126, 3365160; 229106, 3365170; 229086, 3365180; 229067, 3365191; 229048, 3365203; 229030, 3365215; 229012, 3365228; 228994, 3365242; 228977, 3365256; 228961, 3365271; 228945, 3365286; 228929, 3365302; 228914, 3365318; 228900, 3365335; 228887, 3365353; 228874, 3365371; 228861, 3365389; 228850, 3365408; 228839, 3365428; 228828, 3365447; 228819, 3365467; 228810, 3365487; 228802, 3365508; 228794, 3365529; 228788, 3365550; 228782, 3365572; 228777, 3365593; 228773, 3365615; 228769, 3365637; 228766, 3365659; 228764, 3365681; 228763, 3365700; 228688, 3366732; 228321, 3367548; 227537, 3368623; 227307, 3368893; 227292, 3368909; 227278, 3368926; 227264, 3368944; 227251, 3368962; 227239, 3368980; 227227, 3368999; 227216, 3369018; 227206, 3369038; 227196, 3369058; 227187, 3369078; 227179, 3369099;

227172, 3369120; 227165, 3369141; 227159, 3369163; 227154, 3369184; 227150, 3369206; 227146, 3369228; 227144, 3369250; 227142, 3369272; 227140, 3369294; 227140, 3369316; 227140, 3369338; 227142, 3369360; 227144, 3369382; 227146, 3369404; 227150, 3369426; 227154, 3369448; 227159, 3369470; 227165, 3369491; 227172, 3369512; 227179, 3369533; 227187, 3369554; 227196, 3369574; 227206, 3369594; 227216, 3369614; 227227, 3369633; 227239, 3369652; 227251, 3369670; 227264, 3369688; 227278, 3369706; 227292, 3369723; 227307, 3369739; 227322, 3369755; 227338, 3369771; 227354, 3369785; 227371, 3369800; 227389, 3369813; 227407, 3369826; 227425, 3369839; 227444, 3369850; 227463, 3369861; 227483, 3369871; 227503, 3369881; 227523, 3369890; 227544, 3369898; 227565, 3369905; 227586, 3369912; 227608, 3369918; 227629, 3369923; 227651, 3369927; 227673, 3369931; 227695, 3369934; 227717, 3369936; 227739, 3369937; 227761, 3369937; 227783, 3369937; 227805, 3369936; 227827, 3369934; 227849, 3369931; 227871, 3369927; 227893, 3369923; 227915, 3369918; 227936, 3369912; 227957, 3369905; 227978, 3369898; 227999, 3369890; 228019, 3369881; 228039, 3369871; 228059, 3369861; 228078, 3369850; 228097, 3369839; 228115, 3369826; 228133, 3369813; 228151, 3369800; 228168, 3369785; 228184, 3369771; 228200, 3369755; 228216, 3369739; 228230, 3369723; 228245, 3369706; 228254, 3369693; 228903, 3368930; 228918, 3368913; 228932, 3368896; 228946, 3368879; 228959, 3368861; 228971, 3368843; 228983, 3368824; 229573, 3367995; 229585, 3367977; 229597, 3367958; 229608, 3367938; 229618, 3367919; 229628, 3367899; 229636, 3367878; 229645, 3367858; 229652, 3367837; 229659, 3367816; 229664, 3367794; 229670, 3367773; 229674, 3367751; 229677, 3367729; 229679, 3367716; 229989, 3365862; 229990, 3365857; 229995, 3365835; 229998, 3365814; 230001, 3365792; 230003, 3365769; 230004, 3365747; 230005, 3365725; 230004, 3365703; 230003, 3365681; 230001, 3365659; 229998, 3365637; 229995, 3365615; 229990, 3365593; 229985, 3365572; 229980, 3365550; 229973, 3365529; 229966, 3365508; 229957, 3365487; 229949, 3365467; 229939, 3365447; 229929, 3365428; 229918, 3365408; 229906, 3365389; 229894, 3365371; 229881, 3365353; 229867, 3365335; 229853, 3365318; 229838, 3365302; 229823, 3365286; 229807, 3365271; 229790, 3365256; 229773, 3365242; 229756, 3365228; 229738, 3365215; 229719, 3365203; 229701, 3365191; 229681, 3365180; 229662, 3365170; 229642, 3365160; 229621, 3365151; 229601, 3365143; 229580, 3365136; 229559, 3365129; 229537, 3365123; 229516, 3365118; 229494, 3365114; 229472, 3365110; 229450, 3365108; 229428, 3365106; 229406, 3365105.

(ii) **Note:** Map of Unit 1 follows:



BILLING CODE 4310–55–C

(7) Unit 2: Harrison County, Mississippi.

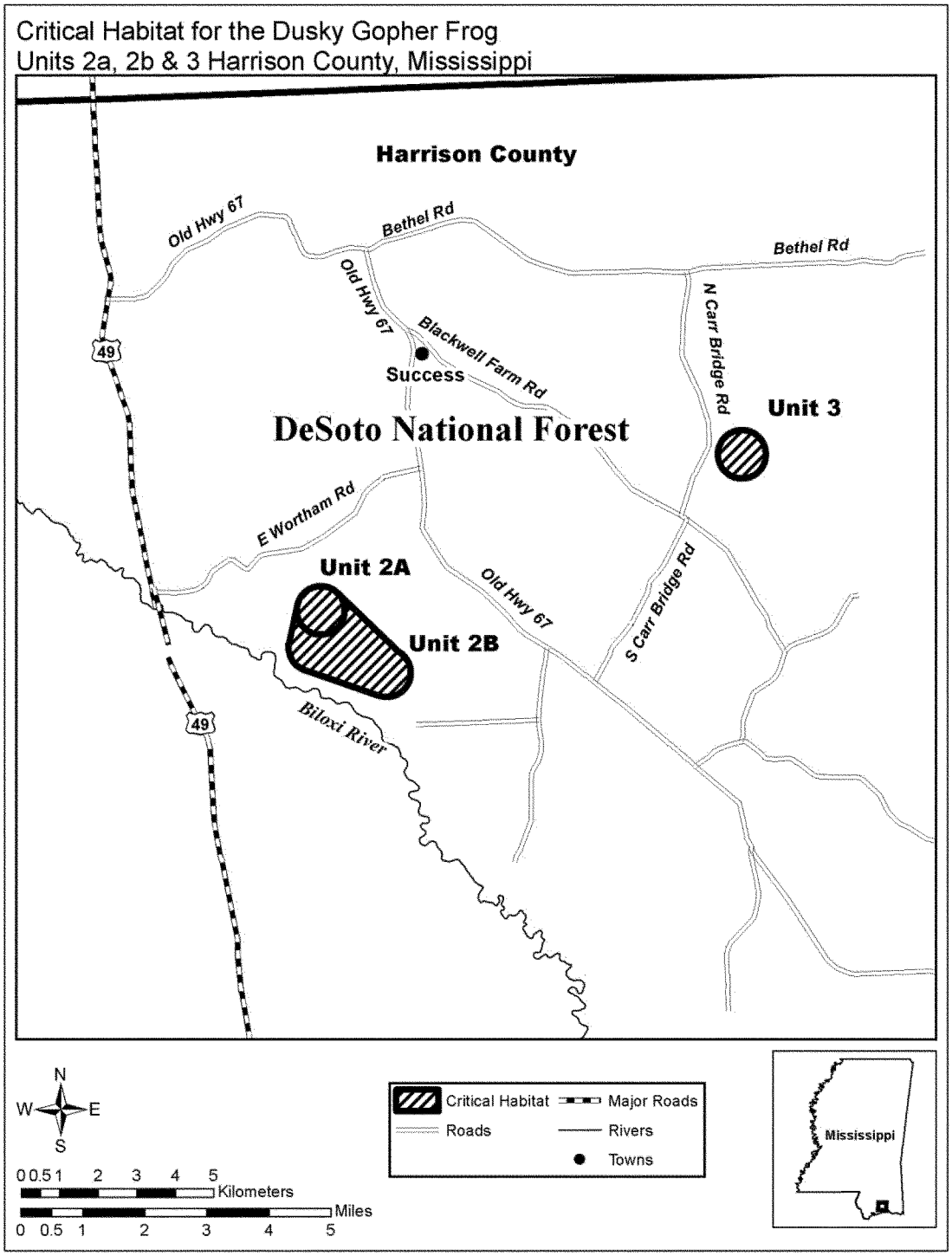
(i) Subunit 2A, Harrison County, Mississippi. From USGS 1:24,000 scale quadrangle map Success, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 300727, 3382207; 300749, 3381710; 300727, 3381710; 300705, 3381710; 300683, 3381711; 300661, 3381713; 300639, 3381716; 300617, 3381720; 300595, 3381724; 300574, 3381729; 300552, 3381735; 300531, 3381742; 300510, 3381749; 300490, 3381757; 300469, 3381766; 300449, 3381775; 300430, 3381786; 300410, 3381797; 300391, 3381808; 300373, 3381821; 300355, 3381834; 300338, 3381847; 300321, 3381861; 300304, 3381876; 300288, 3381892; 300273, 3381908; 300258, 3381924; 300244, 3381941; 300230, 3381959; 300217, 3381977; 300205, 3381995; 300193, 3382014; 300182, 3382033; 300172, 3382053; 300162, 3382073; 300153, 3382093; 300145, 3382114; 300138, 3382135; 300131, 3382156; 300125, 3382177; 300120, 3382199; 300116, 3382220; 300113, 3382242; 300110, 3382264; 300108, 3382286; 300107, 3382309; 300106, 3382331; 300107, 3382353; 300108, 3382375; 300110, 3382397; 300113, 3382419; 300116, 3382441; 300120, 3382463; 300123, 3382473; 300125, 3382484; 300131, 3382506; 300138, 3382527; 300145, 3382548;

300153, 3382568; 300162, 3382589; 300172, 3382609; 300182, 3382628; 300193, 3382648; 300205, 3382666; 300217, 3382685; 300230, 3382703; 300244, 3382720; 300258, 3382737; 300273, 3382754; 300288, 3382770; 300304, 3382785; 300321, 3382800; 300338, 3382814; 300355, 3382828; 300373, 3382841; 300391, 3382853; 300410, 3382865; 300430, 3382876; 300449, 3382886; 300469, 3382896; 300490, 3382904; 300510, 3382913; 300531, 3382920; 300552, 3382927; 300574, 3382932; 300595, 3382938; 300617, 3382942; 300639, 3382945; 300661, 3382948; 300661, 3382948; 300683, 3382950; 300705, 3382951; 300727, 3382952; 300749, 3382951; 300772, 3382950; 300794, 3382948; 300816, 3382945; 300837, 3382942; 300859, 3382938; 300881, 3382932; 300902, 3382927; 300923, 3382920; 300944, 3382913; 300965, 3382904; 300985, 3382896; 301005, 3382886; 301025, 3382876; 301044, 3382865; 301063, 3382853; 301081, 3382841; 301099, 3382828; 301117, 3382814; 301134, 3382800; 301150, 3382785; 301166, 3382770; 301182, 3382754; 301197, 3382737; 301203, 3382729; 301211, 3382720; 301224, 3382703; 301237, 3382685; 301250, 3382666; 301261, 3382648; 301272, 3382628; 301283, 3382609; 301292, 3382589; 301301, 3382568; 301309, 3382548; 301316, 3382527; 301317, 3382524; 301323, 3382506; 301329, 3382484; 301334, 3382463; 301338, 3382441; 301342, 3382419; 301345, 3382397; 301347, 3382375; 301348, 3382353; 301348, 3382331; 301348, 3382309; 301347, 3382286; 301345, 3382264; 301342, 3382242; 301338, 3382220; 301334, 3382199; 301329, 3382177; 301323, 3382156; 301316, 3382135; 301309, 3382114; 301301, 3382093; 301292, 3382073; 301283, 3382053; 301272, 3382033; 301261, 3382014; 301250, 3381995; 301237, 3381977; 301224, 3381959; 301211, 3381941; 301197, 3381924; 301182, 3381908; 301166, 3381892; 301150, 3381876; 301134, 3381861; 301117, 3381847; 301099, 3381834; 301081, 3381821; 301063, 3381808; 301044, 3381797; 301025, 3381786; 301005, 3381775; 300985, 3381766; 300965, 3381757; 300944, 3381749; 300923, 3381742; 300902, 3381735; 300881, 3381729; 300859, 3381724; 300837, 3381720; 300816, 3381716; 300794, 3381713; 300772, 3381711; 300749, 3381710.

(ii) Subunit 2B, Harrison County, Mississippi. From USGS 1:24,000 scale quadrangle map Success, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 301340, 3381104; 301399, 3382522; 302686, 3381163; 302704, 3381151; 302722, 3381138; 302740, 3381124; 302757, 3381110; 302773, 3381095; 302789, 3381080; 302804, 3381064; 302819, 3381048; 302833, 3381031; 302847, 3381013; 302860, 3380995; 302872, 3380977; 302884, 3380958; 302895, 3380939; 302905, 3380919; 302915, 3380899; 302924, 3380879; 302932, 3380858; 302939, 3380837; 302946, 3380816; 302952, 3380794; 302957, 3380773; 302961, 3380751; 302965, 3380729; 302967, 3380707; 302969, 3380685; 302969, 3380684; 302970, 3380663; 302971, 3380641; 302970, 3380619; 302969, 3380597; 302967, 3380575; 302965, 3380553; 302961, 3380531; 302957, 3380509; 302952, 3380487; 302950, 3380482; 302946, 3380466; 302939, 3380445; 302932, 3380424; 302924, 3380403; 302915, 3380383; 302905, 3380363; 302895, 3380343; 302884, 3380324; 302872, 3380305; 302860, 3380287; 302847, 3380269; 302833, 3380251; 302819, 3380234; 302804, 3380218; 302789, 3380202; 302773, 3380186; 302757, 3380172; 302740, 3380157; 302722, 3380144; 302704, 3380131; 302686, 3380118; 302667, 3380107; 302647, 3380096; 302628, 3380086; 302608, 3380076; 302588, 3380067; 302567, 3380059; 302546, 3380052; 302525, 3380045; 302503, 3380039; 302482, 3380034; 302460, 3380030; 302438, 3380026; 302416, 3380023; 302394, 3380022; 302372, 3380020; 302350, 3380020; 302328, 3380020; 302306, 3380022; 302283, 3380023; 302261, 3380026; 302240, 3380030; 302218, 3380034; 302196, 3380039; 302175, 3380045; 302154, 3380052; 302133, 3380059; 302112, 3380067; 302092, 3380076; 300268, 3380807; 300247, 3380814; 300226, 3380822; 300206, 3380831; 300186, 3380841; 300166, 3380851; 300147, 3380862; 300128, 3380873; 300110, 3380886; 300092, 3380899; 300074, 3380912; 300057, 3380927; 300041, 3380941; 300025, 3380957; 300009, 3380973; 299994, 3380989; 299980, 3381006; 299967, 3381024; 299954, 3381042; 299941, 3381060; 299930, 3381079; 299919, 3381098; 299908, 3381118; 299899, 3381138; 299890, 3381158; 299882, 3381179; 299875, 3381200; 299868, 3381221; 299862, 3381242; 299857, 3381264; 299853, 3381286; 299849, 3381307; 299846, 3381329; 299844, 3381352; 299843, 3381374; 299843, 3381396; 299843, 3381418; 299844, 3381440; 299846, 3381462; 299849, 3381484; 299853, 3381506; 299857, 3381528; 299862, 3381549; 299868, 3381571; 299875, 3381592; 299877, 3381598; 300078, 3382312; 300123, 3382473; 300120, 3382463; 300116, 3382441; 300113, 3382419; 300110, 3382397; 300108, 3382375; 300107, 3382353; 300106, 3382331; 300107, 3382309; 300108, 3382286; 300110, 3382264; 300113, 3382242; 300116, 3382220; 300120, 3382199; 300125, 3382177; 300131, 3382156; 300138, 3382135; 300145, 3382114; 300153, 3382093; 300162, 3382073; 300172, 3382053; 300182, 3382033; 300193, 3382014; 300205, 3381995; 300217, 3381977; 300230, 3381959; 300244, 3381941; 300258, 3381924; 300273, 3381908; 300288, 3381892; 300304, 3381876; 300321, 3381861; 300338, 3381847; 300355, 3381834; 300373, 3381821; 300391, 3381808; 300410, 3381797; 300430, 3381786; 300449, 3381775; 300469, 3381766; 300490, 3381757; 300510, 3381749; 300531, 3381742; 300552, 3381735; 300574, 3381729; 300595, 3381724; 300617, 3381720; 300639, 3381716; 300661, 3381713; 300683, 3381711; 300705, 3381710; 300727, 3381710; 300749, 3381710; 300772, 3381711; 300794, 3381713; 300816, 3381716; 300837, 3381720; 300859, 3381724; 300881, 3381729; 300902, 3381735; 300923, 3381742; 300944, 3381749; 300965, 3381757; 300985, 3381766; 301005, 3381775; 301025, 3381786; 301044, 3381797; 301063, 3381808; 301081, 3381821; 301099, 3381834; 301117, 3381847; 301134, 3381861; 301150, 3381876; 301166, 3381892; 301182, 3381908; 301197, 3381924; 301211, 3381941; 301224, 3381959; 301237, 3381977; 301250, 3381995; 301261, 3382014; 301272, 3382033; 301283, 3382053; 301292, 3382073; 301301, 3382093; 301309, 3382114; 301316, 3382135; 301323, 3382156; 301329, 3382177; 301334, 3382199; 301338, 3382220; 301342, 3382242; 301345, 3382264; 301347, 3382286; 301348, 3382309; 301348, 3382331; 301348, 3382353; 301347, 3382375; 301345, 3382397; 301342, 3382419; 301338, 3382441; 301334, 3382463; 301329, 3382484; 301323, 3382506; 301317, 3382524; 301316, 3382527; 301309, 3382548; 301301, 3382568; 301292, 3382589; 301283, 3382609; 301272, 3382628; 301261, 3382648; 301250, 3382666; 301237, 3382685; 301224, 3382703; 301211, 3382720; 301203, 3382729; 301399, 3382522.

(iii) **Note:** Map of Units 2 and 3 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(8) Unit 3: Harrison County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map White Plains, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 311835, 3385625; 311857, 3385128; 311835, 3385128; 311812, 3385128; 311790, 3385130; 311768, 3385132; 311746, 3385134; 311724, 3385138; 311703, 3385142; 311681, 3385147; 311660, 3385153; 311639, 3385160; 311618, 3385167; 311597, 3385175; 311577, 3385184; 311557, 3385194; 311537, 3385204; 311518, 3385215; 311499, 3385227; 311480, 3385239; 311462, 3385252; 311445, 3385265; 311428, 3385280; 311411, 3385295; 311396, 3385310; 311380, 3385326; 311365, 3385342; 311351, 3385359; 311338, 3385377; 311325, 3385395; 311312, 3385413; 311301, 3385432; 311290, 3385451; 311279, 3385471; 311270, 3385491; 311261, 3385511; 311253, 3385532; 311245, 3385553; 311239, 3385574; 311233, 3385595; 311228, 3385617; 311224, 3385639; 311220, 3385661; 311217, 3385683; 311215, 3385705; 311214, 3385727; 311214, 3385749; 311214, 3385771; 311215, 3385793; 311217, 3385815; 311220, 3385837; 311224, 3385859; 311228, 3385881; 311233, 3385903; 311239, 3385924; 311245, 3385945; 311253, 3385966;

311261, 3385987; 311270, 3386007; 311279, 3386027; 311290, 3386047; 311301, 3386066; 311312, 3386085; 311325, 3386103; 311338, 3386121; 311351, 3386139; 311365, 3386156; 311380, 3386172; 311396, 3386188; 311411, 3386204; 311428, 3386218; 311445, 3386233; 311462, 3386246; 311480, 3386259; 311499, 3386271; 311518, 3386283; 311537, 3386294; 311557, 3386304; 311577, 3386314; 311597, 3386323; 311618, 3386331; 311639, 3386338; 311660, 3386345; 311681, 3386351; 311703, 3386356; 311724, 3386360; 311746, 3386364; 311768, 3386366; 311790, 3386368; 311812, 3386370; 311835, 3386370; 311857, 3386370; 311879, 3386368; 311901, 3386366; 311923, 3386364; 311945, 3386360; 311967, 3386356; 311988, 3386351; 312010, 3386345; 312031, 3386338; 312052, 3386331; 312072, 3386323; 312093, 3386314; 312113, 3386304; 312132, 3386294; 312152, 3386283; 312170, 3386271; 312189, 3386259; 312207, 3386246; 312224, 3386233; 312241, 3386218; 312258, 3386204; 312274, 3386188; 312289, 3386172; 312304, 3386156; 312318, 3386139; 312332, 3386121; 312345, 3386103; 312357, 3386085; 312369, 3386066; 312380, 3386047; 312390, 3386027; 312400, 3386007; 312408, 3385987; 312416, 3385966; 312424, 3385945; 312430, 3385924; 312436, 3385903; 312441, 3385881; 312446, 3385859; 312449, 3385837; 312452, 3385815; 312454, 3385793; 312455, 3385771; 312456, 3385749; 312455, 3385727; 312454, 3385705; 312452, 3385683; 312449, 3385661; 312446, 3385639; 312441, 3385617; 312436, 3385595; 312430, 3385574; 312424, 3385553; 312416, 3385532; 312408, 3385511; 312400, 3385491; 312390, 3385471; 312380, 3385451; 312369, 3385432; 312357, 3385413; 312345, 3385395; 312332, 3385377; 312318, 3385359; 312304, 3385342; 312289, 3385326; 312274, 3385310; 312258, 3385295; 312241, 3385280; 312224, 3385265; 312207, 3385252; 312189, 3385239; 312170, 3385227; 312152, 3385215; 312132, 3385204; 312113, 3385194; 312093, 3385184; 312072, 3385175; 312052, 3385167; 312031, 3385160; 312010, 3385153; 311988, 3385147; 311967, 3385142; 311945, 3385138; 311923, 3385134; 311901, 3385132; 311879, 3385130; 311857, 3385128.

(ii) **Note:** Map of Unit 3 is provided at paragraph (7)(iii) of this entry.

(9) Unit 4: Jackson County, Mississippi.

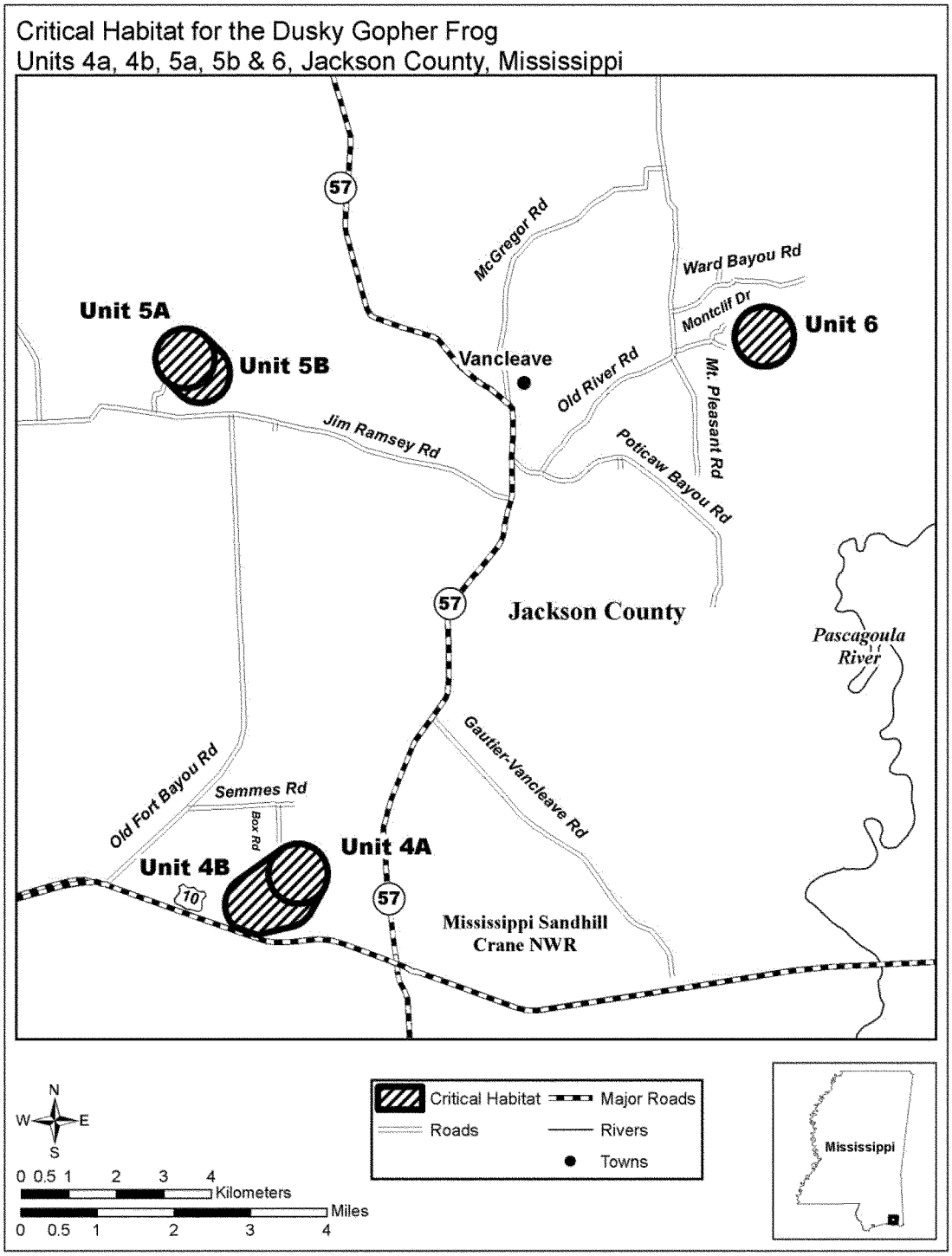
(i) Subunit 4A. From USGS 1:24,000 scale quadrangle map Gauthier North, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 333109, 3370810; 333632, 3370599; 333619, 3370580; 333606, 3370562; 333593, 3370545; 333579, 3370528; 333564, 3370511; 333548, 3370495; 333532, 3370480; 333516, 3370465; 333499, 3370451; 333481, 3370437; 333463, 3370425; 333445, 3370412; 333426, 3370401; 333407, 3370390; 333387, 3370379; 333367, 3370370; 333347, 3370361; 333326, 3370353; 333305, 3370345; 333284, 3370339; 333263, 3370333; 333241, 3370328; 333220, 3370323; 333198, 3370320; 333176, 3370317; 333154, 3370315; 333131, 3370314; 333109, 3370314; 333087, 3370314; 333065, 3370315; 333043, 3370317; 333021, 3370320; 332999, 3370323; 332977, 3370328; 332956, 3370333; 332934, 3370339; 332913, 3370345; 332892, 3370353; 332872, 3370361; 332851, 3370370; 332831, 3370379; 332812, 3370390; 332792, 3370401; 332774, 3370412; 332755, 3370425; 332737, 3370437; 332720, 3370451; 332703, 3370465; 332686, 3370480; 332670, 3370495; 332655, 3370511; 332640, 3370528; 332626, 3370545; 332612, 3370562; 332599, 3370580; 332587, 3370599; 332575, 3370618; 332564, 3370637; 332554, 3370657; 332544, 3370677; 332536, 3370697; 332527, 3370718; 332520, 3370739; 332513, 3370760; 332508, 3370781; 332502, 3370803; 332498, 3370824; 332495, 3370846; 332492, 3370868; 332490, 3370890; 332489, 3370912; 332488, 3370935; 332489, 3370957; 332490, 3370979; 332492, 3371001; 332495, 3371023; 332498, 3371045; 332502, 3371067; 332508, 3371088; 332513, 3371110; 332520, 3371131; 332527, 3371152; 332536, 3371172; 332544, 3371193; 332554, 3371213; 332564, 3371232; 332575, 3371251; 332587, 3371270; 332599, 3371289; 332612, 3371307; 332626, 3371324; 332640, 3371341; 332655, 3371358; 332670, 3371374; 332686, 3371389; 332703, 3371404; 332720, 3371418; 332737, 3371432; 332755, 3371445; 332766, 3371452; 332774, 3371457; 332792, 3371469; 332812, 3371480; 332831, 3371490; 332851, 3371499; 332872, 3371508; 332892, 3371516; 332913, 3371524; 332934, 3371530; 332956, 3371536; 332977, 3371541; 332999, 3371546; 333021, 3371549; 333043, 3371552; 333065, 3371554; 333087, 3371555; 333109, 3371556; 333131, 3371555; 333154, 3371554; 333176, 3371552; 333198, 3371549; 333220, 3371546; 333241, 3371541; 333263, 3371536; 333284, 3371530; 333305, 3371524; 333326, 3371516; 333347, 3371508; 333367, 3371499; 333387, 3371490; 333407, 3371480; 333426, 3371469; 333445, 3371457; 333463, 3371445; 333481, 3371432; 333499, 3371418; 333516, 3371404; 333532, 3371389; 333548, 3371374; 333564, 3371358; 333579, 3371341; 333593, 3371324; 333606, 3371307; 333619, 3371289; 333632, 3371270; 333643, 3371251; 333654, 3371232; 333665, 3371213; 333674, 3371193; 333683, 3371172; 333691, 3371152; 333699, 3371131; 333705, 3371110; 333711, 3371088; 333716, 3371067; 333720, 3371045; 333724, 3371023; 333727, 3371001; 333729, 3370979; 333730, 3370957; 333730, 3370935; 333730, 3370912; 333729, 3370890; 333727, 3370868; 333724, 3370846; 333720, 3370824; 333716, 3370803; 333711, 3370781; 333705, 3370760; 333699, 3370739; 333691, 3370718; 333683, 3370697; 333674, 3370677; 333665, 3370657; 333654, 3370637; 333643, 3370618; 333632, 3370599.

(ii) Subunit 4B. From USGS 1:24,000 scale quadrangle maps Gauthier North and Ocean Springs, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 332162, 3370411; 332175, 3369717; 331717, 3369908; 331711, 3369915; 331696, 3369932; 331682, 3369949; 331668, 3369966; 331655, 3369984; 331643, 3370003; 331631, 3370021; 331621, 3370041; 331610, 3370060; 331601, 3370080; 331592, 3370101; 331584, 3370121; 331576, 3370142; 331570, 3370163; 331564, 3370185; 331559, 3370206; 331554, 3370228; 331551, 3370250; 331548, 3370272; 331546, 3370294; 331545, 3370316; 331545, 3370338; 331545, 3370360; 331546, 3370383; 331548, 3370405; 331551, 3370427; 331554, 3370448; 331559, 3370470; 331564, 3370492; 331570, 3370513; 331576, 3370534; 331584, 3370555; 331592, 3370576; 331601, 3370596; 331610, 3370616; 331621, 3370636; 331631, 3370655; 331643, 3370674; 331655, 3370692; 331668, 3370710; 331682, 3370728; 331696, 3370745; 331711, 3370761; 331726, 3370777; 331742, 3370793; 331759, 3370808; 331776, 3370822; 331793, 3370835; 331811, 3370848; 331830, 3370861; 331849, 3370872; 332766, 3371452; 332755, 3371445; 332737, 3371432; 332720, 3371418; 332703, 3371404; 332686, 3371389; 332670, 3371374; 332655, 3371358; 332640, 3371341; 332626, 3371324; 332612, 3371307; 332599, 3371289; 332587, 3371270; 332575, 3371251; 332564, 3371232; 332554, 3371213; 332544, 3371193; 332536, 3371172; 332527, 3371152; 332520, 3371131; 332513, 3371110; 332508, 3371088; 332502, 3371067; 332498, 3371045; 332495, 3371023; 332492, 3371001; 332490, 3370979; 332489, 3370957;

332488, 3370935; 332489, 3370912; 332490, 3370890; 332492, 3370868; 332495, 3370846; 332498, 3370824; 332502, 3370803; 332508, 3370781; 332513, 3370760; 332520, 3370739; 332527, 3370718; 332536, 3370697; 332544, 3370677; 332554, 3370657; 332564, 3370637; 332575, 3370618; 332587, 3370599; 332599, 3370580; 332612, 3370562; 332626, 3370545; 332640, 3370528; 332655, 3370511; 332670, 3370495; 332686, 3370480; 332703, 3370465; 332720, 3370451; 332737, 3370437; 332755, 3370425; 332774, 3370412; 332792, 3370401; 332812, 3370390; 332831, 3370379; 332851, 3370370; 332872, 3370361; 332892, 3370353; 332913, 3370345; 332934, 3370339; 332956, 3370333; 332977, 3370328; 332999, 3370323; 333021, 3370320; 333043, 3370317; 333065, 3370315; 333087, 3370314; 333109, 3370314; 333131, 3370314; 333154, 3370315; 333176, 3370317; 333198, 3370320; 333220, 3370323; 333241, 3370328; 333263, 3370333; 333284, 3370339; 333305, 3370345; 333326, 3370353; 333347, 3370361; 333367, 3370370; 333387, 3370379; 333407, 3370390; 333426, 3370401; 333445, 3370412; 333463, 3370425; 333481, 3370437; 333499, 3370451; 333516, 3370465; 333532, 3370480; 333548, 3370495; 333564, 3370511; 333579, 3370528; 333593, 3370545; 333606, 3370562; 333619, 3370580; 333632, 3370599; 333366, 3370173; 333359, 3370159; 333348, 3370140; 333336, 3370121; 333324, 3370103; 333311, 3370085; 333297, 3370067; 333283, 3370050; 333268, 3370034; 333253, 3370018; 333237, 3370002; 333220, 3369987; 333203, 3369973; 333186, 3369960; 333168, 3369947; 333149, 3369934; 333131, 3369923; 333111, 3369912; 333092, 3369901; 333072, 3369892; 333051, 3369883; 333031, 3369875; 333010, 3369868; 332989, 3369861; 332967, 3369855; 332946, 3369850; 332924, 3369846; 332902, 3369842; 332880, 3369839; 332867, 3369838; 332303, 3369733; 332298, 3369731; 332276, 3369727; 332254, 3369724; 332232, 3369721; 332210, 3369719; 332188, 3369718; 332175, 3369717.

(iii) **Note:** Map of Units 4, 5, and 6 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(10) Unit 5: Jackson County, Mississippi.

(i) Subunit 5A. From USGS 1:24,000 scale quadrangle map Latimer, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 331312, 3381629; 331800, 3382137; 331809, 3382125; 331822, 3382107; 331834, 3382089; 331846, 3382070; 331857, 3382050; 331867, 3382031; 331877, 3382011; 331886, 3381990; 331894, 3381970; 331901, 3381949; 331908, 3381928; 331914, 3381906; 331919, 3381885; 331923, 3381863; 331927, 3381841; 331929, 3381819; 331931, 3381797; 331932, 3381775; 331933, 3381753; 331932, 3381731; 331931, 3381708; 331929, 3381686; 331927, 3381664; 331923, 3381643; 331919, 3381621; 331914, 3381599; 331908, 3381578; 331901, 3381557; 331894, 3381536; 331886, 3381515; 331877, 3381495; 331867, 3381475; 331857, 3381455; 331846, 3381436; 331834, 3381417; 331822, 3381399; 331809, 3381381; 331795, 3381363; 331781, 3381346; 331766, 3381330; 331751, 3381314; 331735, 3381298; 331719, 3381283; 331702, 3381269; 331684, 3381256; 331666, 3381243; 331648, 3381230; 331629, 3381219; 331610, 3381208; 331590, 3381197; 331570, 3381188; 331550, 3381179; 331529, 3381171; 331508, 3381164; 331487, 3381157;

331465, 3381151; 331444, 3381146; 331422, 3381142; 331400, 3381138; 331378, 3381135; 331356, 3381133; 331334, 3381132; 331312, 3381132; 331290, 3381132; 331268, 3381133; 331246, 3381135; 331224, 3381138; 331202, 3381142; 331180, 3381146; 331158, 3381151; 331137, 3381157; 331116, 3381164; 331095, 3381171; 331074, 3381179; 331054, 3381188; 331034, 3381197; 331014, 3381208; 330995, 3381219; 330976, 3381230; 330958, 3381243; 330940, 3381256; 330922, 3381269; 330905, 3381283; 330904, 3381284; 330889, 3381298; 330873, 3381314; 330857, 3381330; 330843, 3381346; 330828, 3381363; 330815, 3381381; 330802, 3381399; 330789, 3381417; 330778, 3381436; 330767, 3381455; 330757, 3381475; 330747, 3381495; 330738, 3381515; 330730, 3381536; 330723, 3381557; 330716, 3381578; 330710, 3381599; 330705, 3381621; 330701, 3381643; 330697, 3381664; 330694, 3381686; 330692, 3381708; 330691, 3381731; 330691, 3381753; 330691, 3381775; 330692, 3381797; 330694, 3381819; 330697, 3381841; 330701, 3381863; 330705, 3381885; 330710, 3381906; 330716, 3381928; 330723, 3381949; 330730, 3381970; 330738, 3381990; 330747, 3382011; 330757, 3382031; 330767, 3382050; 330778, 3382070; 330789, 3382089; 330802, 3382107; 330815, 3382125; 330828, 3382142; 330843, 3382159; 330857, 3382176; 330873, 3382192; 330889, 3382207; 330905, 3382222; 330922, 3382236; 330940, 3382250; 330958, 3382263; 330976, 3382275; 330995, 3382287; 331014, 3382298; 331034, 3382308; 331054, 3382318; 331074, 3382327; 331095, 3382335; 331116, 3382342; 331137, 3382349; 331158, 3382355; 331180, 3382360; 331202, 3382364; 331224, 3382367; 331246, 3382370; 331268, 3382372; 331290, 3382373; 331312, 3382374; 331334, 3382373; 331356, 3382372; 331378, 3382370; 331400, 3382367; 331422, 3382364; 331444, 3382360; 331465, 3382355; 331487, 3382349; 331508, 3382342; 331529, 3382335; 331550, 3382327; 331570, 3382318; 331590, 3382308; 331610, 3382298; 331629, 3382287; 331648, 3382275; 331666, 3382263; 331684, 3382250; 331702, 3382236; 331719, 3382222; 331735, 3382207; 331751, 3382192; 331766, 3382176; 331781, 3382159; 331795, 3382142; 331800, 3382137.

(ii) Subunit 5B. From USGS 1:24,000 scale quadrangle maps Latimer and Vancleave, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 332002, 3381342; 330904, 3381284; 330905, 3381283; 330922, 3381269; 330940, 3381256; 330958, 3381243; 330976, 3381230; 330995, 3381219; 331014, 3381208; 331034, 3381197; 331054, 3381188; 331074, 3381179; 331095, 3381171; 331116, 3381164; 331137, 3381157; 331158, 3381151; 331180, 3381146; 331202, 3381142; 331224, 3381138; 331246, 3381135; 331268, 3381133; 331290, 3381132; 331312, 3381132; 331334, 3381132; 331356, 3381133; 331378, 3381135; 331400, 3381138; 331422, 3381142; 331444, 3381146; 331465, 3381151; 331487, 3381157; 331508, 3381164; 331529, 3381171; 331550, 3381179; 331570, 3381188; 331590, 3381197; 331610, 3381208; 331629, 3381219; 331648, 3381230; 331666, 3381243; 331684, 3381256; 331702, 3381269; 331719, 3381283; 331735, 3381298; 331751, 3381314; 331766, 3381330; 331781, 3381346; 331795, 3381363; 331809, 3381381; 331822, 3381399; 331834, 3381417; 331846, 3381436; 331857, 3381455; 331867, 3381475; 331877, 3381495; 331886, 3381515; 331894, 3381536; 331901, 3381557; 331908, 3381578; 331914, 3381599; 331919, 3381621; 331923, 3381643; 331927, 3381664; 331929, 3381686; 331931, 3381708; 331932, 3381731; 331933, 3381753; 331932, 3381775; 331931, 3381797; 331929, 3381819; 331927, 3381841; 331923, 3381863; 331919, 3381885; 331914, 3381906; 331908, 3381928; 331901, 3381949; 331894, 3381970; 331886, 3381990; 331877, 3382011; 331867, 3382031; 331857, 3382050; 331846, 3382070; 331834, 3382089; 331822, 3382107; 331809, 3382125; 331800, 3382137; 332044, 3381881; 332052, 3381873; 332067, 3381857; 332082, 3381840; 332096, 3381823; 332110, 3381806; 332123, 3381788; 332135, 3381769; 332147, 3381750; 332158, 3381731; 332168, 3381711; 332178, 3381691; 332187, 3381671; 332195, 3381650; 332202, 3381630; 332209, 3381608; 332215, 3381587; 332220, 3381565; 332224, 3381544; 332228, 3381522; 332230, 3381500; 332232, 3381478; 332234, 3381456; 332234, 3381433; 332234, 3381411; 332232, 3381389; 332230, 3381367; 332228, 3381345; 332224, 3381323; 332220, 3381301; 332215, 3381280; 332209, 3381258; 332202, 3381237; 332195, 3381216; 332187, 3381196; 332178, 3381175; 332168, 3381155; 332158, 3381136; 332147, 3381117; 332135, 3381098; 332123, 3381079; 332110, 3381061; 332096, 3381044; 332082, 3381027; 332067, 3381010; 332052, 3380994; 332036, 3380979; 332020, 3380964; 332003, 3380950; 331985, 3380936; 331967, 3380923; 331949, 3380911; 331930, 3380899; 331911, 3380888; 331891, 3380878; 331871, 3380869; 331851, 3380860; 331830, 3380852; 331809, 3380844; 331788, 3380838; 331767, 3380832; 331745, 3380827; 331723, 3380822; 331701, 3380819; 331679, 3380816; 331657, 3380814; 331635, 3380813; 331613, 3380812; 331591, 3380813; 331569, 3380814; 331547, 3380816; 331525, 3380819; 331503, 3380822; 331481, 3380827; 331459, 3380832; 331438, 3380838; 331417, 3380844; 331396, 3380852; 331375, 3380860; 331355, 3380869; 331335, 3380878; 331315, 3380888; 331296, 3380899; 331277, 3380911; 331259, 3380923; 331241, 3380936; 331223, 3380950; 331206, 3380964; 331190, 3380979; 331174, 3380994; 331158, 3381010; 331144, 3381027; 331143, 3381027; 330904, 3381284.

(iii) **Note:** Map of Unit 5 is provided at paragraph (9)(iii) of this entry.

(11) Unit 6: Jackson County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Vancleave, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 343468, 3381436; 343490, 3380939; 343468, 3380939; 343446, 3380939; 343424, 3380940; 343402, 3380942; 343380, 3380945; 343358, 3380949; 343336, 3380953; 343314, 3380958; 343293, 3380964; 343272, 3380971; 343251, 3380978; 343230, 3380986; 343210, 3380995; 343190, 3381005; 343170, 3381015; 343151, 3381026; 343132, 3381037; 343114, 3381050; 343096, 3381063; 343078, 3381076; 343061, 3381091; 343045, 3381105; 343029, 3381121; 343014, 3381137; 342999, 3381153; 342984, 3381170; 342971, 3381188; 342958, 3381206; 342946, 3381224; 342934, 3381243; 342923, 3381262; 342913, 3381282; 342903, 3381302; 342894, 3381322; 342886, 3381343; 342879, 3381364; 342872, 3381385; 342866, 3381406; 342861, 3381428; 342857, 3381450; 342853, 3381472; 342851, 3381493; 342849, 3381516; 342847, 3381538; 342847, 3381560; 342847, 3381582; 342849, 3381604; 342851, 3381626; 342853, 3381648; 342857, 3381670; 342861, 3381692; 342866, 3381713; 342872, 3381735; 342879, 3381756; 342886, 3381777; 342894, 3381798; 342903, 3381818; 342913, 3381838; 342923, 3381857; 342934, 3381877; 342946, 3381896; 342958, 3381914; 342971, 3381932; 342984, 3381950; 342999, 3381967; 343014, 3381983; 343029, 3381999; 343045, 3382014; 343061, 3382029; 343078, 3382043; 343096, 3382057; 343114, 3382070; 343132, 3382082; 343151, 3382094; 343170, 3382105; 343190, 3382115; 343210, 3382125; 343230, 3382134;

343251, 3382142; 343272, 3382149; 343293, 3382156; 343314, 3382162; 343336, 3382167; 343358, 3382171; 343380, 3382175; 343402, 3382177; 343424, 3382179; 343446, 3382180; 343468, 3382181; 343490, 3382180; 343512, 3382179; 343534, 3382177; 343556, 3382175; 343578, 3382171; 343600, 3382167; 343622, 3382162; 343643, 3382156; 343664, 3382149; 343685, 3382142; 343706, 3382134; 343726, 3382125; 343746, 3382115; 343766, 3382105; 343785, 3382094; 343804, 3382082; 343822, 3382070; 343840, 3382057; 343858, 3382043; 343875, 3382029; 343891, 3382014; 343907, 3381999; 343923, 3381983; 343937, 3381967; 343952, 3381950; 343965, 3381932; 343978, 3381914; 343990, 3381896; 344002, 3381877; 344013, 3381857; 344023, 3381838; 344033, 3381818; 344042, 3381798; 344050, 3381777; 344057, 3381756; 344064, 3381735; 344070, 3381713; 344075, 3381692; 344079, 3381670; 344083, 3381648; 344085, 3381626; 344087, 3381604; 344089, 3381582; 344089, 3381560; 344089, 3381538; 344087, 3381516; 344085, 3381493; 344083, 3381472; 344079, 3381450; 344075, 3381428; 344070, 3381406; 344064, 3381385; 344057, 3381364; 344050, 3381343; 344042, 3381322; 344033, 3381302; 344023, 3381282; 344013, 3381262; 344002, 3381243; 343990, 3381224; 343978, 3381206; 343965, 3381188; 343952, 3381170; 343937, 3381153; 343923, 3381137; 343907, 3381121; 343891, 3381105; 343875, 3381091; 343858, 3381076; 343840, 3381063; 343822, 3381050; 343804, 3381037; 343785, 3381026; 343766, 3381015; 343746, 3381005; 343726, 3380995; 343706, 3380986; 343685, 3380978; 343664, 3380971; 343643, 3380964; 343622, 3380958; 343600, 3380953; 343578, 3380949; 343556, 3380945; 343534, 3380942; 343512, 3380940; 343490, 3380939.

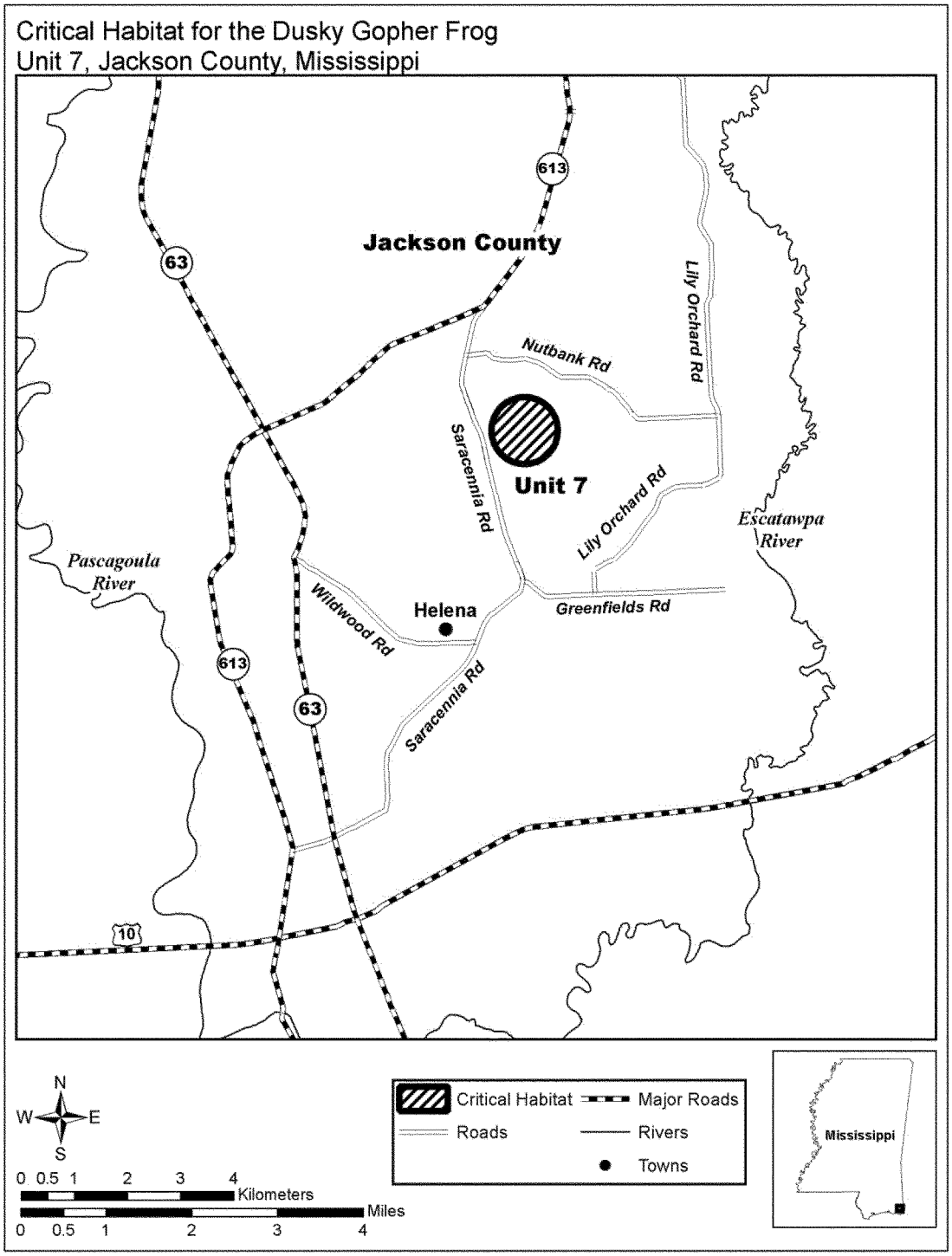
(ii) **Note:** Map of Unit 6 is provided at paragraph (9)(iii) of this entry.

(12) Unit 7: Jackson County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Big Point, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 356810, 3377501; 356832, 3377004; 356810, 3377004; 356788, 3377004; 356766, 3377006; 356744, 3377008; 356722, 3377010; 356700, 3377014; 356678, 3377018; 356657, 3377023; 356635, 3377029; 356614, 3377036; 356593, 3377043; 356573, 3377051; 356552, 3377060; 356532, 3377070; 356513, 3377080; 356493, 3377091; 356474, 3377103; 356456, 3377115; 356438, 3377128; 356421, 3377142; 356404, 3377156; 356387, 3377171; 356371, 3377186; 356356, 3377202; 356341, 3377218; 356327, 3377235; 356313, 3377253; 356300, 3377271; 356288, 3377289; 356276, 3377308; 356265, 3377327; 356255, 3377347; 356245, 3377367; 356236, 3377387; 356228, 3377408; 356221, 3377429; 356214, 3377450; 356208, 3377471; 356203, 3377493; 356199, 3377515; 356196, 3377537; 356193, 3377559; 356191, 3377581; 356190, 3377603; 356189, 3377625; 356190, 3377647; 356191, 3377669; 356193, 3377691; 356196, 3377713; 356199, 3377735; 356203, 3377757; 356208, 3377779; 356214, 3377800; 356221, 3377821; 356228, 3377842; 356236, 3377863; 356245, 3377883; 356255, 3377903; 356265, 3377923; 356276, 3377942; 356288, 3377961; 356300, 3377979; 356313, 3377997; 356327, 3378015; 356341, 3378032; 356356, 3378048; 356371, 3378064; 356387, 3378080; 356404, 3378094; 356421, 3378109; 356438, 3378122; 356456, 3378135; 356474, 3378147; 356493, 3378159; 356513, 3378170; 356532, 3378180; 356552, 3378190; 356573, 3378199; 356593, 3378207; 356614, 3378214; 356635, 3378221; 356657, 3378227; 356678, 3378232; 356700, 3378236; 356722, 3378240; 356744, 3378242; 356766, 3378244; 356788, 3378246; 356810, 3378246; 356832, 3378246; 356855, 3378244; 356877, 3378242; 356899, 3378240; 356920, 3378236; 356942, 3378232; 356964, 3378227; 356985, 3378221; 357006, 3378214; 357027, 3378207; 357048, 3378199; 357068, 3378190; 357088, 3378180; 357108, 3378170; 357127, 3378159; 357146, 3378147; 357164, 3378135; 357182, 3378122; 357200, 3378109; 357217, 3378094; 357233, 3378080; 357249, 3378064; 357265, 3378048; 357280, 3378032; 357294, 3378015; 357307, 3377997; 357320, 3377979; 357333, 3377961; 357344, 3377942; 357355, 3377923; 357366, 3377903; 357375, 3377883; 357384, 3377863; 357392, 3377842; 357399, 3377821; 357406, 3377800; 357412, 3377779; 357417, 3377757; 357421, 3377735; 357425, 3377713; 357428, 3377691; 357430, 3377669; 357431, 3377647; 357431, 3377625; 357431, 3377603; 357430, 3377581; 357428, 3377559; 357425, 3377537; 357421, 3377515; 357417, 3377493; 357412, 3377471; 357406, 3377450; 357399, 3377429; 357392, 3377408; 357384, 3377387; 357375, 3377367; 357366, 3377347; 357355, 3377327; 357344, 3377308; 357333, 3377289; 357320, 3377271; 357307, 3377253; 357294, 3377235; 357280, 3377218; 357265, 3377202; 357249, 3377186; 357233, 3377171; 357217, 3377156; 357200, 3377142; 357182, 3377128; 357164, 3377115; 357146, 3377103; 357127, 3377091; 357108, 3377080; 357088, 3377070; 357068, 3377060; 357048, 3377051; 357027, 3377043; 357006, 3377036; 356985, 3377029; 356964, 3377023; 356942, 3377018; 356920, 3377014; 356899, 3377010; 356877, 3377008; 356855, 3377006; 356832, 3377004.

(ii) **Note:** Map of Unit 7 follows:

BILLING CODE 4310–55–P

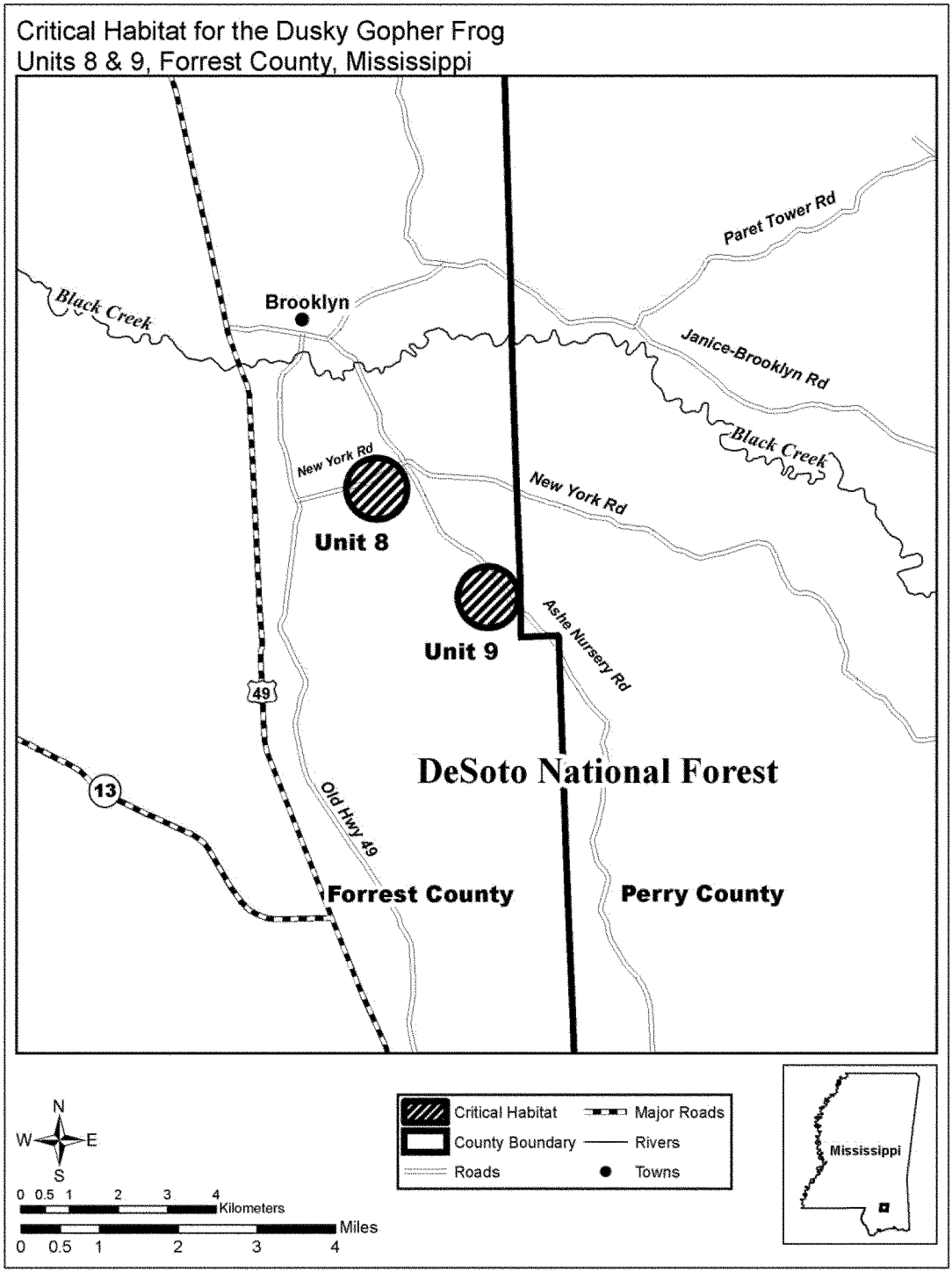


(13) Unit 8: Forrest County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Brooklyn, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 292305, 3434903; 292328, 3434158; 292305, 3434157; 292283, 3434158; 292261, 3434159; 292239, 3434161; 292217, 3434164; 292195, 3434167; 292173, 3434172; 292152, 3434177; 292130, 3434183; 292109, 3434189; 292088, 3434197; 292068, 3434205; 292047, 3434214; 292027, 3434223; 292008, 3434233; 291989, 3434244; 291970, 3434256; 291951, 3434268; 291933, 3434281; 291916, 3434295; 291899, 3434309; 291882, 3434324; 291866, 3434339; 291851, 3434355; 291836, 3434372; 291822, 3434389; 291808, 3434406; 291795, 3434424; 291783, 3434443; 291771, 3434462; 291760, 3434481; 291750, 3434501; 291741, 3434521; 291732, 3434541; 291724, 3434561; 291716, 3434582; 291710, 3434604; 291704, 3434625; 291699, 3434646; 291694, 3434668; 291691, 3434690; 291688, 3434712; 291686, 3434734; 291685, 3434756; 291684, 3434778; 291685, 3434801; 291686, 3434823; 291688, 3434845; 291691, 3434867; 291694, 3434889; 291699, 3434910; 291704, 3434932; 291710, 3434953; 291716, 3434975; 291724, 3434996; 291732, 3435016; 291741, 3435036; 291750, 3435056;

291760, 3435076; 291771, 3435095; 291783, 3435114; 291795, 3435133; 291808, 3435151; 291822, 3435168; 291836, 3435185; 291851, 3435202; 291866, 3435218; 291882, 3435233; 291899, 3435248; 291916, 3435262; 291919, 3435265; 291922, 3435267; 291933, 3435276; 291951, 3435289; 291970, 3435301; 291989, 3435313; 292008, 3435324; 292027, 3435334; 292047, 3435343; 292068, 3435352; 292088, 3435360; 292109, 3435368; 292130, 3435374; 292152, 3435380; 292173, 3435385; 292195, 3435390; 292217, 3435393; 292239, 3435396; 292261, 3435398; 292283, 3435399; 292305, 3435399; 292328, 3435399; 292350, 3435398; 292372, 3435396; 292394, 3435393; 292416, 3435390; 292437, 3435385; 292459, 3435380; 292480, 3435374; 292502, 3435368; 292522, 3435360; 292543, 3435352; 292563, 3435343; 292583, 3435334; 292603, 3435324; 292622, 3435313; 292641, 3435301; 292660, 3435289; 292678, 3435276; 292695, 3435262; 292712, 3435248; 292729, 3435233; 292745, 3435218; 292760, 3435202; 292775, 3435185; 292789, 3435168; 292803, 3435151; 292816, 3435133; 292828, 3435114; 292839, 3435095; 292850, 3435076; 292861, 3435056; 292870, 3435036; 292879, 3435016; 292887, 3434996; 292895, 3434975; 292901, 3434953; 292907, 3434932; 292912, 3434910; 292917, 3434889; 292920, 3434867; 292923, 3434845; 292925, 3434823; 292926, 3434801; 292926, 3434778; 292926, 3434756; 292925, 3434734; 292923, 3434712; 292920, 3434690; 292917, 3434668; 292912, 3434646; 292907, 3434625; 292901, 3434604; 292895, 3434582; 292887, 3434561; 292879, 3434541; 292870, 3434521; 292861, 3434501; 292850, 3434481; 292839, 3434462; 292828, 3434443; 292816, 3434424; 292803, 3434406; 292789, 3434389; 292775, 3434372; 292760, 3434355; 292745, 3434339; 292729, 3434324; 292712, 3434309; 292695, 3434295; 292678, 3434281; 292660, 3434268; 292641, 3434256; 292622, 3434244; 292603, 3434233; 292583, 3434223; 292563, 3434214; 292543, 3434205; 292522, 3434197; 292502, 3434189; 292480, 3434183; 292459, 3434177; 292437, 3434172; 292416, 3434167; 292394, 3434164; 292372, 3434161; 292350, 3434159; 292328, 3434158.

(ii) **Note:** Map of Units 8 and 9 follows:



BILLING CODE 4310–55–C

(14) Unit 9: Forrest County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Brooklyn, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 294462, 3432341; 294484, 3431844; 294462, 3431844; 294439, 3431844; 294417, 3431845; 294395, 3431847; 294373, 3431850; 294351, 3431854; 294330, 3431858; 294308, 3431863; 294287, 3431869; 294266, 3431876; 294245, 3431883; 294224, 3431891; 294204, 3431900; 294184, 3431909; 294164, 3431920; 294145, 3431931; 294126, 3431942; 294107, 3431955; 294089, 3431968; 294072, 3431981; 294055, 3431995; 294038, 3432010; 294023, 3432026; 294007, 3432042; 293992, 3432058; 293978, 3432075; 293964, 3432093; 293952, 3432111; 293939, 3432129; 293928, 3432148; 293917, 3432167; 293906, 3432187; 293897, 3432207; 293888, 3432227; 293880, 3432248; 293872, 3432269; 293866, 3432290; 293860, 3432311; 293855, 3432333; 293850, 3432355; 293847, 3432376; 293844, 3432398; 293842, 3432420; 293841, 3432443; 293841, 3432465; 293841, 3432487; 293842, 3432509; 293844, 3432531; 293847, 3432553; 293850, 3432575; 293855, 3432597; 293860, 3432618; 293866, 3432640; 293872, 3432661; 293880, 3432682; 293888, 3432702;

293897, 3432723; 293906, 3432743; 293917, 3432762; 293928, 3432782; 293939, 3432801; 293952, 3432819; 293964, 3432837; 293978, 3432854; 293992, 3432871; 294007, 3432888; 294023, 3432904; 294038, 3432919; 294055, 3432934; 294072, 3432948; 294089, 3432962; 294107, 3432975; 294126, 3432987; 294145, 3432999; 294164, 3433010; 294184, 3433020; 294204, 3433030; 294224, 3433039; 294245, 3433047; 294266, 3433054; 294287, 3433061; 294308, 3433066; 294330, 3433072; 294351, 3433076; 294373, 3433079; 294395, 3433082; 294417, 3433084; 294439, 3433085; 294462, 3433086; 294484, 3433085; 294506, 3433084; 294528, 3433082; 294550, 3433079; 294572, 3433076; 294594, 3433072; 294615, 3433066; 294637, 3433061; 294658, 3433054; 294679, 3433047; 294699, 3433039; 294720, 3433030; 294740, 3433020; 294759, 3433010; 294779, 3432999; 294797, 3432987; 294816, 3432975; 294834, 3432962; 294851, 3432948; 294868, 3432934; 294885, 3432919; 294901, 3432904; 294916, 3432888; 294931, 3432871; 294945, 3432854; 294959, 3432837; 294972, 3432819; 294984, 3432801; 294996, 3432782; 295007, 3432762; 295017, 3432743; 295027, 3432723; 295035, 3432702; 295043, 3432682; 295051, 3432661; 295057, 3432640; 295063, 3432618; 295068, 3432597; 295073, 3432575; 295076, 3432553; 295079, 3432531; 295081, 3432509; 295082, 3432487; 295083, 3432465; 295082, 3432443; 295081, 3432420; 295079, 3432398; 295076, 3432376; 295073, 3432355; 295068, 3432333; 295063, 3432311; 295057, 3432290; 295051, 3432269; 295043, 3432248; 295035, 3432227; 295027, 3432207; 295017, 3432187; 295007, 3432167; 294996, 3432148; 294984, 3432129; 294972, 3432111; 294959, 3432093; 294945, 3432075; 294931, 3432058; 294916, 3432042; 294901, 3432026; 294885, 3432010; 294874, 3432000; 294868, 3431995; 294851, 3431981; 294834, 3431968; 294816, 3431955; 294797, 3431942; 294779, 3431931; 294759, 3431920; 294740, 3431909; 294720, 3431900; 294699, 3431891; 294682, 3431884; 294679, 3431883; 294658, 3431876; 294637, 3431869; 294615, 3431863; 294594, 3431858; 294572, 3431854; 294550, 3431850; 294528, 3431847; 294506, 3431845; 294484, 3431844.

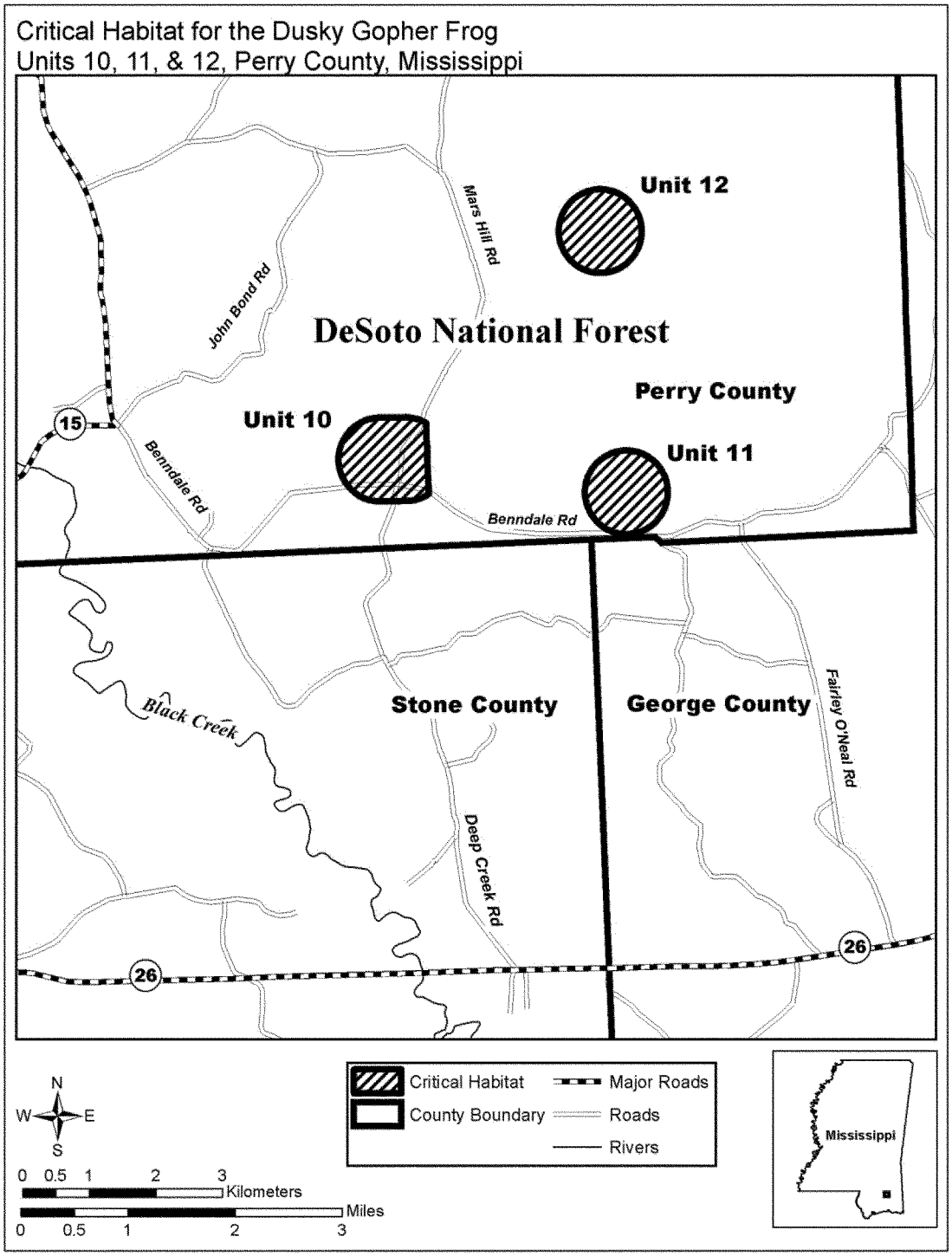
(ii) **Note:** Map of Unit 9 is provided at paragraph (13)(ii) of this entry.

(15) Unit 10: Perry County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Barbara, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 316810, 3422707; 317164, 3421954; 317142, 3421953; 317119, 3421954; 317063, 3421956; 316926, 3421961; 316925, 3421961; 316735, 3421968; 316713, 3421970; 316691, 3421972; 316669, 3421974; 316662, 3421976; 316647, 3421978; 316626, 3421982; 316604, 3421987; 316583, 3421993; 316561, 3422000; 316541, 3422007; 316520, 3422015; 316500, 3422024; 316480, 3422034; 316460, 3422044; 316441, 3422055; 316422, 3422067; 316403, 3422079; 316385, 3422092; 316368, 3422106; 316351, 3422120; 316334, 3422135; 316318, 3422150; 316303, 3422166; 316288, 3422182; 316274, 3422199; 316260, 3422217; 316247, 3422235; 316235, 3422253; 316223, 3422272; 316212, 3422291; 316202, 3422311; 316193, 3422331; 316184, 3422351; 316176, 3422372; 316168, 3422393; 316162, 3422414; 316156, 3422436; 316151, 3422457; 316146, 3422479; 316143, 3422501; 316140, 3422523; 316138, 3422545; 316137, 3422567; 316137, 3422589; 316137, 3422611; 316138, 3422633; 316140, 3422655; 316143, 3422677; 316146, 3422699; 316151, 3422721; 316156, 3422743; 316162, 3422764; 316168, 3422785; 316176, 3422806; 316184, 3422827; 316193, 3422847; 316202, 3422867; 316212, 3422887; 316223, 3422906; 316235, 3422925; 316247, 3422943; 316260, 3422961; 316274, 3422979; 316288, 3422996; 316303, 3423012; 316318, 3423028; 316334, 3423044; 316351, 3423058; 316368, 3423073; 316385, 3423086; 316403, 3423099; 316422, 3423112; 316441, 3423123; 316460, 3423134; 316480, 3423144; 316500, 3423154; 316520, 3423163; 316541, 3423171; 316561, 3423178; 316583, 3423185; 316604, 3423191; 316626, 3423196; 316647, 3423200; 316669, 3423204; 316691, 3423207; 316713, 3423209; 316735, 3423210; 316758, 3423210; 316780, 3423210; 316802, 3423209; 316804, 3423208; 317147, 3423195; 317164, 3423195; 317186, 3423194; 317208, 3423192; 317230, 3423189; 317252, 3423186; 317274, 3423181; 317295, 3423176; 317317, 3423170; 317338, 3423164; 317359, 3423156; 317379, 3423148; 317400, 3423139; 317420, 3423130; 317439, 3423119; 317458, 3423108; 317476, 3423097; 317474, 3422836; 317472, 3422760; 317466, 3422451; 317463, 3422043; 317458, 3422040; 317439, 3422029; 317420, 3422019; 317400, 3422010; 317379, 3422001; 317359, 3421993; 317338, 3421985; 317317, 3421979; 317295, 3421973; 317274, 3421968; 317252, 3421963; 317230, 3421960; 317208, 3421957; 317186, 3421955; 317164, 3421954.

(ii) **Note:** Map of Units 10, 11, and 12 follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(16) Unit 11: Perry County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle maps Barbara and Avent, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 320420, 3421781; 320442, 3421285; 320420, 3421284; 320398, 3421285; 320376, 3421286; 320354, 3421288; 320332, 3421291; 320310, 3421294; 320288, 3421298; 320267, 3421303; 320245, 3421309; 320224, 3421316; 320203, 3421323; 320182, 3421331; 320162, 3421340; 320142, 3421350; 320122, 3421360; 320103, 3421371; 320084, 3421383; 320066, 3421395; 320048, 3421408; 320030, 3421422; 320013, 3421436; 319997, 3421451; 319981, 3421466; 319966, 3421482; 319951, 3421499; 319937, 3421516; 319923, 3421533; 319910, 3421551; 319898, 3421569; 319886, 3421588; 319875, 3421607; 319875, 3421608; 319865, 3421627; 319855, 3421647; 319846, 3421668; 319838, 3421688; 319831, 3421709; 319824, 3421730; 319818, 3421752; 319813, 3421773; 319809, 3421795; 319805, 3421817; 319803, 3421839; 319801, 3421861; 319800, 3421883; 319799, 3421905; 319800, 3421927; 319801, 3421950; 319803, 3421972; 319805, 3421994; 319808, 3422007; 319809, 3422015; 319813, 3422037; 319818, 3422059; 319824, 3422080;

319831, 3422101; 319838, 3422122; 319846, 3422143; 319855, 3422163; 319865, 3422183; 319875, 3422203; 319886, 3422222; 319898, 3422241; 319910, 3422259; 319923, 3422277; 319937, 3422295; 319951, 3422312; 319966, 3422328; 319981, 3422344; 319997, 3422360; 320013, 3422375; 320030, 3422389; 320048, 3422402; 320066, 3422415; 320084, 3422428; 320103, 3422439; 320122, 3422450; 320142, 3422461; 320162, 3422470; 320182, 3422479; 320203, 3422487; 320224, 3422494; 320245, 3422501; 320267, 3422507; 320288, 3422512; 320310, 3422516; 320332, 3422520; 320354, 3422523; 320376, 3422525; 320398, 3422526; 320420, 3422526; 320442, 3422526; 320464, 3422525; 320486, 3422523; 320508, 3422520; 320530, 3422516; 320552, 3422512; 320574, 3422507; 320595, 3422501; 320616, 3422494; 320637, 3422487; 320658, 3422479; 320678, 3422470; 320698, 3422461; 320718, 3422450; 320737, 3422439; 320756, 3422428; 320774, 3422415; 320792, 3422402; 320810, 3422389; 320827, 3422375; 320843, 3422360; 320859, 3422344; 320875, 3422328; 320889, 3422312; 320904, 3422295; 320917, 3422277; 320930, 3422259; 320943, 3422241; 320954, 3422222; 320965, 3422203; 320975, 3422183; 320985, 3422163; 320994, 3422143; 321002, 3422122; 321009, 3422101; 321016, 3422080; 321022, 3422059; 321027, 3422037; 321031, 3422015; 321035, 3421994; 321038, 3421972; 321040, 3421950; 321041, 3421927; 321041, 3421905; 321041, 3421883; 321040, 3421861; 321038, 3421839; 321035, 3421817; 321031, 3421795; 321027, 3421773; 321022, 3421752; 321016, 3421730; 321009, 3421709; 321002, 3421688; 320994, 3421668; 320985, 3421647; 320975, 3421627; 320965, 3421608; 320954, 3421588; 320943, 3421569; 320930, 3421551; 320917, 3421533; 320904, 3421516; 320889, 3421499; 320875, 3421482; 320859, 3421466; 320843, 3421451; 320827, 3421436; 320810, 3421422; 320792, 3421408; 320774, 3421395; 320756, 3421383; 320737, 3421371; 320718, 3421360; 320698, 3421350; 320678, 3421340; 320658, 3421331; 320637, 3421323; 320616, 3421316; 320595, 3421309; 320574, 3421303; 320552, 3421298; 320530, 3421294; 320508, 3421291; 320486, 3421288; 320464, 3421286; 320442, 3421285.

(ii) **Note:** Map of Unit 11 is provided at paragraph (15)(ii) of this entry.

(17) Unit 12: Perry County, Mississippi.

(i) From USGS 1:24,000 scale quadrangle map Barbara, Mississippi. Land bounded by the following UTM Zone 16N, NAD 83 coordinates, (E, N): 320239, 3425675; 320261, 3425178; 320239, 3425178; 320216, 3425178; 320194, 3425180; 320172, 3425182; 320150, 3425184; 320128, 3425188; 320107, 3425192; 320085, 3425197; 320064, 3425203; 320042, 3425210; 320021, 3425217; 320001, 3425225; 319981, 3425234; 319961, 3425244; 319941, 3425254; 319922, 3425265; 319903, 3425277; 319884, 3425289; 319866, 3425302; 319849, 3425315; 319832, 3425330; 319815, 3425344; 319799, 3425360; 319784, 3425376; 319769, 3425392; 319755, 3425409; 319741, 3425427; 319728, 3425445; 319716, 3425463; 319704, 3425482; 319693, 3425501; 319683, 3425521; 319674, 3425541; 319665, 3425561; 319657, 3425582; 319649, 3425603; 319643, 3425624; 319637, 3425645; 319632, 3425667; 319627, 3425689; 319624, 3425711; 319621, 3425733; 319619, 3425755; 319618, 3425777; 319618, 3425799; 319618, 3425821; 319619, 3425843; 319621, 3425865; 319624, 3425887; 319627, 3425909; 319632, 3425931; 319637, 3425953; 319643, 3425974; 319649, 3425995; 319656, 3426015; 319657, 3426016; 319665, 3426037; 319674, 3426057; 319683, 3426077; 319693, 3426097; 319704, 3426116; 319716, 3426135; 319728, 3426153; 319741, 3426171; 319755, 3426189; 319769, 3426206; 319784, 3426222; 319799, 3426238; 319815, 3426254; 319832, 3426268; 319849, 3426283. 319866, 3426296; 319884, 3426309; 319903, 3426321; 319922, 3426333; 319941, 3426344; 319952, 3426350; 319961, 3426354; 319981, 3426364; 320001, 3426373; 320021, 3426381; 320042, 3426388; 320064, 3426395; 320085, 3426401; 320107, 3426406; 320128, 3426410; 320150, 3426414; 320172, 3426416; 320194, 3426418; 320216, 3426420; 320239, 3426420; 320261, 3426420; 320283, 3426418; 320305, 3426416; 320327, 3426414; 320349, 3426410; 320371, 3426406; 320392, 3426401; 320413, 3426395; 320435, 3426388; 320456, 3426381; 320476, 3426373; 320496, 3426364; 320516, 3426354; 320536, 3426344; 320555, 3426333; 320574, 3426321; 320593, 3426309; 320611, 3426296; 320628, 3426283; 320645, 3426268; 320662, 3426254; 320678, 3426238; 320693, 3426222; 320708, 3426206; 320722, 3426189; 320736, 3426171; 320749, 3426153; 320761, 3426135; 320773, 3426116; 320784, 3426097; 320794, 3426077; 320803, 3426057; 320812, 3426037; 320820, 3426016; 320828, 3425995; 320834, 3425974; 320840, 3425953; 320845, 3425931; 320850, 3425909; 320853, 3425887; 320856, 3425865; 320858, 3425843; 320859, 3425821; 320860, 3425799; 320859, 3425777; 320858, 3425755; 320856, 3425733; 320853, 3425711; 320850, 3425689; 320845, 3425667; 320840, 3425645; 320834, 3425624; 320828, 3425603; 320820, 3425582; 320812, 3425561; 320803, 3425541; 320794, 3425521; 320784, 3425501; 320773, 3425482; 320761, 3425463; 320749, 3425445; 320736, 3425427; 320722, 3425409; 320708, 3425392; 320693, 3425376; 320678, 3425360; 320662, 3425344; 320645, 3425330; 320628, 3425315; 320611, 3425302; 320593, 3425289; 320574, 3425277; 320555, 3425265; 320536, 3425254; 320516, 3425244; 320496, 3425234; 320476, 3425225; 320456, 3425217; 320435, 3425210; 320413, 3425203; 320392, 3425197; 320371, 3425192; 320349, 3425188; 320327, 3425184; 320305, 3425182; 320283, 3425180; 320261, 3425178.

(ii) **Note:** Map of Unit 12 is provided at paragraph (15)(ii) of this entry.

* * * * *

Dated: May 29, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–13488 Filed 6–11–12; 8:45 am]

BILLING CODE 4310–55–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 113 June 12, 2012

Part III

Department of Transportation

Federal Railroad Administration

49 CFR Part 234

Systems for Telephonic Notification of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA–2009–0041, Notice No. 2]

RIN 2130–AC12

Systems for Telephonic Notification of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule requires certain railroads to establish and maintain systems that allow members of the public to call the railroads, using a toll-free telephone number, and report an emergency or other unsafe condition at highway-rail and pathway grade crossings. The rule refers to such a system as an ''Emergency Notification System,'' and it consists of the following components: the signs, placed at the grade crossing, that display the information necessary for the public to report an unsafe condition to the appropriate railroad; the method that the railroad uses to receive and process a telephone call reporting the unsafe condition; the remedial actions that the appropriate railroad or railroads take to address the report of the unsafe conditions; and the related recordkeeping conducted by the railroad(s).

DATES: This final rule is effective August 13, 2012. Petitions for reconsideration must be received on or before August 13, 2012. Petitions for reconsideration will be posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before September 25, 2012.

ADDRESSES: Petitions for reconsideration or comments on such petitions: Any petitions and any comments to petitions related to Docket No. FRA–2009–0041, Notice No. 2, may be submitted by any of the following methods:

- *Web Site:* Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., W12–140, Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Beth Crawford, Transportation Specialist, Grade Crossing Safety and Trespass Prevention, Office of Safety Analysis, FRA, 1200 New Jersey Avenue SE., Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6288), *beth.crawford@dot.gov;* or Sara Mahmoud-Davis, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Mail Stop 10, Washington, DC 20590 (telephone: 202–366–1118), *sara.mahmoud-davis@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Executive Summary
II. Statutory Background
III. History of Accidents Relevant to This Rulemaking
IV. History of Emergency Notification Systems (ENS)
  A. In General
  B. Various ENS Programs in the United States
  C. FRA's 2006 Report to Congress
V. Section-by-Section Analysis
VI. Regulatory Impact
  A. Executive Order 12866 and 13563 and DOT Regulatory Policies and Procedures
  B. Regulatory Flexibility Determination
  C. Federalism
  D. International Trade Impact Assessment
  E. Paperwork Reduction Act
  F. Compliance With the Unfunded Mandates Reform Act of 1995
  G. Environmental Assessment
  H. Energy Impact
  I. Privacy Act

I. Executive Summary

A. In General

There are approximately 211,000 public and private highway-rail and pathway grade crossings in the United States. Each year since 1997, highway-rail and pathway grade crossing collisions have caused more railroad-related deaths than any other single factor, except for trespassing on railroad property.

This rule furthers FRA's efforts to reduce deaths and injuries at grade crossings and elsewhere along the Nation's railroads, by requiring railroads to implement a telephonic system, referred to as an ''Emergency Notification System'' or ''ENS,'' through which they receive reports of unsafe conditions at crossings. Specifically, this rule implements Section 205 (Sec. 205) of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, which was signed into law on October 16, 2008, and which is detailed later in this preamble. This rule uses experience gained through pre-existing voluntary, State, and Federal programs for systems similar to ENS, as well as the U.S. DOT National Crossing Inventory, which began as a voluntary program, and reflects comments on FRA's Notice of Proposed Rulemaking (NPRM) published March 4, 2011 (76 FR 11992). To a certain extent, this rule also builds on pre-existing regulations in 49 CFR part 234 that govern a railroad's response to certain reports of a malfunction of a highway-rail grade crossing signal system and maintenance, inspection, and testing of highway-rail grade crossing signal systems.

B. Overview of Rule Requirements

1. Telephonic Reporting of Unsafe Conditions at Crossings

This rule requires each railroad that dispatches a train, or otherwise provides the authority for the movement of a train, through a highway-rail or pathway grade crossing, to set up and maintain an ENS by which the railroad is able to directly receive telephonic reports from the public of certain unsafe conditions at the crossing and then take specified action to respond to those reports. There are four categories of reportable unsafe conditions for each highway-rail and pathway grade crossing. Generally, these categories are (1) Malfunctions of signals, crossing gates, and other devices to promote safety at the grade crossing; (2) disabled vehicles and other obstructions blocking railroad tracks at the crossing; (3) obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the crossing; and (4) any other unsafe condition at the crossing, such as a downed crossbuck sign or a pot hole in the crossing.

The railroad that dispatches a train through a crossing is called the

''dispatching railroad.'' The dispatching railroad may receive these reports by a variety of methods. The railroad may have a live person answer the calls directly, or use a third-party telephone service. As will be discussed later in more detail, FRA made revisions to the proposed rule that permit a railroad to set up an automated answering system, which ultimately results in the caller speaking to a live person, or, under certain circumstances, the railroad may use an answering machine to receive reports.

Sometimes a railroad does not have the responsibility for maintaining the particular crossing through which it dispatches a train. The rule provides that if the dispatching railroad does not have maintenance responsibility for the crossing that is the subject of the report received through the ENS, and if the report involves maintenance of the crossing, then the dispatching railroad must relay the report to the railroad responsible for maintaining the crossing (the maintaining railroad) for investigation and remedial action. Accordingly, the maintaining railroad must set up a telephonic system for receiving such phone calls from the dispatching railroad. Depending on the circumstances, the maintaining railroad may receive such calls through the use of an automated answering system, third-party telephone service, or answering machine.

It should also be noted that the rule addresses situations where multiple railroads dispatch trains through the same crossing, by requiring those railroads to identify one primary dispatching railroad that is responsible for receiving reports made via the ENS for the crossing.

2. Remedial Actions To Be Taken by Railroads

As will be discussed later in more detail, the receipt of a report made through the ENS of an unsafe condition at a crossing triggers certain responsibilities each for dispatching and maintaining railroads. The dispatching railroad upon receiving such a report and depending on the nature of the report, is required to contact all trains authorized to operate through the crossing to which the report pertains, inform local law enforcement officers of the reported unsafe condition so that they may direct traffic or otherwise assist in ensuring the safety of the crossing, and then either investigate the report itself or request that the railroad with maintenance responsibility for the crossing investigate the report. If the report is substantiated, the railroad with maintenance responsibility for the crossing is required to take certain actions to remedy the unsafe condition.

3. Characteristics and Number of ENS Signs To Be Placed and Maintained at a Crossing

This rule establishes requirements for the physical characteristics, number, placement, and maintenance of ENS signs. In general, each ENS sign must display a minimum amount of information, the toll-free telephone number of the dispatching railroad, an explanation of the purpose of the sign (*e.g.,* ''Report emergency or problem to _____''), and the U.S. DOT National Crossing Inventory number assigned to that crossing.

The ENS signs also must meet certain color and size requirements. Furthermore, the signs must be posted at the crossing in a manner that they are conspicuous to the roadway or pathway user, do not obstruct other signs or traffic control devices, and do not limit the view of trains approaching the crossing. The signs also must be crashworthy if mounted on a post.

In general, an ENS sign must be placed on each approach to a highway-rail or pathway grade crossing. There are two exceptions. At a farm grade crossing, a railroad is required to install and maintain only one ENS sign. Additionally, one sign is sufficient at each vehicular entrance to a certain type of private industrial facility.

In general, the responsibility for the placement and maintenance of an ENS sign at a crossing is the responsibility of the maintaining railroad. However, it should also be noted that, where there are multiple railroads that maintain the same crossing, the rule requires that those railroads identify one to be responsible for the placement and maintenance of the sign(s) at the crossing.

4. Compliance Dates

In this rule, FRA extends several of the compliance dates beyond the dates proposed in the NPRM, to provide railroads a longer period of time to phase in implementation of an ENS. FRA made several significant changes from the proposed rule, which will be discussed later in more detail. For example, a railroad subject to the rule that has no type of ENS currently in place now has until September 1, 2015, to establish such a system. Additionally, for a railroad that currently has ENS signs in place at its crossings, the requirements for replacing the sign are as follows: If the sign is 60 square inches or greater with lettering that measures at least ¾ inch high, the railroad is permitted to retain the sign for the duration of the sign's useful life; if the sign is 60 square inches or greater, but the lettering measures less than ¾ inch high, the railroad must replace the sign by September 1, 2017; and if the sign is smaller than 60 square inches, regardless of the size of the lettering, the railroad must replace the sign by September 1, 2015.

C. Expected Costs and Benefits of the Rule

FRA has estimated the costs of this rule, evaluated over a 15-year period and using a discount rate of 7 percent. For the 15-year period analyzed, the estimated quantified cost that will be imposed on railroads totals $15.6 million, with a present value (PV, 7 percent) of $10.1 million. This rule is expected to improve railroad safety by ensuring that all crossings have adequate signage displaying a telephone number for reporting unsafe conditions at the crossing to the railroad. The primary benefits include heightened safety at crossings from an earlier awareness of potential track obstructions, crossing signal malfunctions, and other safety issues, which FRA anticipates will reduce related crossing accidents and the associated fatalities, injuries, and damages. Thus, in general, implementation of this rule should decrease railroad accidents at crossings as well as other railroad accidents, and associated casualties and damages. Based on FRA's analysis, the agency has found that the expected accident-reduction benefits will exceed the total cost of this rule. Over a 15-year period, this analysis concludes that $57.8 million in cost savings will accrue through casualty prevention and damage avoidance. The discounted value of this casualty prevention and damage avoidance is $31.7 million (PV, 7 percent).

The table below presents the estimated costs associated with this rule.

15-YEAR ESTIMATED COSTS OF THE FINAL RULE

Section 234.303—Toll-Free Service	$989,870
Section 234.306—Multiple Dispatching or Maintaining Railroads	9,800
Section 234.307—Third-Party Service	2,881
Section 234.309—Signs (Materials)	2,863,448
Section 234.309—Signs (Installation)	2,007,754
Section 234.311—Post (Materials)	238,621

15-YEAR ESTIMATED COSTS OF THE FINAL RULE—Continued

Section 234.311—Post (Installation)	200,775
Section 234.313—Initial Recordkeeping	299,790
Section 234.313—Remedial Recordkeeping	3,490,728
Total	10,103,668

Dollars are discounted at a present value rate of 7 percent. Note that numbers may not add due to rounding.

The table below presents the estimated benefits associated with this rule.

15-YEAR ESTIMATED BENEFITS OF THE FINAL RULE

Fatalities (Prevented)	$21,519,783
Injuries (Prevented)	8,587,839
Highway Vehicle Damage (Avoided)	651,130
Railroad Equipment Damage (Avoided)	327,922
Track/Structure Damage (Avoided)	203,988
Other Benefits	416,974
Total	$31,707,636

Dollars are discounted at a present value rate of 7 percent. Note that numbers may not add due to rounding.

II. Statutory Background

This final rule is intended specifically to implement Sec. 205 of the RSIA, Public Law 110–432, Division A, which was enacted October 16, 2008, and generally to increase safety at highway-rail and pathway grade crossings. *See* 49 U.S.C. 20152, Notification of grade crossing problems, and definitions in revised 49 CFR 234.5 and new 49 CFR 234.301. Sec. 205 of the RSIA mandates that the Secretary of Transportation (Secretary) require certain railroad carriers (railroads) to take a series of specified actions related to setting up and using systems by which the public is able to notify the railroad by toll-free telephone number of safety problems at its highway-rail and pathway grade crossings. Such systems are commonly known as Emergency Notification Systems (ENS) or ENS programs. This rule is also being issued under the authority of a separate statutory provision, 49 U.S.C. 20103, which gives the Secretary very broad authority to prescribe rail safety regulations and issue rail safety orders pursuant to notice-and-comment procedures. The Secretary has delegated the responsibility to carry out both Sec. 205 of the RSIA and 49 U.S.C. 20103 to the Administrator of FRA. 49 CFR 1.49(m), (oo). Essentially, Sec. 205 of the RSIA imposes a mandate requiring FRA as the Secretary's delegate to prescribe regulations or orders imposing the requirements specified in that section; this final rule implements that statutory mandate.

In particular, under Sec. 205 of the RSIA, FRA is to require each railroad to ''establish and maintain a toll-free telephone service for rights-of-way over which it dispatches trains'' through ''the grade crossing of railroad tracks on those rights-of-way and public or private roads,'' ''to directly receive calls reporting'' any of three types of unsafe conditions at the grade crossing or other safety-related information involving such a grade crossing. Under that section, the three types of reportable unsafe conditions are as follows: (1) Malfunctions of warning signals, crossing gates, and other devices intended to promote safety at the highway-rail grade crossing; (2) disabled vehicles blocking railroad tracks at such grade crossings; and (3) obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to such a grade crossing. To the extent that the requirements of the final rule exceed the requirements specified by the RSIA, FRA relies primarily upon its general safety rulemaking authority under 49 U.S.C. 20103.

In addition to specifying the requirement that the Secretary must impose on dispatching railroads to establish and maintain telephonic notification systems, the RSIA includes a series of additional specifications to be reflected in FRA's regulation. When a railroad receives through the ENS a report of a malfunction of a warning signal, crossing gate, and/or other device intended to promote safety at a grade crossing or a report of a disabled vehicle blocking a railroad track at a grade crossing through which the railroad dispatches a train, the dispatching railroad must promptly contact trains operating near the grade crossing to warn them of the malfunctioning device or disabled vehicle. After contacting the trains, the dispatching railroad must contact appropriate public safety officials having jurisdiction over the grade crossing to provide them with the information necessary for them to direct traffic, assist in the removal of the disabled vehicle, or carry out other activities. When a railroad receives a report through the ENS of either an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to a grade crossing through which it dispatches a train or a report of another unsafe condition involving such a grade crossing, the railroad must timely investigate the report, remove the obstruction if lawful and feasible to do so, or correct the unsafe condition if lawful and feasible to do so, or, if that railroad does not have maintenance responsibility for the crossing, ask the maintaining railroad to do so as required by the rule.

Further, under the RSIA, FRA must require that the owner of the track at a grade crossing ''ensure the placement * * * of appropriately located signs'' bearing, at a minimum, ''a toll-free telephone number to be used for placing calls'' to report unsafe conditions at the crossing to the railroad that dispatches trains on that right-of-way through the crossing, ''an explanation of the purpose of that toll-free telephone number,'' and the ''grade crossing number assigned for that crossing by the'' U.S. DOT National Crossing Inventory (Crossing Inventory).

III. History of Accidents Relevant to This Rulemaking

There are approximately 211,000 public and private at-grade highway-rail and pathway crossings (highway-rail and pathway grade crossings) in the United States. In other words, the country has approximately 211,000 locations where a collision can occur between a train and a car, truck, or other motor vehicle, or a pedestrian at any one time. Grade crossing collisions are among the most challenging areas in FRA's efforts to reduce deaths and injuries along the Nation's railroads. In fact, since 1997, grade crossing collisions have caused more railroad-related fatalities per year than any other single factor except for trespassing on railroad property. During the 11-year period from 1999–2009, 2,306 collisions occurred at highway-rail and pathway grade crossings where a vehicle was stalled or sight obstructions were reported to FRA. *See* accident reporting regulations at 49 CFR part 225 and 49 CFR 234.7.

A train striking a pedestrian can result in serious injury or death. Further, a collision between a train and a vehicle of any size can be catastrophic. Serious injuries or deaths are far more likely to occur with a collision between a train and a vehicle than with a collision between two vehicles. While significant improvements in grade crossing safety have been achieved over the last two decades, grade crossing collisions still pose a significant public safety threat, and one that can spiral beyond the immediate impact of the vehicle and train. The derailment of a freight train as a result of a collision at the grade

crossing can have a disastrous effect on the train crew or even on an entire community, especially if the derailment results in a release of hazardous material that necessitates the evacuation of a neighborhood or the community. Moreover, if a passenger train derails as a result of a collision, the risk of injuries extends beyond the vehicle occupants and train crew to the passengers of the train. An example of such an accident occurred in 1999 in Bourbonnais, Illinois, when a National Railroad Passenger Corporation (Amtrak) passenger train struck a truck loaded with steel at a highway-rail grade crossing. Almost the entire train derailed, resulting in 11 deaths and 131 injuries to the passengers and crew of the train.

Other vehicles and pedestrians in the vicinity of a highway-rail or pathway grade crossing collision can also be at grave risk. This was the scenario in 1993 when an Amtrak passenger train collided with a gasoline tanker truck at a highway-rail grade crossing in Ft. Lauderdale, Florida. The truck driver was attempting to cross through a grade crossing where traffic was congested. The tanker truck was punctured when it was struck by the Amtrak train; a fire erupted and engulfed the truck and nine other vehicles near the crossing. The fire killed the driver of the truck and five occupants of three stopped vehicles near the grade crossing.

There are ancillary benefits associated with an ENS beyond its primary purpose of facilitating the telephonic reporting of unsafe conditions at highway-rail or pathway grade crossings and remedying those unsafe conditions. Railroads with an ENS also have received calls from the public reporting unsafe conditions in the general vicinity of the crossing, but not immediately at the crossing. Although not within the scope of this rule, responsive action by the railroads to such reports of other types of unsafe conditions often accrue significant benefits to the railroad and surrounding community.

The National Transportation Safety Board (NTSB) issued a report in March 2012 of a derailment on the Canadian National Railway Company (CN) that illustrates the potential benefit of having an ENS. The accident occurred in Cherry Valley, Illinois in 2009. The derailment, which resulted in a fatality, several injuries, and the evacuation of 600 residents, was caused by a washout of track near a highway-rail grade crossing, but not at the crossing. Before the derailment occurred, several individuals observed high water conditions affecting the track. One individual was familiar with the practice of railroads posting emergency telephone numbers at grade crossings and attempted to locate such a sign. There was no sign posted at the crossing. Several calls were placed to the local 911[1] system to report the washout and warn of the potential of a train derailment. The first call was received by the 911 center 56 minutes before a train approached, but local police only first learned of the situation approximately 20 minutes after that first call was made to 911. Additionally, several critical minutes were lost as the local police attempted to identify the railroad that owned the track. The NTSB concluded that ''[h]ad the emergency contact information been available, the citizen [*i.e.,* the individual who was unable to locate the railroad contact information at the Mulford Road crossing] would likely have called the CN instead of 911, or both. Even though the 911 center was able to identify the crossing, it was not until 41 minutes after the initial 911 call that the CN Police Emergency Call Center in Montreal was notified of the track washout.''

By the time the information was relayed to the proper railroad officials, the train derailed, and several of the cars, carrying flammable liquids, erupted in flames. As a result, several motor vehicles that had been stopped at the crossing waiting for the train to pass were impacted by the incident. One motor vehicle passenger was fatally injured; two other passengers in the vehicle were seriously injured along with five occupants of another car. The incident also resulted in the evacuation of 600 nearby residents. The NTSB concluded ''that had the required CN grade crossing identification and emergency contact information been posted at the Mulford Road crossing, the railroad would likely have been notified of the track washout earlier, and the additional time may have been sufficient for the [rail traffic controllers] to issue instructions to stop the train and prevent the accident.'' *Derailment of CN Freight Train U70691–18 With Subsequent Hazardous Materials Release and Fire, Cherry Valley, Illinois, June 19, 2009,* Railroad Accident Report NTSB/RAR–12/01 (Washington, DC: National Transportation Safety Board, February 14, 2012), *http://www.ntsb.gov/doclib/reports/2012/RAR1201.pdf.*

[1] The current 911 system in the United States was designed to provide a universal, easy-to-remember number, 9–1–1, for people to reach police, fire or emergency medical assistance from any phone in any location, without having to look up specific phone numbers.

IV. History of Emergency Notification Systems (ENS)

A. In General

The existence of an effective system by which a member of the public is provided with a telephone number that may be used to alert the appropriate railroad promptly to an emergency situation or other unsafe condition at a specific, identified highway-rail or pathway grade crossing enables the railroad and local public safety officials to respond to the crossing hazard earlier than they would otherwise be able to do so. Therefore, the railroad is provided with more time to take steps to avert an accident at the crossing before it happens or, in any event, to mitigate its consequences. Currently, all Class I railroads have put in place some sort of means by which they can receive prompt telephonic notification from the public of any emergency or other unsafe condition at most of their highway-rail grade crossings, whereas many regional and short line railroads do not have any such kind of notification system in place. The rule requires certain railroads to implement such a communication system, which this rule also calls an Emergency Notification System or ENS, covering public and private highway-rail and pathway grade crossings.

B. Various ENS Programs in the United States

In 1983, the State of Texas established the first toll-free call-in program in the United States that enabled the public to notify a State call center by telephone of problems at the State's public highway-rail grade crossings equipped with automated warning devices. As the current Texas ENS program is organized today, after receiving such a call, the Texas call center, operated by the Texas Department of Public Safety, in turn notifies the railroad involved. The call-in system also requires that a sign be posted at the highway-rail grade crossing with the crossing's unique identifying number from the Crossing Inventory, as well as a toll-free telephone number. Texas's call center has a dedicated computer with a modified inventory database that facilitates the identification of the relevant crossing and railroad. The Center operator then calls the appropriate railroad and relays the report of the problem. At last report, the Texas system handles more than 1,200 calls per month for the State's public crossings, even though only those crossings equipped with active warning devices are equipped with the signs containing the Center's toll-free telephone number. It should be noted

that under this final rule, railroads using State programs for notification of unsafe conditions at grade crossings, such as Texas's program, may no longer comply with the regulation. However, a State would be allowed to operate as a ''third-party telephone service'' as described in the rule, as long as the program complies with all the conditions specified.

Following the successful establishment of this ENS program in Texas, and in part at the urging of FRA and the NTSB, virtually all of the Nation's major railroads have voluntarily adopted similar systems for the majority of their highway-rail and pathway grade crossings, sometimes including all grade crossings, *i.e.,* systems not limited only to public highway-rail grade crossings or only to those equipped with active warning devices. Unfortunately, more than 72,000 public and private highway-rail and pathway grade crossings belonging to the Nation's short line and regional railroads are not included. Many of these railroads do not have 24-hour operations and do not have the resources to establish such a call-in program.

The 1994 Rail-Highway Crossing Safety Action Plan Support Proposals issued by DOT recommended an automated, computer-based system to ''receive, catalogue and forward telephone calls from the concerned'' public regarding signal malfunctions and other safety-related problems at highway-rail grade crossings. *Rail-Highway Crossing Safety Action Plan Support Proposals,* 17 (Washington, DC: FRA, June 13, 1994). However, the automated system that was envisioned in 1994 was a type of automated answering and message forwarding system that relied on the caller to enter the required information. Once entered, this information would then be forwarded to the appropriate railroad. Unlike the automated answering system prescribed in this rule, the caller would not have been directed to speak to a live operator. In FRA's experience fully automated systems have proven to be unworkable, whereas staffed systems have been successful.

In 1994, Congress directed FRA to conduct pilot projects in at least two States to demonstrate the efficiency of such ''emergency notification system'' programs covering highway-rail grade crossings and to report to Congress on the results of the pilot projects. Section 301, ''Emergency Notification of Grade Crossing Problems,'' of Public Law 103–440, November 2, 1994 (108 Stat. 4626). Also, in 1996, Congress appropriated funds for the development of software and hardware to support the demonstration of a toll-free ENS to report emergencies and other safety problems at crossings.

Initially, FRA joined in a cooperative effort with the Texas Department of Emergency Management to evaluate the Texas notification system. Texas was designated one of the pilot States, and an extensive array of software, hardware, and operating improvements was developed. FRA prepared and implemented new software on an upgraded system in 1999. Based on comments and suggestions, further improvements were implemented in 2001 when the Texas call center operation was transferred to the Texas Department of Public Safety.

This 2001 version of the software was modified for use by a ''9–1–1'' center in Clinton County, Pennsylvania, with the participation of eight short line railroads. A 30-month demonstration program was initiated in November 2001. *See Project Plan: 1–800 Toll-Free Emergency Notification System for Shortline Railroad Highway-Rail Crossings in the Commonwealth of Pennsylvania* (Washington, DC: Federal Railroad Administration, September 20, 2000), *http://www.fra.dot.gov/downloads/safety/emergency_notification_system.pdf.*

In 2002, an agreement was reached with the Paducah & Louisville Railway, Inc. (PAL) to conduct an additional pilot project (the third). At the time PAL was a regional railroad with 24-hour operations and approximately 400 grade crossings. FRA modified the program software to accommodate the railroad's needs.

As a result of these pilot programs, FRA continued to modify its software for use by States and railroads. The software enables the timely reporting of emergencies, malfunctions, and other unsafe conditions at grade crossings. Call center operators can log the reported problem, access the Crossing Inventory files to look up the proper crossing number, and notify the correct railroad dispatch center and other emergency responders. FRA makes this software freely available to railroads and emergency response centers. Furthermore, FRA strongly encourages railroads and States with ENS programs to keep their crossing inventory information current, as required by Sec. 204 of the RSIA (codified at 49 U.S.C. 20160 and 21301(a), with respect to railroads, and 23 U.S.C. 130, with respect to States). A key component of an effective ENS is to be able to correctly and quickly identify the crossing number upon receiving a report of an unsafe condition at a crossing.

C. FRA's 2006 Report to Congress

In May 2006, as mandated by Congress in Section 301, ''Emergency Notification of Grade Crossing Problems,'' of Public Law 103–440, FRA published a report to Congress outlining the development of ENS programs (Report). *Pilot Programs for Emergency Notification Systems at Highway-Rail Grade Crossings,* (Washington, DC: Federal Railroad Administration, May 2006), *http://www.fra.dot.gov/downloads/safety/1_800_report.pdf.* The Report covered, among other things, the Texas ENS program, the Pennsylvania ENS program, Congressional action, NTSB recommendations, and FRA actions. Based on the findings of the Report, FRA made certain recommendations, to Congress. These recommendations were as follows: (1) Class I railroads should continue to implement, augment, and review the ENS programs that they have initiated; (2) smaller railroads, including commuter railroads, should work cooperatively through The American Short Line and Regional Railroad Association (ASLRRA), or another suitable organization or organizations, to establish ENS programs serving member railroads; (3) signs installed or replaced at highway-rail grade crossings should be displayed prominently to crossing users (*e.g.,* mounted on signal masts where practicable) and should conform to the Federal Highway Administration's (FHWA) Manual on Uniform Traffic Control Devices (MUTCD) guidance; and (4) any program that does not currently include passive highway-rail grade crossings be expanded to include, at minimum, all such public crossings where it is practicable to do so.

The Report concluded that the pilot ENS programs in both Texas and Pennsylvania afforded the general public a quick and easy means of alerting appropriate railroad officials to safety-related problems. Additionally, the Report concluded that the Texas ENS likely resulted in the prevention of numerous accidents and injuries, and Pennsylvania's ENS, albeit on a smaller scale than Texas's, demonstrated that it is possible to create emergency call systems through the development of agreements with multiple railroads. Finally, the Report emphasized that the Pennsylvania ENS also showed the value of including all highway-rail grade crossings, not just those with train-activated warning devices.

V. Section-by-Section Analysis

Section 234.1 Scope

FRA is expanding this part to include new subpart E, Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings. For this reason, FRA is amending the description of the scope of the part, § 234.1, by converting it into two paragraphs, dividing the first paragraph into four enumerated subparagraphs, and inserting in new § 234.1(a)(4) the following reference to new subpart E: ''Requirements that certain railroads establish systems for receiving toll-free telephone calls reporting various unsafe conditions at highway-rail grade crossings and at pathway grade crossings, and for taking certain actions in response to those calls.'' Further, for improved readability of the section, FRA is designating the last sentence of the current § 234.1 as paragraph (b) of revised § 234.1.

Section 234.3 Application and Responsibility for Compliance

This section is being adopted as proposed in the NPRM, with the exception of minor typographical revisions. FRA received public comment on this section from three commenters—an individual, the California Public Utilities Commission (CPUC), and the ASLRRA.

The individual commenter noted that even though the NPRM clearly stated that proposed part 234, subpart E, requires a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing to establish and maintain an ENS,[2] some small railroads may be confused by the language in the rule. The commenter claimed that some small railroads may incorrectly interpret the meaning of ''dispatch'' in a narrow sense, such as only a railroad that employs an individual in a ''dispatcher'' position as actually ''dispatching'' trains. In the final rule, FRA's definitions in § 234.301 of ''dispatching railroad,'' ''dispatches a train or dispatches trains,'' and ''maintaining railroad,'' and the associated duties and obligations for these railroads described in the rule clearly explain which railroads are subject to subpart E. Despite the commenter's concerns, railroads have the burden of complying with FRA regulations, requiring them to carefully read the final rule in its entirety and thoroughly understand their duties and obligations as stated in the rule. For this reason, FRA sees no need, as the commenter recommended, to contact small railroads to inform them of their responsibilities pursuant to this final rule.

The CPUC recommended that all public highway-rail grade crossings be covered by this rule, to include those through which a ''plant railroad'' dispatches trains. In § 234.3(a)(1), a ''plant railroad'' is excepted from part 234. CPUC expressed concern that a ''plant railroad,'' as defined in § 234.5, might dispatch trains through a public highway-rail grade crossing, yet still not be required by subpart E to establish and maintain an ENS. CPUC may be correct that a small number of plant railroads may dispatch trains through public highway-rail grade crossings and not be required to establish an ENS because a ''plant railroad'' is excepted from part 234. However, FRA historically has not regulated plant railroads. By their very nature, most plant railroads operate at very low speed, which allows them to avoid collisions. Furthermore, the low speed would reduce the severity of any collision that does occur. Additionally, since the public crossing is actually within the confines of the plant, the owner of the crossing would be very evident to any user of the public crossing. Consequently, the user of the crossing is better positioned to report signal malfunctions, poor sight distance, or other unsafe conditions to the plant. Finally, plant railroads would be free to implement their own ENS if they choose to do so.

ASLRRA recommended that the rule not apply to Class II and Class III railroads that operate at restricted speed for their primary operating practice, in order to relieve those railroads of the rule's financial burden. FRA is not in a position to make such an exception since the RSIA statutorily mandates that each railroad ''establish and maintain a toll-free telephone service for rights-of-way over which it dispatches trains.'' However, FRA has carefully considered the various monitoring and sign placement costs that the rule imposes on small railroads and has made several changes with respect to these costs in the final rule to lessen the financial burden. These changes are described in more detail in the section-by-section analysis of §§ 234.303 and 234.311.

Section 234.5 Definitions

FRA received no public comments related specifically to the definitions in this section. This section is being adopted as proposed in the NPRM, with the exception of minor typographical and stylistic changes, and a new definition. First, FRA is adding clarification to the defined term ''Credible report of warning system malfunction,'' by also calling it a ''credible report of warning system malfunction at a highway-rail grade crossing.'' Second, this section now defines the term ''Warning system malfunction'' or ''warning system malfunction at a highway-rail grade crossing.'' ''Warning system malfunction'' or ''warning system malfunction at a highway-rail grade crossing'' means an activation failure, a partial activation, or a false activation of a highway-rail grade crossing warning system.

Subpart E—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

As proposed in the NPRM, FRA is amending part 234 by adding new subpart E, which includes §§ 234.301–234.317. In the final rule, FRA is revising the title of the subpart to read—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings.

Section 234.301 Definitions

Unless otherwise stated here, FRA is adopting the definitions for new subpart E as proposed in the NPRM. FRA received public comments regarding several of the proposed definitions in this section. The organization Crossing Call recommended that the proposed definition in the NPRM of ''Automated answering service'' be amended to permit incoming calls to be answered by an initial recorded announcement so long as thereafter the call is handled by a live operator. Many of the Class I railroads already have similar emergency notification systems in place that respond to reports of emergencies and other unsafe conditions at crossings in a timely manner and effectively route callers to an automated menu of options before reaching a live operator. FRA agrees with this recommendation, and is changing the term ''Automated answering service'' to ''Automated answering system,'' and revising the definition, accordingly, to mean a type of answering system that directs a telephone caller to a single menu of options, where the caller has the choice to select one of the available options to report an unsafe condition at a highway-rail or pathway grade crossing; and immediately after selecting one of the

[2] *E.g.,* the proposed rule, defined ''[d]ispatching railroad'' to mean ''a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing.'' 76 FR 11992, 12009 (March 4, 2011).

available menu options, the caller must be transferred to a live telephone operator.

Separately, in this final rule, FRA is adding the term ''Answering machine,'' which means either a device or a voicemail system that allows a telephone caller to leave a recorded message to report an unsafe condition at a highway-rail or pathway grade crossing, and the railroad is able to retrieve the recorded message either remotely or on-site. In this final rule, § 234.303(b) permits the use of an answering machine by certain dispatching railroads under certain circumstances to receive reports of unsafe conditions at crossings through which they dispatch trains. Additionally, § 234.305(h)(2) permits a maintaining railroad under certain circumstances to use an answering machine to receive from a dispatching railroad reports of unsafe conditions at crossings that it maintains.

In the NPRM, FRA solicited comments with respect to setting a maximum amount of time a caller must wait before the call is answered by the railroad. FRA received responses from a handful of industry associations, two State agencies, and individuals. Advocates for a maximum wait time included the Brotherhood of Railroad Signalmen (BRS), the CPUC, the Illinois Commerce Commission (ILCC), and the American Association for Justice (AAJ), in addition to a few individuals. These organizations and individuals recommended that the maximum wait time experienced by a caller be between one and two minutes. The AAJ also suggested that the railroads have an automated system to inform a caller of how long the wait time will be to speak to a live operator. However, the Angels on Track Foundation commented that public calls reporting unsafe conditions at grade crossings should receive immediate attention and that a caller should not experience any waiting time.

Separately, at the public hearing held by FRA on September 29, 2011, FRA asked the Association of American Railroads (AAR) to consider a standard for the time that it takes for a live operator to answer a call concerning a problem at a crossing. AAR submitted supplemental comments that address this issue. AAR argued that it is impossible to establish a meaningful performance standard for the time that it takes to contact a live operator through toll-free numbers posted at crossings. Furthermore, AAR stated that calls to railroad telephone systems are typically answered ''expeditiously.'' AAR also stated that, from the time a caller selects a telephone menu option for ''emergency'' or ''malfunctioning signal device,'' on average it is no more than one minute before a live person answers. Crossing Call suggested that if FRA promulgated standards for answering calls, those standards should conform to the metrics tracked by answering services (*e.g.,* percent of calls answered within a certain time period).

FRA recognizes that the more promptly a railroad routes a caller to a live operator, the sooner the railroad can avert a potential accident or remedy a problem at a crossing. FRA encourages all railroads to promptly route grade crossing emergency phone calls to a live operator; but, at this time, FRA assesses that there is little additional safety benefit to be derived from imposing a maximum call wait time in light of the final rule's requirements in § 234.303.

There were two commenters who took issue with the use of the term ''dispatching railroad.'' The NPRM proposed to define the term to mean, ''a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing.'' The Everett Railroad Company recommended that FRA apply a narrow meaning to the term so as to make this final rule applicable only to rail operations that employ a dispatcher and have controlled trackage. FRA disagrees with this recommendation as contrary to the statutory mandate for the rulemaking. Section 205 of the RSIA states, in part, that

> the Secretary of Transportation shall require each railroad carrier to—(1) establish and maintain a toll-free telephone service for rights of way over which it dispatches trains, to directly receive calls reporting—(A) malfunctions of * * * devices to promote safety at the grade crossing of railroad tracks on those rights-of-way and public or private roads; (B) disabled vehicles blocking railroad tracks at such grade crossings; (c) obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach; or (d) other safety information involving such grade crossings.

Section 205 of the RSIA does not define the word ''dispatches'' nor does it limit the scope of this rule only to those railroads that have a position of a dispatcher or have controlled trackage. So in developing the final rule, FRA considered the plain meaning of the word and the definition of ''dispatches'' in the final rule is consistent with this plain meaning. The other commenter noted that smaller railroads may be confused by the language in § 234.305(a) of the NPRM, and may interpret the language in the narrowest sense, meaning that only railroads that ''dispatch'' trains using a dispatcher would be considered a ''dispatching railroad,'' and required to comply with Part 234. The final rule also defines ''dispatching railroad'' to mean, ''a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing.'' The definition makes clear that this rule applies to both railroads that dispatch in the traditional sense, *or* by other means control train movement through highway-rail or pathway grade crossings. Furthermore, to clarify the meaning of the use of the verb ''to dispatch,'' in the final rule, FRA is adding the definition of the phrase *''Dispatches a train''* or *''dispatches trains''* to mean dispatches or otherwise provides the authority for the movement of the train or trains through a highway-rail or pathway grade crossing.

To properly receive notification of unsafe conditions at grade crossings, a railroad or group of railroads is required to implement a system that consists of multiple components. To refer to the entire set of these various components, the term ''Emergency Notification System'' or its abbreviation (''ENS'') is used. In the final rule, FRA adopted the definition of ''Emergency Notification System'' as proposed in the NPRM, with the exception of minor typographical and stylistic changes. As explained previously in the NPRM, although the word ''emergency'' is part of the term ''Emergency Notification System,'' FRA does not intend to imply that all reportable unsafe conditions are emergencies, *i.e.,* conditions that create an imminent hazard of death or injury to an individual or damage to property. In other words, some reportable unsafe conditions are not emergencies. The term ''Emergency Notification System'' is used in part because of its use in the 1994 legislation and its use colloquially by persons managing or working with the already existing ENS programs.

In the final rule, FRA is adding the term ''farm grade crossing'' to explain that farm grade crossings are a subset of highway-rail grade crossings that are on private roadways and that are used for the movement of farm motor vehicles, farm machinery, or livestock in connection with agricultural pursuits, forestry, or other land-productive purposes. In consideration of public comments on the number of signs that would be required at crossings, the final rule in § 234.311 permits farm grade crossings to have just one ENS sign. This revision is discussed more thoroughly in the section-by-section analysis of § 234.311.

As mentioned previously in the NPRM, the railroad that dispatches a train through a highway-rail or pathway grade crossing and the railroad that maintains the crossing may not necessarily be the same entity. To address this scenario, FRA proposed a definition for ''maintaining railroad.'' In response to public comments, FRA is revising the definition of ''Maintaining railroad'' to clarify the responsibilities of a maintaining railroad and to account not only for an owner of the track, but also for a lessee of the track. ''Maintaining railroad'' now means the entity (*e.g.,* track owner or lessee) that is responsible for maintenance of the highway-rail or pathway grade crossing warning device or other aspects of safety maintenance at the crossing. If the maintenance responsibility is handled by a contractor, such as maintaining a warning system or track structure at the highway-rail or pathway grade crossing, then the contractor is considered the ''maintaining railroad'' for the purposes of this subpart.

The Kansas City Southern Railway Company (KCS) found the proposed definition of ''Pathway grade crossing'' to be unclear and recommended that the phrase ''explicitly authorized'' be further explained to ensure that FRA's enforcement of the rule is consistent. KCS suggested that for a public authority to ''explicitly authorize'' a pathway grade crossing that public entity needs to have taken some affirmative act that is memorialized in its records. Furthermore, KCS stated that for a railroad to have ''explicitly authorized'' a pathway grade crossing, there should at a minimum be a written agreement between the railroad and some other entity allowing for public use of a pathway across the railroad's tracks. KCS argued that ''continued use'' alone is insufficient to establish a pathway grade crossing as ''explicitly authorized.'' FRA agrees with KCS on this point. Continuous use of a pathway grade crossing would constitute only one of several elements of either an easement by prescription or by implication. By their very nature, neither prescriptive nor implied easements are explicitly authorized. In the NPRM, FRA's definition of ''Pathway grade crossing'' was taken from Section 2 of the RSIA, which defines ''crossing,'' as used in the RSIA, as a location, other than a location where one or more railroad tracks cross one or more railroad tracks at-grade, where—

(B) a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of nonvehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks either at grade or grade-separated.

122 Stat. 4848, 4849–50.

After careful consideration of the comment by KCS, FRA decided not to revise the proposed definition of ''pathway grade crossing.'' There are a number of ways that a pathway could be ''explicitly authorized,'' to include but not limited to, by easement stated in a deed, will, or other written instrument, by public ordinance, or by written agreement with a railroad or a public authority. In other words, there must be a clear understanding between the interested parties that the existence of the pathway is authorized.

In the final rule, FRA is adding the term ''Public report of warning system malfunction,'' or ''Public report of warning system malfunction at a highway-rail grade crossing,'' to distinguish between the two types of reports that may be received by a dispatching railroad of a warning system malfunction at a highway-rail grade crossing. The first type of report, a ''public report of warning system malfunction,'' originates from a member of the general public, that is, not a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. In contrast, a ''credible report of warning system malfunction'' is supplied by a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. The receipt of a credible report of warning system malfunction triggers the duty to comply with subpart C. Subpart C does not apply to public reports of warning system malfunction.

In the final rule, FRA is also adding the term ''third-party telephone service,'' to describe the use of a third-party service by a dispatching or maintaining railroad, pursuant to § 234.307, to receive telephonic reports of unsafe conditions at highway-rail and pathway grade crossings. This term is described in more detail in the section-by-section analysis for § 234.307.

FRA is also adding the term ''warning system failure at a pathway grade crossing'' to mean a failure of an active pathway grade crossing warning system to perform as intended. The term would include, but not be limited to, such problems as the failure of the device to activate as a train approaches the pathway crossing, a false activation of the device when no train is approaching the pathway crossing, or a burnt out light on the device. This definition is being added to explain the term, which appears in § 234.305, Remedial actions in response to reports of unsafe conditions at highway-rail and pathway grade crossings. Note that a ''warning system failure at a pathway grade crossing'' does not trigger the remedial action requirements of subpart C. The term ''warning system failure at a pathway grade crossing'' is being added to differentiate it from the terms ''warning system malfunction'' and ''warning system malfunction at a highway-rail grade crossing,'' which describe the various activation failures that may occur at a highway-rail grade crossing and that if the subject of a credible report of warning system malfunction at a highway-rail grade crossing do trigger the remedial action requirements of subpart C.

Section 234.303 Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

Section 234.303(a) requires each railroad that dispatches a train, or otherwise provides the authority for the movement of a train, through a highway-rail or pathway grade crossing, to set up a system to directly and promptly receive telephonic notification of certain unsafe conditions at the crossing. In particular, § 234.303(a) requires these dispatching railroads to establish and maintain a toll-free telephone service by which the railroad can directly receive calls reporting any of the unsafe conditions listed in paragraph (c) (with respect to highway-rail grade crossings) and paragraph (d) (with respect to pathway grade crossings).

Further, § 234.303(a) specifically requires that the railroad either have a live person answer the calls directly and promptly, or else use an automated answering system or a third-party telephone service for answering the calls, except as provided in paragraph (b).

One of the comments expressed concern that this rule would conflict with the hours of service laws (49 U.S.C. ch. 211). FRA disagrees that this rule presents a conflict with the hours of service laws. One of the many provisions in the current hours of service laws mandates that a railroad dispatching service employee, such as an operator, train dispatcher, or any other employee who by use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements, may not remain or go

on duty for more than 9 or 12 hours in a 24-hour period, depending on the number of shifts employed at the tower, office, station, or place that the employee is on duty. (49 U.S.C. 21105). This final rule does not stipulate which employees would be assigned to receive and respond to emergency notification calls as required by subpart E. It is the railroad's responsibility to divide employees' duties in a way that would not violate the hours of service laws, and/or hire additional employees, if necessary. FRA recognizes that some of the small railroads may operate with fewer employees and would have less flexibility in scheduling staff to receive and respond to incoming calls. To that end, FRA has made several changes in the final rule to address such concerns. These changes are discussed in the relevant sections that follow.

Several of the comments that FRA received noted that either local law enforcement or 911 systems are capable of handling emergency calls for unsafe conditions at grade crossings. FRA disagrees. A system in which a telephone call gets routed directly to the dispatching railroad is more efficient than one that relies on local law enforcement agencies or 911 systems. While some local law enforcement agencies may be familiar with the railroad's contact information in the event of an emergency, FRA believes that many local law enforcement agencies and 911 systems lack the knowledge or information to properly notify the railroad in these kinds of situations. For example, some local law enforcement agencies and 911 systems may incorrectly contact the wrong railroad or identify the crossing by its street name rather than the Crossing Inventory number. Furthermore, some local law enforcement agencies may have neither the capacity nor the capabilities to promptly route this information to the dispatching railroad. It is imperative for improved crossing safety that the dispatching railroad receives precise information so that it can act quickly to take the steps necessary to attempt to prevent a collision or other crossing incident and any resulting casualties and, in any event, to mitigate their severity.

A dispatching railroad must be able to directly receive calls through the toll-free telephone service, unless the railroad is permitted to use a non-toll-free number as provided in paragraph (e) of this section. ''Directly'' does not necessarily mean that the railroad must be the first entity that receives the telephone call when the toll-free service is used. In the NPRM, FRA proposed that only one entity may exist between the caller and the railroad. In the final rule, ''directly'' does mean that only one entity—a third-party telephone service—may be placed between the caller reporting the unsafe condition(s) at the grade crossing and the dispatching railroad. The rationale for the use of a third-party telephone service is addressed further in the discussion of § 234.307. Regardless if an additional entity is used, the dispatching railroad ultimately remains responsible for setting up and using a system by which it can receive notification of unsafe conditions at a grade crossing and take the appropriate action in response to such notification. This responsibility is placed on the dispatching railroad because it is in the best position to immediately contact and warn the affected train crew(s) of the reported unsafe condition(s) prior to each train's arrival at the crossing to which the report pertains.

One comment noted that placing signs at private highway-rail grade crossings (*i.e.,* a highway-rail grade crossing on a private roadway) and pathway grade crossings would not result in a benefit to the public. FRA believes that providing a mechanism to report an unsafe condition is vital, regardless of the type of crossing. Incidents such as a downed tree, or a recreational vehicle hung up on the crossing can and do happen at all types of highway-rail and pathway grade crossings, both public and private. Furthermore, as FRA stated in the NPRM, the frequency with which a highway-rail or pathway grade crossing is used does not determine whether it is included in the system established pursuant to § 234.303(a). FRA believes that it is important to provide an immediate means to communicate a notice of an unsafe condition even at such grade crossings traversed infrequently. Imagine, for example, the driver of a logging truck stuck at a seldom-used private highway-rail grade crossing in the Rocky Mountains with no knowledge of what actions to take or whom to contact. FRA agrees that some private highway-rail grade crossings, such as farm grade crossings, have characteristics that lend themselves to a modification of the requirement to have a sign on each approach to the crossing. Farm grade crossings are discussed in more detail in the analysis of § 234.311.

In the final rule, FRA is creating a new paragraph (b) in § 234.303 to provide exceptions to § 234.303(a) that allow certain railroads under certain conditions to use an answering machine, as defined in § 234.301, to receive reports of unsafe conditions at highway-rail and pathway grade crossings through which they dispatch trains. The exceptions in § 234.303(b) reduce the economic burden placed on smaller railroads, allowing many of these railroads to use an existing phone line to receive ENS reports and, thereby avoiding any additional expense for a toll-free service.

Paragraph (b)(1) permits a railroad that dispatches trains each of which is authorized to travel through a highway-rail or pathway grade crossing at speeds not greater than 20 miles per hour (mph) to use an answering machine to receive calls regarding unsafe conditions at the crossing. If the railroad uses an answering machine under these circumstances, the railroad must retrieve its messages immediately prior to the start of its operations for the day to ensure that a report of an unsafe condition does not come in after the answering machine has been checked, but before the first train of the day departs. FRA's rationale for this exception is that at speeds of 20 mph or less the train engineer would have a greater ability to stop the train in advance of a crossing that has an unsafe condition, and thereby have a greater opportunity to avert an accident at the crossing, than would a train traveling at higher speeds.

Paragraph (b)(2) permits a railroad that dispatches one or more trains through a highway-rail or pathway grade crossing on a seasonal or intermittent basis (*e.g.,* a tourist, biweekly, or non-24-hour service), and any of the trains is authorized to travel through the crossing at speeds greater than 20mph to use an answering machine, but only during hours of non-operation. During periods of non-operation, the railroad is required to retrieve its messages once daily. However, the railroad must retrieve its messages immediately prior to the start of its operations for the day, to ensure that a report of an unsafe condition does not come in after the answering machine has been checked, but before the first train of the day departs. During hours of operation, the railroad must comply with § 234.303(a) by either having a live person answer calls directly and promptly, using an automated answering system, or employing a third-party telephone service to receive reports of unsafe conditions at crossings through which it dispatches such trains.

The four types of unsafe conditions at highway-rail grade crossings that are to be reportable through the ENS are set forth in § 234.303(c). In the final rule, FRA is adopting this paragraph as proposed in the NPRM, with the exception of typographical and stylistic

changes. The first type of reportable unsafe condition at a highway-rail grade crossing is a warning system malfunction at the crossing.

The second type of reportable unsafe condition at a highway-rail grade crossing is a disabled vehicle or other obstruction blocking a railroad track at the crossing. As mentioned in Section II of this preamble, a significant number of collisions between a train and a vehicle have occurred at highway-rail grade crossings due to a vehicle blocking the railroad tracks at the crossing, with many of these collisions resulting in injuries and fatalities. While FRA acknowledges that not all of these incidents may have been prevented by the presence of an ENS, such a system increases the likelihood that the dispatching railroad will learn of the disabled vehicle in time to alert the train crew(s) prior to each train's arrival at the crossing, thus potentially averting a collision and any resulting casualties. Other obstructions, aside from a disabled vehicle, also may block the tracks at a crossing and create an unsafe condition that needs to be reported to the railroad. For instance, as a result of a severe storm, a large tree may fall onto the tracks at a highway-rail grade crossing, and if a railroad is not alerted about this unsafe condition, a train that is authorized to operate through that crossing could collide with the downed tree, thus potentially causing a derailment. Under Sec. 205 of the RSIA, the second category of unsafe conditions is a disabled vehicle blocking the tracks at a grade crossing. To the extent that FRA's final rule requires more than Sec. 205 of the RSIA would have it require, the agency relies on its general safety rulemaking authority.

The third type of a reportable unsafe condition at a highway-rail crossing is an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the crossing. FRA's Track Safety Standards provide that ''vegetation on railroad property which is on or immediately adjacent to the roadbed shall be controlled so that it does not [o]bstruct visibility of railroad signs and signals [a]t highway-rail grade crossings.'' 49 CFR 213.7(b)(1) (§ 213.7(b)(1)). Section 234.303(c)(3) allows a member of the public to inform the railroad of conditions at highway-rail grade crossings that may not fall under § 213.7(b)(1), but that, in the individual's opinion, present an unsafe condition involving a sight obstruction at the crossing. In the NPRM, FRA solicited comments regarding what is a ''reasonable distance'' to determine whether an obstruction to a pedestrian or vehicle operator's view of a train's approach to a highway-rail grade crossing presents an unsafe condition at the grade crossing. Amtrak in its comments noted that the regulation does not define ''reasonable distance,'' which depends on the particular facts of the situation and makes it a very subjective standard. AAR remarked that there can be legitimate disagreements over whether an obstruction even poses an unsafe condition. The AAJ commented that no one sight distance should apply to all crossings, and thus, all reports of sight distance obstruction should be investigated. Several of the comments, including AAJ suggested using the Federal Highway Administration's Railroad-Highway Grade Crossing Handbook to determine appropriate minimum sight distances. After careful consideration, FRA is not qualifying the meaning of ''reasonable'' in this final rule. Since a crossing user is unlikely to have knowledge of this specific FRA regulation, the individual will report an unsafe condition based on their personal judgment and perspective of the situation, and the particular conditions at the crossing at the time. What actions, if any, the railroad must take in response to such reports is discussed in § 234.305.

The final type of reportable unsafe condition at a highway-rail grade crossing is described in § 234.303(c)(4) as any condition at the crossing that may be considered unsafe and is not covered by § 234.303(c)(1)–(3). This catch-all provision is intended to provide the public with the opportunity to report other types of unsafe conditions that are not covered by § 234.303(c)(1)–(3). In the NPRM, FRA explained that a downed or missing crossbuck sign illustrates the type of condition at a highway-rail grade crossing that may be deemed unsafe and, therefore, should be reported to the railroad, but does not fall into one of the three other categories. The CPUC in its comments provided a few other examples of unsafe conditions that do not fall into one of the three other categories, such as ''rough pavement or broken track paneling.'' These are merely some examples of the various conditions that may be considered unsafe under this catch-all provision.

The four types of reportable unsafe conditions at pathway grade crossings as opposed to highway-rail grade crossings are set forth in § 234.303(d). In the final rule, FRA is adopting this paragraph as proposed in the NPRM, with the exception of typographical and stylistic changes. The four types of reportable unsafe conditions at pathway grade crossings are, essentially, the same as those for highway-rail grade crossings, but, as detailed below, the four types of reportable unsafe conditions at pathway grade crossings are not described in the exact same words, and unlike the first type of report for a highway-rail grade crossing, the first type of report for a pathway grade crossing does not trigger the duty to address the report in the manner prescribed by existing subpart C.

The first type of reportable condition for a pathway grade crossing is a failure of the active warning system at the pathway grade crossing to perform as intended. Section 234.303(c)(1) does not use the term ''warning system malfunction'' to refer to a failure of an active warning system at a pathway grade crossing because, as defined in § 234.5, a ''warning system malfunction'' is an activation failure, partial activation, or false activation of the active warning system at a highway-rail grade crossing, not a pathway grade crossing. Further, ''activation failure,'' ''partial activation,'' and ''false activation'' are all defined in § 234.5 and only apply to highway-rail grade crossings. In the final rule, FRA does not establish specific standards regarding the maintenance and repair of active warning systems at pathway grade crossings. However, the final rule does require a railroad to provide the public with a means to report when the active warning system at a pathway grade crossing through which it dispatches a train is not performing as intended and is creating an unsafe condition at the crossing.

While the term ''failure of the active warning system at the pathway grade crossing to perform as intended'' as used in § 234.303(d)(1) is not specifically defined, FRA believes that the term sufficiently addresses the scenarios in which an active warning system at a pathway grade crossing malfunctions and poses a significant safety risk to a pathway grade crossing user. The term includes, but is not limited to, such problems as the failure of the device to activate as a train approaches the pathway crossing, a false activation of the device when no train is approaching the pathway crossing, or a burnt out light on the device. Although FRA solicited comments regarding the types of failures of an active warning system at a pathway grade crossing that may differ from failures of active warning systems at highway-rail grade crossings, there were no public comments received on this issue. Additionally, FRA sought comments regarding how the maintenance and repair of an active warning system at a pathway grade

crossing differ from the required maintenance and repair of an active warning system at a highway-rail grade crossing. The ILCC replied that there should be no difference in the testing, maintenance, and repair of an active warning system whether it be at a highway-rail grade crossing or a pathway grade crossing. In fact, FRA notes that pathway grade crossing warning systems typically have different designs than those of traditional grade crossing warning systems.

The second type of reportable unsafe condition at a pathway grade crossing is an obstruction blocking a railroad track at the crossing. To avoid confusion, the term ''disabled vehicle'' is purposely omitted from § 234.303(d)(2), though it is used in § 234.303(c)(2), because, as defined in § 234.301, a ''pathway grade crossing'' is, among other things, dedicated for the use of nonvehicular traffic; thus, by the definition, a vehicle should not be using a pathway grade crossing. However, to ensure that all possible scenarios in which an obstruction could be blocking the tracks at a pathway grade crossing, including certain disabled vehicles that may be using the pathway (such as all-terrain vehicles, golf carts, maintenance vehicles, or snowmobiles), § 234.303(d)(2) uses the broad term ''obstruction.''

The third type of reportable unsafe condition at a pathway grade crossing is an obstruction to the view of a pathway user for a reasonable distance in either direction of a train's approach to the crossing. See discussion above of § 234.303(c)(3).

The final type of reportable unsafe condition at a pathway grade crossing is any condition at the crossing that may be considered unsafe and is not covered by § 234.303(d)(1)–(3). See discussion above of § 234.303(c)(4).

FRA believes that there may be certain scenarios in which a caller would be discouraged from reporting an unsafe condition at a grade crossing because the use of a non-toll-free number would impose an additional cost on the caller as opposed to if a toll-free number was used. Yet, the requirement for the number to be toll-free may be overly burdensome to a short line or other small railroad. To avoid these types of situations, FRA adopts § 234.303(e) in this final rule (as proposed in the NPRM), which states that if a railroad classified by the Surface Transportation Board (STB) as a Class II or Class III rail carrier dispatches trains within an area in which the use of a non-toll-free number would incur no additional fees for the caller than if a toll-free number were used, then that railroad may use that non-toll-free number to receive calls pursuant to § 234.303(a) regarding each grade crossing in that area.

FRA adopts as paragraph (f) in this section, the text proposed as paragraph (e) of § 234.303 in the NPRM. Paragraph (f) provides that if a report of an unsafe condition at a highway-rail or pathway grade crossing was not made through the telephone service described in § 234.303(a), then subpart E does not apply to the report. Subpart E only sets forth the requirements for the establishment and use of an ENS within the meaning of subpart E, and the response to a report of an unsafe condition received through a required ENS. A report that is not received through a required ENS falls outside the scope of the requirements of subpart E and, therefore, does not trigger the duty to comply with the requirements of subpart E.

Section 234.305 Remedial Actions in Response to Reports of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

Section 234.305 addresses the actions that a railroad must take in response to an ENS-generated report of an unsafe condition at a highway-rail or pathway grade crossing. In the final rule, FRA adopts the majority of this section as proposed in the NPRM. Specific changes that were made in the final rule are explained in detail below.

In response to the NPRM, the AAR commented that the words ''promptly'' and ''immediately'' are used in an inconsistent manner throughout the proposed section with respect to the railroad's response to reports of unsafe conditions at highway-rail and pathway grade crossings. The term ''promptly'' is already used in subpart C, so in the final rule, where it was appropriate, FRA replaced ''immediately'' with ''promptly'' to correspond with subpart C.

Additionally, AAR recommended that FRA amend the language proposed in the NPRM, requiring a railroad to ''immediately contact all trains that are authorized to operate through the highway-rail grade crossing [or pathway grade crossing] and warn the trains of the reported malfunction [or failure].'' AAR suggested incorporating the phrase ''prior to the trains' arrival at the crossing,'' which is similar to language already used in subpart C, § 234.105 and § 234.107. To remain consistent with current regulations and to enhance clarity in this final rule, FRA is changing the text from that proposed in the NPRM to require in the final rule that a railroad promptly contact all trains that are authorized to operate through the highway-rail or pathway grade crossing, in an effort to notify the train crews of the reported malfunction or failure prior to each train's arrival at the crossing.

Paragraph (a) of this section is the general rule on response to ENS-generated credible reports of warning system malfunctions at highway-rail grade crossings. If a railroad receives an ENS-generated report of a warning system malfunction that is a credible report of warning system malfunction and the railroad has maintenance responsibility for the warning system at the highway-rail grade crossing to which the report pertains, the railroad is required to take the action required by subpart C. As defined in § 234.5, a ''credible report of warning system malfunction'' is ''a report that contains specific information regarding a malfunction of a highway-rail grade crossing warning system at an identified highway-rail grade crossing, supplied by a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity.'' If a report of a warning system malfunction is not provided by one of the four specific types of people listed, then the report is not a credible report of warning system malfunction within the meaning of either subpart C or subpart E, and subpart C does not require any remedial action in response to those reports. It should be noted that the term ''credible report of warning system malfunction'' only applies to highway-rail grade crossings and does not include pathway grade crossings. Thus, for these technical reasons, regardless of who reports a warning system malfunction at a pathway grade crossing, the report is not considered a ''credible report of warning system malfunction'' within the meaning of either subpart C or subpart E.

Several of the comments that FRA received in response to the NPRM indicated that FRA's use of the term ''credible report of a warning system malfunction'' may need some clarification. The term, as used in part 234, is simply a technical term. ''Credible report of warning system malfunction'' refers to reports of signal malfunctions by a specific class of public officials and railroad personnel acting in an official capacity. These regulations have been in existence for many years. The use of the word ''credible'' in that term does not go to the accuracy or truthfulness of the report; rather, the term simply denotes the type of report the receipt of which is the precondition that triggers the duty

for a railroad to perform certain actions, pursuant to subpart C. In other words, when a credible report of warning system malfunction at a highway-rail grade crossing is received from one of the four specific types of people listed, as opposed to reports received from a member of the general public, the railroad having maintenance responsibility for the warning system must promptly take the actions prescribed by subpart C. Just because a report originates from a member of the general public and, therefore, is not classified as a ''credible report of warning system malfunction'' as defined by § 234.5, does not mean that the report is any less accurate or truthful.

In consideration of the many comments received on this issue, FRA decided in the final rule to refrain from the use of the phrase ''not a credible report,'' so as not, however inadvertently, to disparage or undermine the legitimacy of reports that originate from the general public. Instead, FRA created the new, defined term, ''public report of warning system malfunction at a highway-rail grade crossing,'' which means a report that contains specific information regarding a warning system malfunction at a highway-rail grade crossing that is supplied to a railroad via the ENS by a member of the public who does not belong to one of the categories of individuals listed in the definition of ''*Credible report of warning system malfunction''* in § 234.5. In other words, *public report of warning system malfunction* means a report that contains specific information regarding a warning system malfunction at a highway-rail grade crossing that is supplied to a railroad via the ENS by someone who is not a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. The term ''public report of warning system malfunction at a highway-rail grade crossing'' only applies to warning system malfunctions that occur at highway-rail grade crossings. If a report is neither a ''credible report of warning system malfunction at a highway-rail grade crossing'' nor a ''public report of warning system malfunction at a highway-rail grade crossing,'' then it is just referred to in the final rule as a ''report'' of another type of unsafe condition, *e.g.,* ''report of warning system failure at a pathway grade crossing.''

Paragraph (a) of § 234.305 explains that if the report is a credible report of warning system malfunction, but the railroad that initially receives the report is not the railroad that has maintenance responsibility for the warning system at the highway-rail grade crossing to which the report pertains, that railroad is already responsible for contacting the trains that are authorized to operate through the highway-rail grade crossing and warn the trains of the reported malfunction under subpart C. After warning the trains, the railroad must then contact the railroad that has maintenance responsibility for the warning system at the highway-rail grade crossing, which will then be responsible for taking the appropriate remedial action under subpart C. FRA recognizes that in some instances the railroad that initially receives the report may not be the railroad that has maintenance responsibility over the warning system at that crossing. Therefore, to ensure that the responsibility to take the appropriate remedial action as required by subpart C falls on the appropriate railroad, § 234.305(a)(2) requires the railroad with maintenance responsibility to take the appropriate remedial action under subpart C, except for promptly contacting the trains operating through the crossing and the law enforcement agency with jurisdiction for the crossing; these responsibilities remain with the dispatching railroad.

Paragraph (b) of § 234.305 is the general rule on response to an ENS-generated public report of a warning system malfunction at a highway-rail grade crossing, and requires that railroads take certain specified remedial action in response to such a report. In other words, § 234.305(b) addresses ENS-generated reports of warning system malfunctions that do not fall within the amended definition of ''credible report of warning system malfunction'' in § 234.5 because the report is made by someone who is not a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. In particular, if a railroad receives such a public report of a warning system malfunction and that railroad has maintenance responsibility for the warning system at the crossing, the railroad must promptly contact all trains that are authorized to operate through the grade crossing about which the report pertains, in an effort to notify the train crews of the reported malfunction prior to each train's arrival at the crossing. The railroad must then promptly contact the law enforcement agency that has jurisdiction over the crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the grade crossing. Further, the railroad must promptly investigate the report and determine the nature of the malfunction and, if necessary, take appropriate action as required by a provision of existing 49 CFR part 234, subpart D, *i.e.,* § 234.207(a), which requires that ''[w]hen any essential component of a highway-rail grade crossing warning system fails to perform its intended function, the cause shall be determined and the faulty component adjusted, repaired, or replaced without undue delay.''

If a railroad receives a public report of a warning system malfunction and that railroad does not have maintenance responsibility for the warning system at the highway-rail grade crossing, the railroad must promptly contact the train crews of all trains that are authorized to operate through the grade crossing to which the report pertains, in an effort to notify the train crews of the reported malfunction prior to each train's arrival at the crossing. The railroad must then promptly contact the law enforcement agency that has jurisdiction over the grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the grade crossing. The railroad must then promptly contact the railroad that has maintenance responsibility for the warning system and inform that railroad of the reported malfunction. The railroad having maintenance responsibility must promptly investigate the report, determine the nature of the malfunction, and take the appropriate action as required by 49 CFR 234.207(a) if necessary.

Paragraph (c) of § 234.305 is the general rule on response to a report of a warning system failure at a pathway grade crossing. If the dispatching railroad for the pathway crossing receives a report pursuant to § 234.303(c)(1) and that railroad also has maintenance responsibility for the active warning system at the pathway grade crossing, the railroad shall promptly contact all trains that are authorized to operate through the pathway grade crossings to which the report pertains, in an effort to notify the train crews of the reported failure prior to each train's arrival at the crossing. The railroad shall then promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information to the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. Finally, the railroad shall then promptly investigate

the report, determine the nature of the reported failure, and without undue delay repair the active warning system if necessary.

If the dispatching railroad receives a report of a warning system failure at a pathway grade crossing and that dispatching railroad does not have maintenance responsibility for the warning system at the pathway grade crossing, the dispatching railroad must promptly contact all trains that are authorized to operate through the pathway grade crossing to which the report pertains, in an effort to notify the train crews of the reported failure prior to each train's arrival at the crossing. The dispatching railroad must then promptly contact the law enforcement agency that has jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The dispatching railroad must then promptly contact the railroad that has maintenance responsibility for the warning system at the pathway grade crossing and inform that railroad of the reported failure. The railroad having maintenance responsibility shall then promptly investigate the report, determine the nature of the reported failure, and without undue delay repair the warning system if necessary.

Paragraph (d) of § 234.305 is the general rule on response to a report of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing, pursuant to § 234.303(c)(3) or (d)(2), respectively. If the dispatching railroad receives a report of a disabled vehicle or obstruction blocking a railroad track at a grade crossing, and that railroad also has maintenance responsibility for the crossing, the railroad must promptly contact all trains that are authorized to operate through the grade crossing to which the report pertains, in an effort to notify the train crews of the reported disabled vehicle or obstruction prior to each train's arrival at the crossing. The railroad must then contact the law enforcement agency having jurisdiction over the grade crossing to provide that agency with the information necessary to assist in the removal of the disabled vehicle or other obstruction, or to carry out other activities to maintain safety at the crossing. In the NPRM, FRA solicited comments on whether to require the railroad that receives the report (*i.e.,* dispatching railroad) to contact the maintaining railroad if the obstruction is anything other than a disabled vehicle, stating that ''[t]he maintaining railroad would then be responsible for contacting the law enforcement agency and any other entities to assist in directing traffic (if necessary) and removing the obstruction.'' AAR commented that the obstruction could be something beyond the power of the maintaining railroad to address and that requiring the maintaining railroad to be notified in such circumstances serves no purpose. FRA disagrees. In the final rule, paragraph (d)(2) of this section requires that, if the dispatching and maintaining railroad are not the same entity, after the dispatching railroad promptly contacts the appropriate trains and law enforcement agency, it must then promptly contact the maintaining railroad to inform it of the obstruction blocking the track. FRA has determined that the quickest way to contact the law enforcement agency is to have the dispatching railroad make the contact. Because the obstruction is blocking the railroad track it has to be removed in order for train operations to be resumed, and this action is the responsibility of the maintaining railroad. Once informed of the obstruction, the maintaining railroad shall then promptly investigate the report, determine the nature of the obstruction, and without undue delay take the necessary action to have the obstruction removed.

Paragraph (e) of § 234.305 is the special rule on contacting a train that is not required to have communication equipment. Section 220.9 of FRA's regulations on railroad communications sets forth communication equipment standards for trains. 49 CFR 220.9. These standards vary according to specific criteria set forth in § 220.9. According to § 220.9(b), no communication equipment is required on a train if that train does not transport passengers or hazardous material and does not engage in joint operations or operate at a speed greater than 25 miles per hour. *See* 63 FR 47188 (Sept. 4, 1998); § 220.9(b)(1)–(4). However, in subpart E, upon receipt of a credible report of warning system malfunction at a highway-rail grade crossing, a public report of warning system malfunction at a highway-rail grade crossing, a report of warning system failure at a pathway grade crossing, or a report of disabled vehicle or other obstruction blocking a track, a railroad will be required to promptly contact all trains authorized to operate through the highway-rail or pathway grade crossing to which the report pertains, to notify the train crews of the reported unsafe condition prior to each train's arrival at the crossing. If that train is not required by § 220.9 to have any communications equipment, the railroad must contact that train by the quickest means available. Currently, railroad employees are required by 49 CFR 220.13(a) to immediately report certain emergencies by the quickest means available. To maintain consistency among FRA regulations, § 234.305(e) requires that the quickest means used to contact a train upon receipt of a report of a warning system malfunction, warning system failure, or disabled vehicle or other obstruction blocking a track at the crossing is consistent with the quickest means that an employee would use to report an emergency pursuant to § 220.13(a).

Paragraph (f) of § 234.305 is the general rule on response to a report of an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the highway-rail or pathway grade crossing (*i.e.,* visual obstruction). When the dispatching railroad receives a report of a visual obstruction and the railroad also has maintenance responsibility for the highway-rail or pathway grade crossing, the railroad shall timely investigate the report and remove the visual obstruction if it is lawful and feasible to do so. If the dispatching railroad does not have maintenance responsibility for the highway-rail or pathway grade crossing, the dispatching railroad shall promptly contact the railroad having maintenance responsibility for the highway-rail or pathway grade crossing, which shall timely investigate the report and remove the visual obstruction, if it is lawful and feasible to do so. FRA recognizes that in certain instances it may not be possible to remove a visual obstruction, such as a natural visual obstruction due to the steepness of the road or path approaching the crossing or a visual obstruction due to the curvature of the track, or it may not be lawful to do so. Therefore, § 234.305(f) imposes a duty on the maintaining railroad to remove the visual obstruction only if it is lawful and feasible to do so.

In the NPRM, FRA solicited comments on what types of visual obstructions are not feasible to remove. AAR responded that ''not all obstructions are within the control of the railroads and can be cleared.'' Other commenters expressed similar concerns, to include the ILCC, which cited topographical features, appurtenances, and structures required by local conditions, such as retaining walls, and drainage structures, as types of obstructions that may not be feasible for the railroad to correct or remove. FRA recognizes that not all obstructions to view are feasible to correct, or within the legal right of the railroad to do so.

Additionally, some commenters noted that the use of the words ''obstruction'' and ''feasible'' are vague concepts. FRA intentionally chose to use such ambiguous terms. Individuals who use a crossing may have varying degrees of perspective on what constitutes an unsafe obstruction. Furthermore, it is the responsibility of the railroad, once a report of this type is received, to investigate and make its own determination as to whether it is lawful and feasible to correct the situation. Additionally, the ILCC urged FRA to refrain from categorically excluding certain types of reports of visual obstructions from the reports that a railroad would be required to investigate. FRA agreed with the ILCC's suggestion, and the final rule does not limit the types of obstructions to view that a railroad would be required to investigate and correct, if lawful and feasible to do so.

Paragraph (g) of § 234.305 is the general rule on response to a report of other unsafe conditions at a highway-rail or pathway grade crossing. In the final rule, FRA combined proposed (g)(1) and (g)(2) into one paragraph. If the dispatching railroad receives a report related to a safety device at a highway-rail or pathway grade crossing, such as a downed crossbuck or other similar grade crossing device, or a report of any other unsafe condition, such as a pothole in the crossing, that is not covered by paragraphs (a), (b), or (c) of this section, and the railroad has maintenance responsibility for the crossing, the railroad must timely investigate the report, and if the railroad finds that the unsafe condition exists, the railroad must timely correct it if it is lawful and feasible to do so. However, if the dispatching railroad that receives the report does not also have maintenance responsibility for the crossing, upon receipt of the report, the railroad must timely inform the maintaining railroad of the reported unsafe condition. The maintaining railroad must then timely investigate the report, and if it finds that the unsafe condition exists, it must timely correct it if it is lawful and feasible to do so. In the NPRM, FRA solicited comments on what types of other unsafe conditions are not feasible to correct. AAR noted that the failure of nearby highway signals to properly coordinate timing with crossing signals may not be feasible to correct. FRA agrees that improperly programmed highway signals are beyond the ability of the railroad to correct. However, when such hazards are reported to the railroad, the railroad is encouraged to report the condition to the appropriate highway authority.

In the final rule, FRA clarifies the purpose of paragraph (h), by renaming it the general rule on a maintaining railroad's responsibilities for receiving reports of unsafe conditions at highway-rail and pathway grade crossings. If the dispatching railroad is not the same as the maintaining railroad, the maintaining railroad shall provide the dispatching railroad with sufficient contact information by which the dispatching railroad may timely contact the maintaining railroad upon receipt of a report, as required. Furthermore, to receive calls from the dispatching railroad of reports of unsafe conditions, the maintaining railroad must have either a live person answer calls directly and promptly, or use an automated answering system, unless it is permitted by the exceptions in § 234.305(h)(2) to use an answering machine or a third-party telephone service. If a maintaining railroad uses a third-party telephone service it must do so in accordance with § 234.307. The exceptions in paragraph (h)(2) of this section provide, in particular, smaller maintaining railroads a less costly option for receiving telephonic reports of unsafe conditions from dispatching railroads. These exceptions are similar to those extended to dispatching railroads in § 234.303(b).

Section 234.306 Multiple Dispatching or Maintaining Railroads With Respect to the Same Highway-Rail or Pathway Grade Crossing; Appointment of Responsible Railroad

In the NPRM, under the section-by-section analysis for §§ 234.303 and 234.311, FRA solicited comments on how to handle a highway-rail or pathway grade crossing where there are multiple railroads dispatching trains on one or more tracks through the crossing, and possibly, multiple maintaining railroads each responsible for various maintenance responsibilities at the same crossing.

FRA recognizes that there are some situations where there are multiple tracks at a grade crossing where each railroad dispatches trains over its own track. Under these circumstances, FRA believes it would create confusion if each railroad posts a sign with its own emergency telephone number. Having more than one emergency number posted at such crossings would not only be more confusing for the users of the crossing and an unnecessary cost for the multiple railroads, but also a less effective method of responding to reports of unsafe conditions.

AAR and CPUC suggested that under circumstances where there are multiple railroads that dispatch trains through the same crossing, the railroads should coordinate among themselves to delineate their individual responsibilities. AAR also stated that in such situations the railroads should ''make arrangements as to whose telephone number will be displayed on the sign.'' FRA agrees that one point of contact for the crossing is the most efficient and safest means to address a situation where multiple railroads dispatch trains through the same crossing.

Separately, AAR also suggested that FRA include in its Crossing Inventory database an indicator of where multiple railroads dispatch through the same crossing. FRA will not be doing this since it is outside of the scope of this rule. The recommendation by AAR does not enhance the effectiveness of the rule.

In this final rule, FRA is creating § 234.306 to address the situation of multiple railroads that dispatch trains through the same crossing, and the possibility that multiple railroads have maintenance responsibilities for the same crossing. FRA notes that with respect to the requirements of this section, the railroads are free to work out a cost-sharing agreement among themselves.

Paragraph (a) of § 234.306 requires that where multiple railroads dispatch trains through the same crossing, the railroads must appoint one of their number to be the primary dispatching railroad for the crossing and, as such, to receive reports of unsafe conditions pursuant to § 234.303. The emergency phone number of the primary dispatching railroad for the crossing shall be displayed on the ENS sign(s) at the crossing. Furthermore, when the primary dispatching railroad receives a report of an unsafe condition at the crossing, it is responsible for promptly contacting all the other railroads that dispatch trains through the crossing to notify them of the report. Each of these other dispatching railroads to which the report pertains must carry out the appropriate remedial action as required by § 234.305 and recordkeeping as required by § 234.313.

The primary dispatching railroad for the crossing is also responsible for notifying each railroad that has maintenance responsibility for the crossing of a reported unsafe condition, if the maintaining railroad is a different entity from the dispatching railroad already contacted. Finally, in response to reports of unsafe conditions, the primary dispatching railroad, as a railroad that also dispatches trains through the crossing, must otherwise

carry out its own duties as a dispatching railroad under this subpart.

Paragraph (b) of this section, similarly requires that if there is more than one maintaining railroad for the same crossing, the maintaining railroads must appoint one of their number to be responsible for placing and maintaining the ENS sign(s) at the crossing as required by §§ 234.309 and 234.311. The railroad appointed under this paragraph must post the emergency telephone number of the dispatching railroad, or if applicable, that of the primary dispatching railroad, for the crossing on the ENS sign(s) at the crossing. Additionally, after receiving a report of an unsafe condition at the crossing from the dispatching railroad, each of the maintaining railroads to which the report pertains must carry out the appropriate remedial action as required by § 234.305 and recordkeeping as required by § 234.313.

Where there are multiple maintaining railroads for a crossing, paragraph (c) of this section imposes a duty on a dispatching railroad, or if applicable, the primary dispatching railroad, to promptly contact and inform the appropriate maintaining railroad(s) of a reported problem at that crossing. After being informed of a report of an unsafe condition that pertains to the maintaining railroad's maintenance responsibilities for the crossing, the railroad must carry out the appropriate remedial action as required by § 234.305 and recordkeeping as required by § 234.313.

Section 234.307 Use of Third-Party Telephone Service by Dispatching and Maintaining Railroads

Section 234.307 addresses the option for a dispatching railroad to use a third-party telephone service to receive reports concerning an unsafe condition at a highway-rail or pathway grade crossing pursuant to § 234.303. This section also describes the duties of maintaining railroads with respect to their use of a third-party telephone service as permitted by § 234.305(h)(2).

In response to the NPRM, the Angels on Track Foundation objected to the use of a third-party telephone service, asserting that it would compromise safety because railroads would not be receiving calls ''directly.'' FRA does not believe that this method of receiving reports of unsafe conditions at highway-rail and pathway grade crossings would compromise safety. All of the Class I railroads currently have telephone systems in place by which they receive reports of unsafe conditions at highway-rail and pathway grade crossings. As a result, Class I railroads are unlikely to employ a third-party telephone service. Permitting the use of a third-party telephone service provides smaller railroads with a more economical and less burdensome option, without compromising safety. As previously stated in the NPRM, FRA recognizes that many regional and short line railroads may not have the capability and resources to set up and operate a 24-hour system to receive and respond to reports of unsafe conditions at highway-rail and pathway grade crossings. Indeed, requiring such a system could divert limited resources from more vital safety projects. The results of the pilot project that FRA conducted with eight short line railroads in Pennsylvania from October 15, 2001 through May 31, 2003, proved to be extremely successful and demonstrated that a third-party telephone service is a reasonable approach when considered from both a safety and economic perspective.

In the NPRM, FRA stated that for a railroad to ''directly'' receive calls reporting unsafe conditions at a crossing as required by § 234.303, one entity should be the maximum number of entities that may exist between (1) a caller reporting an unsafe condition at a grade crossing and (2) the railroad. FRA believes that allowing more than one entity in between could potentially delay the railroad's receipt of the report and therefore delay its response to the unsafe condition, to the extent that the ENS would not be effective. On review of § 234.307, the BRS suggested in its comments that FRA revise § 234.307 to ensure that the third-party telephone service is the only entity allowed between a caller reporting an unsafe condition at a grade crossing and the railroad. In the final rule, FRA created a defined term for ''third-party telephone service'' in § 234.301, which stipulates that the third-party telephone service is the only entity between a caller who is reporting an unsafe condition at a highway-rail or pathway grade crossing and the transmission of the report to the dispatching railroad. The definition also stipulates that a third-party telephone service that receives reports from a dispatching railroad, on behalf of a maintaining railroad, is the only entity between the receipt of the report and the transmission of the report to the maintaining railroad. FRA also revised the language in § 234.307 to permit the third-party telephone service to utilize an automated answering system, as defined in § 234.301, to receive reports of unsafe conditions at highway-rail or pathway grade crossings.

Paragraphs (a) and (b) of § 234.307 permit a dispatching railroad and a maintaining railroad to use a third-party telephone service to receive reports pursuant to §§ 234.303 and 234.305(h)(2), respectively. FRA believes that it may be in the railroad's interest to use a third-party telephone service that is in the business of receiving and processing calls from the public or from dispatching railroads because that is the third party telephone service's specialty. However, even if the railroad uses a third-party telephone service, the railroad ultimately remains responsible for receiving the report initially received by the third party telephone service, and the railroad is responsible for taking the appropriate remedial action as required by § 234.305 and complying with the proper recordkeeping requirements in § 234.313. The third-party telephone service is merely an extension of the railroad.

In response to the NPRM, several commenters suggested that the third-party telephone service should perform the function of notifying the train crews and public safety officials when it receives reports of unsafe conditions at highway-rail and pathway grade crossings, asserting that this would result in faster transmission of the information to the appropriate parties. FRA disagrees. The dispatching railroad is the only entity that has the authority to control train movements through a crossing, and the dispatching railroad is the only entity with the practical ability to notify train crews in the event of an emergency or any other unsafe condition. Police do not dispatch or otherwise authorize movement of trains. One of the only means available to the police to warn a train of an emergency would be to flag the train down with the use of fusees, which in most cases is neither efficient nor practical when compared to the railroad's ability to notify its train crews. Furthermore, to allow the third-party telephone service to directly communicate with train crews, as some commenters suggested, would in effect alter train movements and create a conflict with other train movements being controlled by the dispatching railroad. Third-party telephone services do not have the knowledge, training, or authority to control train movements.

With respect to dispatching railroads, the role of the third-party telephone service is intended to be limited to receiving calls from the public of an unsafe condition, recording the information, and relaying that information to the dispatching railroad that has contracted for the third-party

telephone service. As previously stated, the railroad then is required to take the appropriate action as prescribed in the rule, to include, if applicable, contacting the train crews, the local public safety officials, and the maintaining railroad (if the maintaining railroad is a separate entity from the dispatching railroad) depending on the nature of the report. Similarly, with respect to maintaining railroads, the role of the third-party telephone service is intended to be limited to receiving calls from the dispatching railroad of an unsafe condition, recording the information, and relaying that information to the maintaining railroad that has contracted for the third-party telephone service.

Paragraph (a) also requires that the third-party telephone service is reached directly and promptly by the telephone number displayed on the sign pursuant to § 234.309. In the final rule, FRA decided to permit the third-party telephone service to receive calls using an automated answering system, as defined in § 234.301, which has a single menu of options for a caller to select to report an unsafe condition at a crossing immediately prior to the caller being transferred to a live person.

Paragraph (c) sets forth the duties of the third-party telephone service. The third-party telephone service is required to contact the railroad immediately when it receives a report pursuant to §§ 234.303 or 234.305. The third-party telephone service must then provide the railroad with a minimum amount of information. First, the third-party telephone service must provide the nature of the reported unsafe condition. The nature of the reported unsafe condition must fall into one of the categories listed in § 234.303(c)(1)–(4) or (d)(1)–(4) so that the dispatching railroad can take the appropriate remedial action as required by § 234.305. Second, the third-party telephone service must provide information on the location of the unsafe condition, which includes providing the Crossing Inventory number for the crossing. Third, the third-party telephone service must inform the railroad whether or not the person reporting the unsafe condition is a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. The third-party telephone service is required to provide this information so that the dispatching railroad can determine whether the report is a credible report of warning system malfunction and, if it is, the railroad must take the appropriate remedial action required by § 234.305 and existing subpart C. Additionally, the third-party telephone service must provide the railroad with the date and time that the report was received by the third-party telephone service—this requirement was added to the final rule and is consistent with the recordkeeping duties in § 234.313. Finally, the third-party telephone service must provide the railroad with any additional information provided by the caller that may be useful to restore the crossing to a safe condition.

Paragraph (d) requires a railroad that uses a third-party telephone service to provide the service with sufficient contact information so that when the third-party service receives a report of an unsafe condition at a grade crossing, it can immediately contact the railroad. In the final rule, FRA requires the railroad to have a live person answer calls directly from the third-party telephone service, unless the railroad is permitted pursuant to either § 234.303(b) or § 234.305(h)(2) to use an answering machine. There may be an unsafe condition for which immediate action by the railroad is necessary, such as a disabled vehicle blocking a track at the crossing; therefore, the contact information that the railroad provides the third-party telephone service must be sufficient to the extent that when the third-party telephone service contacts the railroad, a railroad employee answers the call and takes the appropriate action necessary under § 234.305. The responsibility of the third-party telephone service is solely to receive reports and relay those reports to the railroad; any remedial action that is necessary to correct the unsafe condition is the responsibility of the railroad.

Paragraph (d) also requires a railroad to inform FRA in writing of its intent to use a third-party telephone service to receive reports before the implementation of such a service. The railroad must also provide FRA with the contact information of the third-party telephone service that the railroad intends to use. Further, the railroad must provide FRA with a list identifying the grade crossings about which the third-party service will be receiving reports. In the final rule, FRA is adding a requirement that the railroad must inform FRA in writing within 30 days following any changes in the use or discontinuance of a third-party telephone service. All of this information that the railroad provides to FRA will allow FRA to evaluate the impact that the use of a third-party telephone service has on a railroad's ability to comply with the provisions of this subpart. Finally, paragraph (d) reaffirms the requirement that once a railroad receives a report of an unsafe condition at a grade crossing, the railroad must take the remedial action required by § 234.305.

In response to the NPRM, the organization Crossing Call commented that proposed § 234.307(d) put an undue burden on the third-party telephone service by requiring it to comply with all of subpart E because proposed paragraph (d) stated that ''A third-party service is responsible for complying with this subpart.'' FRA did not intend to hold a third-party telephone service responsible for compliance with all of subpart E. Accordingly, in the final rule, FRA in paragraph (e) of this section, clarifies that the third-party telephone service is responsible only for carrying out the duties of § 234.307, in addition to the recordkeeping duties under § 234.313, and, if applicable, § 234.315. Furthermore, the railroad is responsible for any acts or omissions of the third-party telephone service under the contract that violate these specified sections of subpart E.

FRA recognizes that future advances in technology may provide opportunities for call-in systems that are not specifically described in this rule. FRA is willing to review any new technology and consider its applicability to the regulation, or consider amending the regulation in the future if warranted. FRA welcomes the opportunity to review any such technologies that meet the requirements of the regulation.

Section 234.309 ENS Signs in General

Section 234.309 specifies the color, minimum content and size requirements, and other aspects of the signs that § 234.311 requires to be placed and maintained at highway-rail and pathway grade crossings as part of an ENS. A minimum amount of information must be displayed on the sign so that the unsafe condition may be properly reported and remedied. Paragraph (a) of this section requires that if the dispatching railroad and the maintaining railroad(s) are not the same entity, the dispatching railroad for the crossing must provide to the maintaining railroad the telephone number that is to be displayed on the ENS sign at the crossing, not later than 180 calendar days before the implementation of an ENS is required. In this final rule, FRA is increasing the amount of time from 30 days as proposed to 180 days to provide the maintaining railroad with sufficient time to notify the sign manufacturer of the phone number to be displayed on the signs, to allow for the production of the signs, and then for the installation

of the signs at the crossings by the maintaining railroad.

Paragraph (b) describes the minimum information that is to be displayed on an ENS sign, which includes the following: the toll-free number established to receive reports pursuant to § 234.303(a) (or non-toll-free number as provided for in § 234.303(e)); an explanation of the purpose of the sign (*e.g.,* ''Report emergency or problem to _____''); and the U.S. DOT National Crossing Inventory number assigned to the crossing.

To maintain a certain amount of consistency among the signs so that a grade crossing user may be able to easily identify and understand them, paragraph (c) requires the signs to meet the following requirements: measure at least 12 inches wide by 9 inches high; be retroreflective; have legible text, *i.e.,* lettering and numerals, with a minimum character height of 1 inch for the information required in paragraph (b) of this section; and the sign must have white text set on a blue background with a white border, except that the Crossing Inventory number may be black text set on a white rectangular background.

In the NPRM, FRA solicited comments regarding which standards and guidance provided in the FHWA's MUTCD or Standard Highway Signs and Markings book (SHSM) should be adopted in the final rule as the requirements for the signs placed at crossings pursuant to §§ 234.309 and 234.311. The majority of commenters supported using the MUTCD as the standard sign design.

The MUTCD defines the standards used by road managers nationwide to install and maintain traffic control devices on all public streets, highways, and bikeways, and on private roads open to public traffic. The MUTCD is approved by the FHWA and recognized as the national standard for traffic control on all public roads. It is incorporated by reference into the Code of Federal Regulations at 23 CFR part 655.

MUTCD specifications include the shapes, colors, and fonts used in road markings and signs. In the United States, all traffic control devices must generally conform to these standards. The manual is used by State and local agencies as well as private construction firms to ensure that the traffic control devices they use conform to the national standard. While some State agencies have developed their own sets of standards, including their own MUTCDs, these must substantially conform to the Federal MUTCD.

Section 8B.18 of the MUTCD [3] provides both guidance and a technical standard for emergency notification signs. Specifically, the guidance states that—

> Emergency Notification signs [see Figure 1] should be installed at all highway-rail grade crossings * * * to provide information to road users so that they can notify the railroad company * * * about emergencies or malfunctioning traffic control devices.

Specifically, the standard includes the following—

- When Emergency Notification signs are used at a highway-rail grade crossing, they shall, at a minimum, include the U.S. DOT grade crossing inventory number and the emergency contact telephone number.
- Emergency Notification [s]igns shall have a white legend and border on a blue background.
- The Emergency Notification signs shall be positioned so as to not obstruct any traffic control devices or limit the view of rail traffic approaching the grade crossing.

Section 8B.18 of the MUTCD provides the following additional guidance for emergency notification signs, which specifically states—

- Emergency Notification signs should be retroreflective.
- Emergency Notification signs should be oriented so as to face highway vehicles stopped on or at the grade crossing or on the traveled way near the grade crossing.
- At station crossings, Emergency Notification signs or information should be posted in a conspicuous location.
- Emergency Notification signs mounted on Crossbuck Assemblies or signal masts should only be large enough to provide the necessary contact information. Use of larger signs that might obstruct the view of rail traffic or other highway vehicles should be avoided.

After consideration of the public comments in support of the MUTCD, the final rule establishes broad requirements relating to the physical sign characteristics in § 234.309 and the placement of the sign in § 234.311 that are similar to the standards and guidance contained in the MUTCD for emergency notification signs. However, FRA chose not to include a specific requirement that ENS signs conform to the MUTCD. Rather, FRA believes that the broad requirements contained in this section and in § 234.311 are sufficient. Because the requirements in §§ 234.309 and 234.311 are quite similar to the standards and guidance on emergency notification signs in the MUTCD, FRA will refer to the MUTCD as a guide to inform its enforcement of the provisions in §§ 234.309 and 234.311. Moreover, if a railroad follows the standards and guidance in the MUTCD, FRA will find the railroad in compliance with §§ 234.309 and 311. Figure 1 below is an example of an emergency notification sign provided in the MUTCD. Figure 2 is an example of an alternate design that, like Figure 1, also would meet the requirements of § 234.309.

The ILCC commented that the sign dimensions and letter size proposed in the NPRM, and adopted in the final rule, may be too small for a motorist to read. FRA believes that the minimum required size of the sign and its lettering reflects the attributes of many highway signs that are currently in use, and that the size of both is sufficiently large enough for a user of a highway rail or pathway grade crossing to read. The ILCC also suggested that the Crossing Inventory number assigned to that crossing be highlighted on the sign. Paragraph (c) of this section provides the option to highlight the Crossing Inventory number by displaying the number using black-colored text set on a white rectangular background. Separately, FRA acknowledges that each crossing may have different geometric characteristics that can pose challenges when positioning a sign. As a result, § 234.309 sets minimum design requirements to allow railroads the flexibility to install signs appropriate to the individual environment of the crossing. The final rule does not prohibit a railroad from using larger dimensions, for example, or adding certain stylistic features, so long as they do not conflict with § 234.309.

One commenter expressed concern about the use of the term ''emergency'' on the sign, believing that most people are accustomed to dialing 911 and may call the railroad regarding emergencies not related to the highway-rail or pathway grade crossing. The final rule does not require the use of the term ''emergency'' on the sign, only that the sign convey the purpose of the sign pursuant to paragraph (b)(2) of this section. FRA recognizes that the use of the term ''emergency'' is one acceptable method of explaining the purpose of the sign. In the many ENS-style systems that are in place today, from Class I railroads to the pilot programs in Pennsylvania and Kentucky, FRA is not aware that calls of this nature have been an issue, and believes the term ''emergency'' appropriately conveys the intent of the sign.

Comments submitted by the Everett Railroad Company expressed concern that posting of an emergency number could lead to nuisance calls and false reports of emergencies, placing an

[3] Manual on Uniform Traffic Control Devices for Streets and Highways, 762–63 (Washington DC: Federal Highway Administration, December 2009).

excessive burden on small railroads. History has proven this concern to be unwarranted for the most part. As railroads began to adopt various forms of emergency notification systems, the expectation of nuisance calls was a concern, but did not materialize. This fact was supported by the pilot projects, discussed previously, that FRA conducted in the State of Kentucky, the State of Texas, and with several short line railroads in the Commonwealth of Pennsylvania. *See Pilot Programs for Emergency Notification Systems at Highway-Rail Grade Crossings* (Washington, DC: Federal Railroad Administration, May 2006), *http://www.fra.dot.gov/downloads/safety/1_800_report.pdf.* The pilot programs did not find that false reports, or nuisance calls were an issue. In fact, the report concluded that railroads and the public overwhelmingly benefit from emergency call-in systems, noting,

> [t]he preponderance of calls have reported broken or malfunctioning warning devices, but other calls have reported trains blocking crossings, rough roadway surfaces, obstructions on tracks (often vehicles that are stuck), fires, vandalism, trespassers, etc. Trains have been slowed or stopped to avoid obstructions. Warning devices have been repaired more quickly because railroads have been provided more timely notifications that problems existed.

In order for the public to have an effective means to report warning system malfunctions and other unsafe conditions, a sign(s) must be located at the crossing with the pertinent information in order to contact the appropriate railroad and provide the railroad with sufficient information to correct the unsafe condition. The organization Crossing Call commented that while collisions on smaller railroads with reduced speeds may pose less of a hazard, there are additional benefits to an ENS other than reporting a stalled vehicle at the crossing. Crossing Call noted that—

> [a] properly functioning warning systems [sic] promotes a public perception that the warning ought to be heeded * * *. An Emergency Notification System facilitates prompt attention to malfunctioning equipment and fosters the perception that railroads are concerned that equipment operates as intended.

FRA agrees. Although railroads have previously been obligated to take certain actions as required by subpart C if a report of a crossing system malfunction was reported by a person belonging to one of the categories defined in ''credible report of warning system malfunction'' in § 234.5, this rule expands the duty of the railroad to take certain actions when reports are received from the general public.

Figure 1–Example from the MUTCD of an Emergency Notification Sign

Figure 2–Example of an Alternate Design

Section 234.311 ENS Sign Placement and Maintenance

Section 234.311 requires signs of the type specified by § 234.309 to be placed and maintained at highway-rail and pathway grade crossings. The maintaining railroad for the crossing would be responsible for the proper placement and maintenance of the sign. The dispatching railroad for the crossing would be responsible for providing the telephone number posted on the sign to the maintaining railroad, if the two are not the same railroad.

FRA received comments from a handful of railroads and industry associations, two State agencies, and some individuals with respect to the placement and maintenance of ENS signs. Paragraph (a) of this section requires ENS signs to be placed and maintained on each approach at all public and private highway-rail and pathway grade crossings. An exception is provided in paragraph (a)(2)(i), which was not proposed in the NPRM, that allows for only one sign to be placed and maintained at farm grade crossings, as defined in § 234.301. FRA believes that this exception is warranted because farm grade crossings generally have less vehicular traffic and people who traverse these crossings typically are more familiar with the crossings and likely will have prior knowledge of the presence and location of the ENS sign, if they need to report an unsafe condition.

Another exception is provided in paragraph (a)(2)(ii), which was not proposed in the NPRM and which allows for one sign to be placed and maintained at each vehicular entrance to a railroad yard, port or dock facility,

or a private industrial facility that does not meet the definition of a ''plant railroad'' in § 234.5, rather than signs at each crossing within the yard, port or dock facility or private industrial facility.

As mentioned previously in the NPRM, FRA considered whether to expand subpart E to cover all public highway-rail grade crossings located within a port or dock facility, railroad yard, or private industrial facility and to make such a facility or yard subject to part 234. The ILCC recommended expanding subpart E to cover all public highway-rail grade crossings located within a port or dock facility. The CPUC made a similar recommendation. However, these facilities are typically not open to the general public. FRA believes that a sign located at each vehicular entrance sufficiently provides an invitee with the telephone number of the dispatching railroad if necessary to report an unsafe condition. Furthermore, these facilities often have a significant number of crossings located within a small area, and FRA believes that it is impracticable to consider each crossing within these areas as a separate grade crossing, and posting a sign at every crossing may not be possible. Additionally, railroads typically operate in these facilities at very low speed and thus the hazards of a collision are reduced. Furthermore, treating all the public highway-rail grade crossings within these facilities/yards as one public highway-rail grade crossing is consistent with the *Crossing Inventory, Policy, Procedures and Instructions for States and Railroads* (Washington, DC: Federal Railroad Administration, August 2007), *http://www.fra.dot.gov/downloads/safety/RXIPolicyInstructions0807.pdf*.

A couple of commenters suggested that there be no requirement to have ENS signs placed and maintained at private highway-rail and pathway grade crossings because these private crossings typically are not accessible from public roads and many of them do not have crossbucks. FRA disagrees with this suggestion because probable invitees that use private crossings will not be familiar with the crossings nor have prior knowledge of the presence and/or location of the ENS signs. The presence of two signs—one on each approach—will enhance an invitee's awareness and ability to utilize ENS. A collision that is caused by a vehicle that is stalled on a private grade crossing and is struck by a train has the same consequences as a similar collision that occurs on a public grade crossing. The users of a private grade crossing should have the same opportunity to utilize ENS, and thus FRA has determined that two signs are appropriate at private grade crossings.

Furthermore, one commenter recommended that the private party that operates over the private crossing should be responsible for the installation and maintenance of the ENS sign at the crossing, as opposed to the railroad. FRA believes that it is a maintaining railroad's responsibility to install and maintain the ENS sign; however, this final rule puts no restrictions on a railroad's authority to make a private crossing agreement to that effect, if so desired.

In the NPRM, FRA proposed general requirements regarding the placement of the sign so that the sign may be easily seen and does not obstruct any other sign or traffic control devices at the crossing. FRA sought public comment on ''sign placement so the appropriate placement for optimal visual effectiveness of the sign may be determined.'' AAR was the only commenter opposed to what is now paragraph (b) of § 234.311. FRA made several changes to proposed paragraph (b) in this final rule. The paragraph now identifies four requisite characteristics related to the placement of an ENS sign—that it is conspicuous; does not obstruct other signs or traffic control devices at the crossing; does not limit the view of a train; and, if mounted on a post, it has supports that are crashworthy.

AAR contended that paragraph (b) as it was proposed in the NPRM should be deleted from this section because the MUTCD already addresses the placement of ENS signs. Additionally, AAR asserted that some of the requirements proposed in the NPRM were ambiguous, and therefore would result in compliance and enforcement problems. FRA believes that the revised requirements contained in paragraph (b) of this final rule are more understandable than those proposed in the NPRM. As stated previously, in the discussion of § 234.309, FRA prefers to set its own standards for sign placement and maintenance rather than incorporate the MUTCD by reference.

Several other commenters made suggestions regarding the location and orientation of the signs. The BRS suggested that signs be placed in a location where a stopped motorist is not required to exit the vehicle to read the sign. FRA believes that the requirement in paragraph (b)(i) for an ENS sign to be conspicuous to roadway and pathway users by day and night, combined with the size and letter requirements in § 234.309(c), will limit the times that motorists need to exit their vehicles to read a sign and obtain the telephone number to report unsafe conditions at a crossing. With regard to ENS signs placed on signal bungalows, FRA stated in the NPRM that ''[i]t is difficult to envision a scenario in which placing the sign on the signal bungalow would satisfy all of the [proposed] requirements [particularly those that require] a sign to be placed at a grade crossing so that it is conspicuous to the users of the roadway or pathway.'' The CPUC and ILCC advocated that signs be placed directly at the crossing for each direction of traffic, and acknowledged that ENS signs placed solely on signal bungalows would be too distant from a crossing to be conspicuous to roadway and pathway users. Yet, Amtrak and New Jersey Transit Rail Operations (NJTR) each asserted that their signs currently placed on signal bungalows are sufficiently conspicuous since they are approximately four times larger than the minimum size required in the final rule, and the height of the lettering is two to three times greater than that required in the final rule. Although Amtrak's and NJTR's signs are much larger than the specifications required in the final rule, FRA believes that because they are not located at the crossing itself, but rather on the signal bungalow, the signs are less conspicuous to the roadway or pathway user who is at the crossing and needs to report an emergency or other unsafe condition. Signal bungalows vary widely in their distance from a crossing, so even though the dimensions and lettering of the signs may be considerably larger than required by § 234.309, it still may be difficult for a user of a highway-rail grade crossing to read the sign. Accordingly, the final rule does not prohibit the placement of a sign on the signal bungalow, but a sign placed on the signal bungalow, but nowhere else at the crossing, does not comply with § 234.311. Railroads, like NJTR, that currently have ENS signs that are only located on the signal bungalow will have until September 1, 2017, for their signs to conform to the placement requirements in § 234.311, pursuant to § 234.317.

In the NPRM, FRA solicited comments on other locations at grade crossings, besides signal bungalows, where the placement of the ENS sign would not satisfy proposed § 234.311. CPUC suggested that, in addition to the signal bungalow, it would not be appropriate to place an ENS sign facing the track, unless there is also a sign for each direction of traffic; outside of the crossing area; within a heavily fenced enclosure that would obscure the sign;

immediately behind another sign; or more than 10 feet outside the public right of way unless supplemented by additional signs at the crossing. For the final rule, FRA determined that the requirement in § 234.311(b)(i) that the ENS sign be conspicuous to users of the roadway or pathway by day and night, adequately ensures that ENS signs placed in such locations would not comply.

In the final rule, a sign at a grade crossing is not required to be mounted on a post, but rather may be mounted anywhere at the crossing that is consistent with its being conspicuous to users of the roadway or pathway by day and night, as well as consistent with the other placement requirements in § 234.311. FRA did not require a specific location at a crossing where a sign must be placed because such a specific location may not exist at every crossing. A few of the places suggested by commenters that would comply with § 234.311 include mounting the sign below the crossbuck, on the signal mast, below the gate mechanism, or on a post to the side of the crossbuck. NJTR is the only railroad that commented that there is not sufficient space on the crossing gate masts at their crossings to install ENS signs that meet the minimum sign size specified in § 234.309(c) of at least 12 inches wide by 9 inches high. FRA notes that signs of this size have been installed on crossing gate masts by other railroads so that they do not interfere with the operation of the automatic warning systems. Furthermore, the railroad may display the ENS sign on a separate post, if necessary.

Section 234.313 Recordkeeping

Section 234.313 sets forth the recordkeeping requirements for this subpart that apply to each railroad subject to this subpart. Paragraph (a) of this section requires each railroad to keep certain records pertaining to its compliance with this subpart. Records may be kept on paper forms generated by the railroad or kept electronically in a manner that conforms with § 234.315. In this final rule, FRA mainly adopts paragraph (a) as it was proposed in the NPRM, with the exception of stylistic changes and one addition. In addition to the recordkeeping requirements already enumerated in the NPRM, paragraph (a) now also requires that a railroad retain information regarding the reason why no remedial action was taken by it. In the NPRM, FRA solicited comments on what other information the railroad should be required to record. The CPUC recommended requiring information about why a railroad found a reported problem infeasible or unlawful to remedy. FRA believes that the new requirement in paragraph (a) addresses the issue raised by CPUC. The ILCC also suggested that weather conditions at the crossing location be recorded when a caller makes a report of an unsafe condition. While this may be helpful information for some remedial actions undertaken by the railroad, FRA is not requiring that weather conditions be recorded. The recordkeeping requirements mandated by this section are minimum requirements; railroads are permitted to record additional information if they choose to do so.

Subpart C at 49 CFR 234.109 (§ 234.109) already has specific recordkeeping requirements for a railroad that receives a credible report of warning system malfunction; therefore, paragraph (b) of § 234.313 states there is no separate recordkeeping requirement in subpart E for credible reports of warning system malfunction.

In the final rule, FRA adds paragraphs (c) to this section to address the recordkeeping requirements associated with new § 234.306. In § 234.306, where multiple railroads dispatch trains through the same highway-rail or pathway grade crossing, the railroads are required to appoint one of their number to receive telephonic reports. Similarly, in § 234.306, where multiple railroads have maintenance responsibilities for the same crossing, the railroads are required to appoint one of their number to install and maintain the ENS sign(s) at the crossing. Paragraph (c) of § 234.313 requires that these appointments be recorded in writing and a copy of the document retained by each railroad for the duration of the appointment.

Paragraph (e) of this section requires that each railroad retain for at least one year (from the latest date of railroad activity in response to a report received under this subpart) all records that it makes that are required by this section. Records required to be kept must be made available to FRA as provided by statute (49 U.S.C. 20107). Some public comments received by FRA indicated that one year is not a sufficient period of time for the railroads to retain the records required by this section. However, a one-year period for retention of records is consistent with other FRA regulations in part 234.

In the NPRM, FRA solicited comments on whether to require the railroad to record the caller's name and contact information so that the railroad could follow up with the caller if necessary. A few commenters, including the ILCC and the organization Crossing Call, supported obtaining the caller's name and contact information. However, the AAR recommended against this proposal, stating that the caller's identifying information is not necessary for enforcement purposes and that not all callers would be willing to provide such information. In light of these comments, FRA has decided not to require a dispatching railroad to record a caller's name or contact information in this final rule. Dispatching and maintaining railroads are required to take remedial actions pursuant to § 234.305, regardless of whether or not they know the identity of the caller. A railroad's knowledge of a caller's name and contact information would add little or no benefit to a railroad's remedial efforts. Moreover, some callers reporting an unsafe condition may be deterred from making a report if required to provide their name and contact information.

The Angels on Track Foundation recommended that railroads be required to provide State agencies that are responsible for selecting crossings for upgrades and enforcing regulations at crossings with documentation of the reports of unsafe conditions received through ENS. FRA believes this recommendation is outside the scope of this rule; however, railroads are at liberty to provide such information to State agencies.

Finally, Amtrak requested that FRA protect any documentation and data prepared, compiled, or collected under subpart E from discovery or admission into evidence or otherwise used for any other purpose in a Federal or State court proceeding for damages involving personal injury or wrongful death against a railroad. Specifically, Amtrak references 23 U.S.C. 409, which Congress enacted pursuant to an FHWA proposal to shield information provided to FHWA by State and local governments to further highway transportation safety. Congress in Sec. 205 of the RSIA did not provide a similar protection against the discovery or admission into evidence of certain information in a Federal or State court proceeding in any action for damages arising from information or data obtained as a result of this final rule. Without an express Congressional mandate, it is outside FRA's authority to provide the protections sought by Amtrak.

Section 234.315 Electronic Recordkeeping

Section 234.315 addresses the keeping of records required by subpart E electronically. This section applies to railroads that choose to conduct electronic recordkeeping under subpart E. These electronic recordkeeping

requirements are modeled after the requirements set forth in FRA's Railroad Operating Rules at 49 CFR 217.9(g) (§ 217.9(g)). The final rule adopts § 234.315 as proposed in the NPRM, with the exception of typographical and stylistic changes and clarification that the section applies only to records required by subpart E and not to records required by part 234 in general. FRA received no public comments in response to this proposed section.

If a railroad chooses to conduct electronic recordkeeping of records required by subpart E, the railroad must provide adequate security measures to limit employee access to its electronic data processing system and must prescribe who is allowed to create, modify, or delete data from the database. Although FRA does not identify the management position authorized to institute changes in the database, the railroad must indicate the source authorized to make such changes. The railroad must have a computer and a facsimile or printer connected to the computer to retrieve and produce records for immediate review by FRA representatives. Section 217.9(g) requires the computer to be a desktop computer. However, FRA recognizes that all railroads may not necessarily maintain their records on a desktop computer, so rather than adopting this requirement from § 217.9(g), FRA is allowing railroads the flexibility to maintain their records on other types of computers, such as laptops. It should be noted that, regardless of the type of computer on which the railroad maintains its electronic records, it must be possible for a facsimile or printer to be connected to the computer to retrieve and produce records for immediate review by FRA representatives. The documents must be made available for FRA inspection during ''normal business hours,'' which FRA interprets as the time, any day of the week, when railroads conduct their regular business transactions.

Nevertheless, FRA reserves the right to review and examine the documents prepared in accordance with the applicable section of subpart E, at any reasonable time if situations warrant it. Each railroad must also designate who is authorized to authenticate the hard copies produced from the electronic format. In short, each railroad electing to retain its records electronically must ensure the integrity of the information and prevent possible tampering with data, enabling FRA to fully execute its enforcement responsibilities. Furthermore, if an electronic record kept by the railroad pursuant to this subpart does not comply with paragraph (a) of § 234.315, then the record must be kept on paper.

Section 234.317 Compliance Dates

Section 234.317 provides the date by which each of various groups of railroads must comply with this subpart. In response to the compliance dates proposed in the NPRM, FRA received several comments from railroads and other groups and individuals in the railroad industry. With respect to railroads that currently do not have an ENS of any kind in place, the ILCC recommended that these railroads have 12 months to implement a system that conforms to the subpart. The organization Crossing Call stated that the proposal in the NPRM to allow railroads without an ENS to implement one within 18 months (after the effective date of subpart E), as proposed in the NPRM, was an overly generous amount of time, and recommended allowing only 9 months to conform to the subpart. One individual commented that the compliance dates proposed in the NPRM failed to instill a sense of urgency and all railroads should be allowed somewhere between six and twelve months to conform to the subpart. After careful consideration of these comments, as well as comments from smaller railroads regarding the financial burden that the rule will place on their business operations (see Regulatory Evaluation for this final rule), FRA decided in the final rule to extend the implementation period for railroads that currently do not have any sort of ENS in place from 18 months, as proposed in the NPRM, to approximately three years after the effective date of the final rule, *i.e.,* September 1, 2015. This additional time provides smaller railroads the opportunity to phase-in implementation of an ENS in stages, thus spreading out the costs of implementation.

Paragraph (a) of this section applies to railroads that do not have anything in place that could be considered an ENS as defined in § 234.301. However, if a railroad has a system in place, but some or all of the components do not conform to this subpart, the amount of time the railroad has to bring it into compliance depends on which component is noncompliant.

In paragraph (b) of § 234.317, if a railroad already has its own ENS telephone service or is using a third-party telephone service, but that telephone service does not comply with the requirements in § 234.303 or § 243.307, respectively, the railroad must bring the ENS telephone service into compliance by March 1, 2014—as opposed to the six months proposed in the NPRM.

In paragraph (c)(1) of § 234.317, if a railroad already has ENS signs in place, but those signs do not comply with the requirements set forth in § 234.309, the railroad's ENS signs must conform to § 234.309 within certain time periods as required in paragraph (c)(1)(i)–(iii) of § 234.317.

In response to the NPRM, both the AAR and KCS recommended that all existing ENS signs be permitted to remain in place for their normal useful life. In consideration of these comments, in the final rule, FRA is allowing certain signs to remain in place for the lifecycle of the sign. Specifically, paragraph (c)(1)(i) permits a railroad to keep an ENS sign that is in place for its useful life if the sign size is greater than or equal to 60 square inches, and the height of the lettering on the sign is greater than or equal to ¾ inch for the information required in § 234.309(b). FRA assesses that the useful life of a sign is approximately 15 years. This modification in the final rule decreased the estimated costs initially assessed in the NPRM by $3.0 million over a 15-year period. At present, the majority of Class 1 railroad signs located at crossings meet the size and lettering requirements in paragraph (c)(1)(i).

However, AAR also advocated for railroads being allowed to use their existing inventory of signs if they contain the telephone number and Crossing Inventory number. FRA disagrees. Once a railroad replaces a sign, the new sign must conform to § 234.309, so that within a reasonable amount of time there is uniformity to the signs at crossings throughout the United States.

Paragraph (c)(1)(ii) requires that if a railroad has an ENS sign in place that is greater than or equal to 60 square inches, but the height of the lettering on the sign is less than ¾ inch for the information required in § 234.309(b), the railroad must replace the sign with a compliant sign by September 1, 2017.

Paragraph (c)(1)(iii) requires that if a railroad has an ENS sign in place that is less than 60 square inches, regardless of the height of the lettering for the information required in § 234.309(b), the railroad must replace the sign with a compliant sign by September 1, 2015.

Paragraph (c)(2) of this section stipulates that if the railroad replaces a non-conforming sign before the expiration of the time periods in paragraph(c)(1)(i)–(iii), the railroad must replace the sign with one that conforms to § 234.309.

Under paragraph (d) of § 234.317, if a railroad already has ENS signs in place,

but the placement of those signs does not comply with the requirements set forth in § 234.311, the placement of the signs must conform to § 234.311 by September 1, 2017. If the railroad changes the placement of the sign before the expiration of the five-year period, the placement of the sign must conform to § 234.311. Furthermore, if a railroad replaces a sign before September 1, 2017 so that the sign conforms to § 234.309 and the placement of the sign does not conform to § 234.311, the railroad must also change the placement of the sign so that it conforms to § 234.311.

In the NPRM, FRA solicited comments on whether to reduce the amount of time that the railroad would have to bring the placement of the sign into compliance if the only sign at the crossing is placed on the signal bungalow. FRA received several comments on this issue. The BRS, the CPUC, and the ILCC all supported reducing the implementation period from 5 years to 18 months or less for signs placed on signal bungalows. However, to provide economic relief to railroads, FRA decided in the final rule to grant railroads until September 1, 2017, allotting the same amount of time as proposed in the NPRM.

Finally, paragraph (e) requires that if a railroad already conducts recordkeeping as part of its ENS, but the recordkeeping does not conform to § 234.313 or § 234.315, the railroad's recordkeeping must conform to § 234.313 or, as applicable, § 234.315, by September 1, 2013.

V. Regulatory Impact

A. Executive Order 12866 and 13563 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and 13563 and DOT policies and procedures. *See* 44 FR 11034 (February 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this final rule. FRA has met with and made presentations to those who are likely to be affected by this rule in order to seek their views on the rule.

As part of the regulatory evaluation, FRA has assessed quantitative measurements of the cost streams expected to result from the implementation of this final rule. For the 15-year period analyzed, the estimated quantified cost that will be imposed on industry totals $15.6 million with a present value (PV, 7 percent) of $10.1 million. The requirements that are expected to impose the largest burdens relate to recordkeeping and the purchase and installation of signs at grade crossings. The table below presents the estimated costs associated with this final rule.

15-Year Estimated Costs of the Final Rule

Section 234.303—Toll-Free Service	$989,870
Section 234.306—Multiple Dispatching or Maintaining Railroads	9,800
Section 234.307—Third-Party Service	2,881
Section 234.309—Signs (Materials)	2,863,448
Section 234.309—Signs (Installation)	2,007,754
Section 234.311—Post (Materials)	238,621
Section 234.311—Post (Installation)	200,775
Section 234.313—Initial Recordkeeping	299,790
Section 234.313—Remedial Recordkeeping	3,490,728
Total	$10,103,668

Dollars are discounted at a present value rate of 7 percent. Note that numbers may not add due to rounding.

As part of the regulatory evaluation, FRA has explained what the likely benefits for this final rule will be, and provided numerical assessments of the potential value of such benefits. This final rule is expected to improve railroad safety by ensuring that all highway-rail and pathway grade crossings have adequate signage to enable the public to inform the railroad of emergencies and other unsafe conditions. The primary benefits include a heightened safety environment in grade crossing areas and potential avoidance of casualties, fatalities, and damage through earlier awareness of track obstructions, including stalled highway vehicles, and other safety hazards. Thus, in general, the final rule should decrease grade crossing accidents and incidents and associated casualties and damages. Other than the reduction of accidents, fatalities, injuries, and associated damages, FRA is aware of several other benefits that will occur when accidents are prevented. Savings have been estimated for avoiding train delay, highway delay, emergency personnel responding, vehicle towing, and accident clean-up associated with grade crossing accidents.

Based on its analysis, FRA has found that the expected accident reduction benefits will exceed the total cost of this final rule. Over a 15-year period, this analysis finds that $57.8 million in cost savings will accrue through casualty prevention, damage avoidance, and other benefits. The discounted value of this is $31.7 million (PV, 7 percent). The table below presents the estimated benefits associated with this final rule.

15-Year Estimated Benefits of the Final Rule

Fatalities (Prevented)	$21,519,783
Injuries (Prevented)	8,587,839
Highway Vehicle Damage (Avoided)	651,130
Railroad Equipment Damage (Avoided)	327,922
Track/Structure Damage (Avoided)	203,988
Other Benefits	416,974
Total	$31,707,636

Dollars are discounted at a present value rate of 7 percent. Note that numbers may not add due to rounding.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA has developed this final rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

As discussed earlier, FRA has initiated this rulemaking as a requirement of the RSIA. This final rule requires each railroad to establish and maintain a toll-free telephone service to directly receive calls from the public reporting an emergency or other unsafe condition at its grade crossings, and to remedy those unsafe conditions, as appropriate. As part of these duties, a railroad is required to install and maintain signs at its grade crossings that display its emergency telephone number.

(1) Description of Regulated Entities and Impacts. The ''universe'' of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this rule. For the rule there is only one type of small entity that is affected: small railroads.

''Small entity'' is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines the term ''small entity'' as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of ''small entity'' a not-for-profit enterprise that is independently owned and operated, and not dominant in its field of operations.

The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' that the largest a railroad business firm that is ''for-profit'' may be, and still be classified as a ''small entity,'' is 1,500 employees for ''Line Haul Operating Railroads'' and 500 employees for ''Switching and Terminal Establishments.'' *See* ''Size Eligibility Provisions and Standards,'' 13 CFR part 121 subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad. *See* 68 FR 24891 (May 9, 2003), codified at Appendix C to 49 CFR part 209. Currently, the revenue requirements are $20 million or less in annual operating revenue, adjusted annually for inflation. The $20 million limit (adjusted annually for inflation) is based on the STB's threshold for a Class III railroad, which is adjusted by applying the railroad revenue deflator adjustment. For further information on the calculation of the specific dollar limit, see 49 CFR part 1201. FRA is using the STB's threshold in its definition of ''small entities'' for this rule.

Included in the entities impacted by this final rule are governmental jurisdictions or transit authorities—none of which are small for purposes of the SBA (*i.e.,* no entity serves a locality with a population less than 50,000). Commuter railroads are part of larger transit organizations that receive Federal funds. Therefore, they are not included in this analysis. Additionally, this final rule is expected to indirectly impact sign and post manufacturers, but only to the extent that the demand increases for products and services they supply. Such impact, however, will likely be both small and favorable to those small businesses.

Railroads. FRA estimates that there are 710 Class III freight and passenger (excluding commuter and intercity) railroads in the United States. Certain provisions of this final rule will apply to all railroads that dispatch trains through highway-rail or pathway grade crossings. Out of the 710 Class III railroads, FRA estimates that there are 153 small freight and passenger (excluding commuter and intercity) railroads that do not have a dispatching function as part of their operations; and therefore, would not be affected by these certain provisions of this final rule. Thus, FRA has concluded that 557 small railroads will be affected by those provisions of this final rule. Hence, FRA has concluded that a substantial number of small entities will be impacted. However, as explained below, the impact on these small railroads will not be significant.

The small railroads affected by this final rule are defined as Class III railroads with grade crossings. FRA estimates that Class III railroads dispatch trains over 59,845 grade crossings. To evaluate the impact on these railroads, it is helpful to separate them into three groups by number of employees. Thus, FRA subdivided these railroads into small railroads, very small railroads, and extremely small railroads. Small railroads are Class III railroads with 15 or more employees. Very small railroads are those with fewer than 15 employees, but more than 2 employees. Extremely small railroads are those with 2 or fewer employees. The table below shows the average annualized cost per small railroad, by category:

Class III affected entities	Number of railroads	Average number of crossings per railroad	Average annualized cost per railroad per year
Small	203	199	$2,461
Very Small	217	69	944
Extremely Small	137	32	312

Source: Federal Railroad Administration 2009 data, compiled on September 1, 2010.

The cost to comply with this final rule largely depends upon the number of crossings that a railroad maintains. Throughout the regulatory evaluation, FRA has split the small railroads into three categories and analyzed the costs and benefits separately for each of these categories. The burden placed on the very small and extremely small Class III railroads is generally proportionately less because they usually maintain fewer crossings.

FRA estimates there are 203 small railroads with 15 or more employees. This group of railroads has 40,363 grade crossings; an average of approximately 199 crossings per railroad. FRA estimates the average total cost for small railroads to comply with this final rule is approximately $4,304 per railroad for each of the first 3 years, and $1,037 per railroad per year for each of the following 12 years.

FRA estimates there are 217 very small railroads; those with less than 15 employees but more than 2 employees. This group of very small railroads has 15,074 grade crossings, an average of approximately 69 crossings per railroad. The average total cost for very small railroads is approximately $1,567 per railroad for each of the first 3 years, and $428 per railroad per year for each of the following 12 years.

Extremely small railroads are those with two or fewer employees. There are 137 railroads in this category, accounting for 4,408 grade crossings. Extremely small railroads have an average of approximately 32 grade crossings. The average total cost for extremely small railroads is approximately $646 per railroad for each of the first 3 years, and $104 per railroad per year for each of the following 12 years. Using the average annualized cost of $312 per railroad per year, and an average of 32 crossings per railroad, FRA estimates the cost to these extremely small railroads to comply with this final rule is about $10 per crossing per year over the 15-year analysis. Railroads with just a few crossings will incur very minimal costs to comply with this final rule. Thus, this final rule will not have a significant economic impact on extremely small railroads.

Many small railroads are subsidiaries of large short line holding companies

with the expertise and resources comparable to larger railroads. The requirement to install two new signs per crossing and provide a toll-free telephone number in case of emergencies will not have a significant economic impact on these railroads. Short line railroads affected by this final rule might collaborate with other small railroads to implement its requirements, which would lower the burden on these small railroads.

FRA received several comments related to the impact on small entities and tourist railroads, regarding the regulatory flexibility analysis, and compliance with Executive Order 13272. FRA considered these comments and, accordingly, in this final rule, FRA examined the impact on small businesses, made cost-reducing changes, and re-evaluated the costs and benefits.

Several comments on the NPRM requested that FRA adjust the monitoring and signage requirements to give consideration to small entities. The changes to the final rule made since the NPRM will reduce the burden on small railroads. FRA revised the monitoring requirements for railroads that dispatch trains authorized to operate at speeds less than or equal to 20 mph through crossings. Also, those railroads that operate at seasonally or intermittently and at speeds greater than 20 mph through crossings are not required to have live monitoring during hours of non-operation. Farm grade crossings are now only required to have one sign per crossing; this reduces the number of signs for Class III railroads by 13,510. These changes have moderately decreased the annual and total costs for small entities. Based on changes made in the regulatory requirements since the NPRM, FRA is even more confident that the impact on small entities will not be significant.

Previously, FRA sampled small railroads and found that revenue averaged approximately $4.7 million (not discounted) in 2006. One percent of average annual revenue per small railroad, or $47,000, is far more than the average annual cost that these railroads will incur because of this final rule. Very small and extremely small railroads likely do have smaller revenues than larger Class III railroads. However, FRA believes that this average provides a good representation of the small railroads, in general. If a railroad has annual average revenue greater than $134,122, the annual cost per railroad will be less than 1 percent of revenue.

FRA concludes that the final rule will not have a noticeable economic impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

(2) Certification. Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads will be affected by the final rule, none of these entities will be significantly impacted.

C. Federalism

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The rule will not have a substantial effect on the States or their political subdivisions; it will not impose any compliance costs; and it will not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This final rule amends part 234, which contains FRA's principal regulations regarding grade crossing safety. Although the final rule on State-specific highway-rail grade crossing action plans published June 28, 2010 (75 FR 36552) removed the preemptive effect provision in part 234, part 234 still could have preemptive effect by operation of law under a provision of the former Federal Railroad Safety Act of 1970 (former FRSA), which was repealed and recodified at 49 U.S.C. 20106 (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to Section 20106.

FRA believes that Section 20106 sufficiently addresses the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision in this final rule, as suggested by some public comments on the proposed rule, concerning the regulation's preemptive effect is duplicative and unnecessary.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections of

the final rule that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
234.303(b)—Receipt by Dispatching RR of Report of Unsafe Condition at Highway-Rail Grade Crossing.	594 railroads	63,891 reports	1 minute	1,065
234.303(d)—Receipt by Dispatching RR of Report of Unsafe Condition at Pathway Grade Crossing.	594 railroads	1,860 reports/1,860 records.	1 minute + 1 minute	62
234.305 (a)(2)—Immediate Contact by Dispatching RR Not Having Maintenance Responsibility of All Trains Authorized to Operate through That Crossing in Response to Credible Report of Warning System Malfunction at Highway-Rail Grade Crossing.	594 railroads	465 contacts	1 minute	8
—(a)(2) Contact of Crossing Maintenance RR by Dispatching RR Not Having Maintenance Responsibility in Response to Credible Report of Warning System Malfunction at Highway-Rail Grade Crossing.	594 railroads	465 contacts + 465 records.	1 minute + 1 minute	16
—(b)(1) In Response to Public Report of Warning System Malfunction at Highway-Rail Grade Crossing Immediate Contact by Dispatching RR Having Maintenance Duty for Crossing of All Trains Authorized to Operate Through That Crossing.	594 railroads	925 contacts + 925 records.	1 minute + 1 minute	30
—Dispatching RR Having Maintenance Duty for Crossing Contact of Appropriate Law Enforcement Authority with Necessary Information regarding Reported Malfunction.	594 railroads	925 contacts	1 minute	15
—234.305 (b)(2) In Response to Public Report of Warning System Malfunction at Highway-Rail Grade Crossing Immediate Contact by Dispatching RR Not Having Maintenance Duty for that Crossing of All Trains Authorized to Operate Through That Crossing.	594 railroads	920 contacts	1 minute	15
—Dispatching RR Contact of Law Enforcement Authority to Direct Traffic/Maintain Safety.	594 railroads	920 contacts	1 minute	15
—Dispatching RR Contact of Maintaining RR re: Reported Malfunction and Maintaining RR Record of Unsafe Condition.	594 railroads	920 contacts + 920 records.	1 minute + 1 minute	30
234.305(c)(1)—In Response to Report of Warning System Failure at Pathway Grade Crossing Dispatching RR Having Maintenance Duty Contact of All Trains Authorized to Operate Thru It & Record of Unsafe Condition.	594 railroads	2 contacts + 2 records	1 minute + 1 minute	.06666
—In Response to Report of Warning System Failure at Pathway Grade Crossing Dispatching RR Having Maintenance Duty Contact of Law Enforcement Agencies to Direct Traffic & Maintain Safety.	594 railroads	2 contacts	1 minute	.03333
—234.305(d)(1) Upon Receiving Report of Disabled Vehicle or Other Obstruction Dispatching RR Having Maintenance Duty Contact of All Trains Authorized to Operate Through Highway-Rail or Pathway Grade Crossing & Record of Unsafe Condition.	594 railroads	7,440 contact + 7,440 reds..	1 minute + 1 minute	248
—Dispatching RR Having Maintenance Duty Contact of Law Enforcement Authority Upon Receiving Report of Disabled Vehicle or Other Obstruction.	594 railroads	7,440 contacts	1 minute	124
—(d)(2) Dispatching RR Not Having Maintenance Duty Contact of All Trains Authorized to Operate through Highway-Rail or Pathway Grade Crossing After Report of Disabled Vehicle or Other Unsafe Condition.	594 railroads	2,556 contacts	1 minute	43

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Dispatching RR Not Having Maintenance Responsibility Contact of Law Enforcement Authority regarding Disabled Vehicle/Unsafe Condition.	594 railroads	2,556 contacts	1 minute	43
—Dispatching RR Contact of Maintaining RR regarding Unsafe Condition at Crossing & Record of Unsafe Condition.	594 railroads	2,556 contacts + 2,556 records.	1 minute + 1 minute	86
234.305(h)—Provision of Contact Information by Maintaining RR to Dispatching RR in Order to Be Contacted regarding Reports of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings.	594 railroads	10 info contacts	1 minute	.1667
234.306(a)—Appointment of One Dispatching RR as Primary Dispatching RR Where Multiple RRs Dispatch Trains through Same Highway-Rail or Pathway Grade Crossing to Provide Info. for ENS Sign.	594 railroads	50 appointments & records.	60 minutes	50
(b)—Appointment of One Maintaining RR As Primary Maintaining RR Where Multiple RRs Maintain Same Highway-Rail or Pathway Grade Crossing for Placement and Maintenance of ENS Sign.	594 railroads	50 appointment & records.	60 minutes	50
234.307(b)—3rd Party Telephone Service Report of Unsafe Conditions at Highway-Rail or Pathway Grade Crossings to Maintaining Railroad and Maintaining RR Record of Unsafe Condition.	594 railroads	50 reports + 50 records	1 minute + 1 minute	2
(c)—3rd Party Telephone Service Report to Dispatching RR of Unsafe Condition.	594 railroads	50 reports	1 minute	1
(d)(1)—Provision of Contact Information to 3rd Party Telephone Service by Dispatching RR or Maintaining RR Using That Service to Receive Reports of Unsafe Conditions at Highway-Rail or Pathway Grade Crossings.	594 railroads	17 contact calls	15 minutes	4
(d)(2)—Written Notice to FRA by Railroad of Intent to Use 3rd Party Svc.	594 railroads	17 letters	60 minutes	17
(d)(3)—Railroad Written Notification to FRA of Any Changes in Use or Discontinuance of 3rd Party Service.	594 railroads	5 letters	60 minutes	5
234.309(a)—ENS Signs—General—Provision of ENS Telephone Number to Maintaining RR by Dispatching RR If Two RRs Are Not the Same.	594 railroads	10 contacts	30 minutes	5
—(b) ENS Signs Located at Highway-Rail or Pathway Grade Crossings as required by § 234.311 with Necessary Information to Receive Reports Required under § 234.303.	594 railroads	81,948 signs	30 minutes	40,974
234.313—Recordkeeping—Records of Reported Unsafe Conditions Pursuant to § 234.303.	594 railroads	186,000 records	4 minutes	12,400

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202–493–6292 or Ms. Kimberly Toone at 202–493–6132 or via email at the following addresses: *Robert.Brogan@dot.gov*; *Kimberly.Toone@dot.gov*.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D. C. 20503, Attention: FRA Desk Officer. Comments may also be sent via email to OMB at the following address: *oira_submissions@omb.eop.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not permitted to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

F. Environmental Assessment

FRA has evaluated this final rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. (*See* 64 FR 28547, May 26, 1999.) Section 4(c)(20) reads as follows: ''Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * * Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.''

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) [$140,800,000 or more in 2010] in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of more than $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

I. Privacy Act Statement

Interested parties should be aware that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://www.regulations.gov.*

List of Subjects in 49 CFR Part 234

Highway safety, Penalties, Railroad safety, and Reporting and recordkeeping requirements, State and local governments.

The Final Rule

In consideration of the foregoing, FRA amends part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—GRADE CROSSING SAFETY, INCLUDING SIGNAL SYSTEMS, STATE ACTION PLANS, AND EMERGENCY NOTIFICATION SYSTEMS

■ 1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20152, 21301, 21304, 21311, 22501 note; Pub. L. 110–432, Div. A, Secs. 202, 205; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. The heading for part 234 is revised to read as set forth above.

■ 3. Section 234.1 is revised to read as follows:

§ 234.1 Scope.

(a) This part prescribes minimum—

(1) Maintenance, inspection, and testing standards for highway-rail grade crossing warning systems;

(2) Standards for the reporting of failures of highway-rail grade crossing warning systems and for the actions that railroads must take when such systems malfunction;

(3) Requirements for particular identified States to develop State highway-rail grade crossing action plans; and

(4) Requirements that certain railroads establish systems for receiving toll-free telephone calls reporting various unsafe conditions at highway-rail grade crossings and pathway grade crossings, and for taking certain actions in response to those calls.

(b) This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

■ 4. Section 234.3 is revised to read as follows:

§ 234.3 Application and responsibility for compliance.

(a) With the exception of § 234.11, this part applies to all railroads except the following:

(1) Operations of a plant railroad as defined in § 234.5;

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation; or

(3) Tourist, scenic, historic, or excursion operations conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track) and only

on track inside an installation that is insular; *i.e.,* the operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation will not be considered insular if one or more of the following exists on its line:

(i) A public highway-rail crossing that is in use;

(ii) An at-grade rail crossing that is in use;

(iii) A bridge over a public road or waters used for commercial navigation; or

(iv) A common corridor with a railroad, *i.e.,* its operations are within 30 feet of those of any railroad.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor or subcontractor for a railroad, who performs any task covered by this part, shall perform that task in accordance with this part.

■ 5. Section 234.5 is amended as follows:

■ a. Remove the definition of ''Credible report of system malfunction'' and add a definition of ''Credible report of warning system malfunction or credible report of warning system malfunction at a highway-rail grade crossing'' in its place.

■ b. Add definitions of ''FRA'' and ''Plant railroad'' in alphabetical order.

■ c. Remove the definition of ''Warning system malfunction'' and add a definition of ''Warning system malfunction or warning system malfunction at a highway-rail grade crossing'' in its place.

The additions read as follows:

§ 234.5 Definitions.

* * * * *

Credible report of warning system malfunction or *credible report of warning system malfunction at a highway-rail grade crossing* means a report that contains specific information regarding a malfunction of a highway-rail grade crossing warning system at an identified highway-rail grade crossing, supplied by a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity.

* * * * *

FRA means the Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

* * * * *

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

* * * * *

Warning system malfunction or *warning system malfunction at a highway-rail grade crossing* means an activation failure, a partial activation, or a false activation of a highway-rail grade crossing warning system.

■ 6. The heading for subpart C of part 234 is revised to read as follows:

Subpart C—Response to Credible Reports of Warning System Malfunction at Highway-Rail Grade Crossings

■ 7. A new subpart E to part 234 is added to read as follows:

Subpart E—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

Sec.

234.301 Definitions.
234.303 Emergency notification systems for telephonic reporting of unsafe conditions at highway-rail and pathway grade crossings.
234.305 Remedial actions in response to reports of unsafe conditions at highway-rail and pathway grade crossings.
234.306 Multiple dispatching or maintaining railroads with respect to the same highway-rail or pathway grade crossing; appointment of responsible railroad.
234.307 Use of third-party telephone service by dispatching and maintaining railroads.
234.309 ENS signs in general.
234.311 ENS sign placement and maintenance.
234.313 Recordkeeping.
234.315 Electronic recordkeeping.
234.317 Compliance dates.

Subpart E—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

§ 234.301 Definitions.

As used in this subpart—

Answering machine means either a device or a voicemail system that allows a telephone caller to leave a recorded message to report an unsafe condition at a highway-rail or pathway grade crossing, as described in § 234.303(c) and (d), and the railroad is able to retrieve the recorded message either remotely or on-site.

Automated answering system means a type of answering system that directs a telephone caller to a single menu of options, where the caller has the choice to select one of the available options to report an unsafe condition at a highway-rail or pathway grade crossing, as described in § 234.303(c) and (d), and immediately after selecting one of the available menu options, the caller is transferred to a live telephone operator.

Class II and *Class III* have the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1), as those regulations may be revised and applied by order of the Board (including modifications in class threshold based on revenue deflator adjustments).

Dispatches a train or *dispatches trains* means dispatches or otherwise provides the authority for the movement of the train or trains through a highway-rail or pathway grade crossing.

Dispatching railroad means a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing.

Emergency Notification System means a system in place by which a railroad receives, processes, and responds to telephonic reports of an unsafe condition at a highway-rail or pathway grade crossing. An Emergency Notification System includes the following components:

(1) The signs, placed and maintained at the grade crossings that display the information necessary for the public to report an unsafe condition at the grade crossing to the dispatching railroad by telephone;

(2) The method that the railroad uses to receive and process a telephone call reporting the unsafe condition;

(3) The remedial actions that a railroad takes to address the report of the unsafe condition; and

(4) The recordkeeping conducted by a railroad in response to the report of the unsafe condition at the grade crossing.

ENS means Emergency Notification System as defined in this section.

Farm grade crossing means a type of highway-rail grade crossing where a private roadway used for the movement of farm motor vehicles, farm machinery, or livestock in connection with agricultural pursuits, forestry, or other land-productive purposes crosses one or more railroad tracks at grade.

Highway-rail and pathway grade crossing means a highway-rail grade crossing and a pathway grade crossing.

Highway-rail or pathway grade crossing means either a highway-rail grade crossing or a pathway grade crossing.

Maintaining railroad means the entity (*e.g.,* track owner or lessee) that is responsible for maintenance of the highway-rail or pathway grade crossing warning device, or for maintenance of other aspects of the highway-rail or pathway grade crossing. If the maintenance responsibility is handled by a contractor, such as maintaining a grade crossing warning system or track structure at the highway-rail or pathway grade crossing, then the contractor is considered the ''maintaining railroad'' for the purposes of this subpart.

Pathway grade crossing means a pathway that crosses one or more railroad tracks at grade and that is—

(1) Explicitly authorized by a public authority or a railroad;

(2) Dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others; and

(3) Not associated with a public highway, road, or street, or a private roadway.

Public report of warning system malfunction or *public report of warning system malfunction at a highway-rail grade crossing* means a report that contains specific information regarding a warning system malfunction at a highway-rail grade crossing that is supplied to a railroad via the ENS by a member of the public who does not belong to one of the categories of individuals listed in the definition of *Credible report of warning system malfunction* or *credible report of warning system malfunction at a highway-rail grade crossing* in § 234.5.

Third-party telephone service means a service that receives telephonic reports of unsafe conditions at highway-rail and pathway grade crossings on behalf of a railroad. A third-party telephone service that receives reports on behalf of a dispatching railroad is the only entity between the receipt of the report from the telephone caller and the transmission of the report to the dispatching railroad. A third-party telephone service that receives reports on behalf of a maintaining railroad is the only entity between the receipt of the report from a dispatching railroad and the transmission of the report to the maintaining railroad.

Warning system failure at a pathway grade crossing means failure of an active pathway grade crossing warning system to perform as intended.

§ 234.303 Emergency notification systems for telephonic reporting of unsafe conditions at highway-rail and pathway grade crossings.

(a) *Duty of dispatching railroad in general.* Each railroad shall establish and maintain a toll-free telephone service by which the railroad can directly and promptly receive telephone calls from the public reporting specific information about any of the conditions listed in paragraph (c) of this section with respect to a highway-rail grade crossing and paragraph (d) of this section with respect to a pathway grade crossing through which the railroad dispatches a train, except as provided in paragraphs (b) and (e) of this section, and in § 234.306(a). The dispatching railroad shall either have a live person answer calls directly and promptly, or use an automated answering system or a third-party telephone service for the purpose of receiving reports pursuant to this section, except as provided in paragraph (b) of this section.

(b) *Exceptions for certain railroads.* If a dispatching railroad operates in accordance with either of the conditions set forth in this paragraph, the railroad is not subject to the general duties stated in the last sentence of paragraph (a) of this section.

(1) If a railroad dispatches one or more trains through a highway-rail or pathway grade crossing, each of which is authorized to travel through the crossing at speeds not greater than 20 miles per hour (mph), the railroad may use an answering machine to receive calls regarding unsafe conditions at such a crossing. If using an answering machine pursuant to this paragraph, the railroad must retrieve its messages immediately prior to the start of its operations each day.

(2) If a railroad dispatches one or more trains through a highway-rail or pathway grade crossing on a seasonal or intermittent basis (*e.g.,* tourist, biweekly service, or non-24-hour service), and any of the trains is authorized to travel through the crossing at speeds greater than 20 mph, the railroad may use an answering machine to receive calls regarding unsafe conditions at such a crossing, but only during hours of non-operation. If using an answering machine pursuant to this paragraph (b), during periods of non-operation, the railroad must retrieve its messages daily. However, the railroad must retrieve its messages immediately prior to the start of its operations for the day, and during hours of operation the dispatching railroad shall either have a live person answer calls directly and promptly, use an automated answering system, or employ a third-party telephone service, in accordance with paragraph (a) of this section, to receive reports regarding unsafe conditions at crossings through which it dispatches trains.

(c) *Reportable unsafe conditions at highway-rail grade crossings.* Each railroad shall establish a service pursuant to paragraph (a) of this section, except as provided in paragraphs (b) and (e) of this section, and in § 234.306(a), to receive telephone calls regarding the following conditions with respect to a highway-rail grade crossing through which it dispatches a train:

(1) A warning system malfunction at the highway-rail grade crossing;

(2) A disabled vehicle or other obstruction blocking a railroad track at the highway-rail grade crossing;

(3) An obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the highway-rail grade crossing; or

(4) Any information relating to any other unsafe condition at the highway-rail grade crossing.

(d) *Reportable unsafe conditions at pathway grade crossings.* Each railroad shall establish a service pursuant to paragraph (a) of this section, except as provided in paragraphs (b) and (e) of this section, and in § 234.306(a), to receive telephone calls regarding the following conditions with respect to a pathway grade crossing through which it dispatches a train:

(1) A failure of the active warning system at the pathway grade crossing to perform as intended;

(2) An obstruction blocking a railroad track at the pathway grade crossing;

(3) An obstruction to the view of a pathway grade crossing user for a reasonable distance in either direction of a train's approach to the pathway grade crossing; or

(4) Any information relating to any other unsafe condition at the pathway grade crossing.

(e) *Class II or Class III railroads.* A Class II or Class III railroad that dispatches one or more trains through a highway-rail or pathway grade crossing within an area in which the use of a non-toll-free number would not incur any additional fees for the caller than if a toll-free number were used, may use

that non-toll-free number to receive calls pursuant to paragraph (a) of this section regarding each such crossing in that area.

(f) *Reports not made through the ENS.* If a report of an unsafe condition at a highway-rail or pathway grade crossing is not made through the telephone service described in paragraph (a) of this section, this subpart E does not apply to that report.

§ 234.305 Remedial actions in response to reports of unsafe conditions at highway-rail and pathway grade crossings.

(a) *General rule on response to credible report of warning system malfunction at a highway-rail grade crossing.* (1) If a railroad receives a credible report of a warning system malfunction at a highway-rail grade crossing pursuant to § 234.303(c)(1) and the railroad has maintenance responsibility for the warning system to which the report pertains, then it shall take the appropriate action required by subpart C of this part.

(2) If a railroad receives a credible report of a warning system malfunction at a highway-rail grade crossing pursuant to § 234.303(c)(1) and the railroad has dispatching responsibility for the crossing, but does not have maintenance responsibility for the warning system to which the report pertains, it shall promptly contact all trains that are authorized to operate through the highway-rail grade crossing in an effort to notify the train crews of the reported malfunction prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the maintaining railroad and inform it of the reported malfunction. The maintaining railroad shall then take the appropriate action required by subpart C of this part.

(b) *General rule on response to public report of warning system malfunction at a highway-rail grade crossing.* (1) If a railroad receives a public report of a warning system malfunction at a highway-rail grade crossing pursuant to § 234.303(c)(1) and the railroad has maintenance responsibility for the warning system to which the report pertains, the railroad shall promptly contact all trains that are authorized to operate through the highway-rail grade crossing in an effort to notify the train crews of the reported malfunction prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the law enforcement agency having jurisdiction over the highway-rail grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the highway-rail grade crossing. The railroad shall then promptly investigate the report, determine the nature of the malfunction and take the appropriate action required by § 234.207.

(2) If a railroad receives a public report of a warning system malfunction at a highway-rail grade crossing warning system pursuant to § 234.303(c)(1) and the railroad does not have maintenance responsibility for the warning system at the highway-rail grade crossing, it shall promptly contact all trains that are authorized to operate through the highway-rail grade crossing to which the report pertains in an effort to notify the train crews of the reported malfunction prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the law enforcement agency having jurisdiction over the highway-rail grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the highway-rail grade crossing. The railroad shall then promptly contact the maintaining railroad and inform it of the reported malfunction. The maintaining railroad shall then promptly investigate the report, determine the nature of the malfunction, and take the appropriate action required by § 234.207.

(c) *General rule on response to report of warning system failure at a pathway grade crossing.* (1) If a railroad receives a report of a warning system failure at a pathway grade crossing pursuant to § 234.303(d)(1) and the railroad has maintenance responsibility for the warning system to which the report pertains, the railroad shall promptly contact all trains that are authorized to operate through the pathway grade crossing in an effort to notify the train crews of the reported failure prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The railroad shall then promptly investigate the report, determine the nature of the failure, and without undue delay repair the active warning system if necessary.

(2) If a railroad receives a report of warning system failure at a pathway grade crossing pursuant to § 234.303(d)(1), but does not have maintenance responsibility for the warning system to which the report pertains, the railroad shall promptly contact all trains that are authorized to operate through the pathway grade crossing to which the report pertains in an effort to notify the train crews of the reported failure prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The railroad shall then promptly contact the maintaining railroad and inform it of the reported failure. The maintaining railroad shall then promptly investigate the report, determine the nature of the failure, and without undue delay repair the warning system if necessary.

(d) *General rule on response to report of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing.* (1) If a railroad receives a report of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing, pursuant to § 234.303(c)(2) or (d)(2), and the railroad has maintenance responsibility for the crossing to which the report pertains, the railroad shall promptly contact all trains that are authorized to operate through the crossing in an effort to notify the train crews of the reported obstruction prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact the law enforcement agency having jurisdiction over the crossing to provide it with the information necessary to assist in the removal of the reported track obstruction or to carry out other activities to maintain safety at the crossing. The railroad shall then promptly investigate the report, determine the nature of the obstruction, and without undue delay take the necessary action to have the obstruction removed.

(2) If a railroad receives a report of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing, pursuant to § 234.303(c)(2) or (d)(2), but does not have maintenance responsibility for the crossing to which the report pertains, the railroad shall promptly contact all trains that are authorized to operate through the crossing to which the report pertains in an effort to notify the train crews of the reported obstruction prior to each train's arrival at the crossing. After contacting the appropriate trains, the railroad shall then promptly contact

the law enforcement agency having jurisdiction over the crossing to provide it with the information necessary to assist in the removal of the reported track obstruction or to carry out other activities to maintain safety at the crossing. The railroad shall then promptly contact the maintaining railroad and inform it of the reported obstruction. The maintaining railroad shall then promptly investigate the report, determine the nature of the obstruction, and without undue delay take the necessary action to have the obstruction removed.

(e) *Special rule on contacting a train that is not required to have communication equipment.* If a railroad is not required by § 220.9 of this chapter to have a working radio or working wireless communications in each occupied controlling locomotive of its trains and the railroad receives a report pursuant to § 234.303(c)(1), (c)(2), (d)(1), or (d)(2) about a highway-rail or pathway crossing that any of the trains is authorized to operate through, the railroad shall promptly contact the occupied controlling locomotive of the train as required by paragraph (a), (b), (c), or (d) of this § 234.305 by the quickest means available consistent with § 220.13(a) of this chapter.

(f) *General rule on response to report of an obstruction of view at a highway-rail or pathway grade crossing.* (1) Upon receiving a report pursuant to § 234.303(c)(3) or (d)(3), the railroad, if it is both the dispatching and the maintaining railroad, shall timely investigate the report and remove the obstruction if it is lawful and feasible to do so.

(2) If the dispatching railroad is not also the maintaining railroad, it shall promptly contact the maintaining railroad, which shall timely investigate the report and remove the obstruction if it is lawful and feasible to do so.

(g) *General rule on response to report of other unsafe condition at a highway-rail or pathway grade crossing.* Upon receiving a report pursuant to § 234.303(c)(4) or (d)(4) related to the maintenance of a crossbuck sign or other similar grade crossing safety device or any other unsafe condition (such as a pot hole that could cause injury or damage) not covered by paragraph (a), (b), or (c) of this § 234.305, the railroad, if it is both the dispatching and the maintaining railroad, shall timely investigate the report; and, if the railroad finds that the unsafe condition exists, it shall timely correct it if it is lawful and feasible to do so. If the dispatching railroad is not also the maintaining railroad, it shall timely inform the maintaining railroad, which shall timely investigate the report; and, if the maintaining railroad finds that the unsafe condition exists, it shall timely correct it if it is lawful and feasible to do so.

(h) *General rule on a maintaining railroad's responsibilities for receiving reports of unsafe conditions at highway-rail and pathway grade crossings.* (1) *In general.* If the dispatching railroad is required under this section to contact the maintaining railroad, the maintaining railroad shall—

(i) Provide the dispatching railroad with sufficient contact information by which the dispatching railroad may timely contact the maintaining railroad upon receipt of a report; and

(ii) Have either a live person answer calls directly and promptly, or use an automated answering system for the purpose of receiving a call from the dispatching railroad of a report of an unsafe condition, except as provided in paragraph (h)(2) of this section.

(2) *Exceptions for use of a third-party telephone service and answering machine by a maintaining railroad.* (i) If a maintaining railroad is responsible for the maintenance of a highway-rail or pathway grade crossing through which a railroad dispatches one or more trains, each of which is authorized to travel through the crossing at speeds not greater than 20 mph, the maintaining railroad may use a third-party telephone service, in accordance with § 234.307, or an answering machine to receive reports from a dispatching railroad of unsafe conditions at such a crossing. If using an answering machine pursuant to this paragraph, the railroad must retrieve its messages immediately prior to the start of its operations for the day.

(ii) If a maintaining railroad is responsible for the maintenance of a highway-rail or pathway grade crossing only on a seasonal or intermittent basis (*e.g.,* tourist, biweekly service, or non-24-hour service), the maintaining railroad may use a third-party telephone service, in accordance with § 234.307, or an answering machine to receive reports from a dispatching railroad of unsafe conditions at such a crossing. If using an answering machine pursuant to this paragraph, during periods of non-operation, the maintaining railroad must retrieve its messages daily. However, the railroad must retrieve its messages immediately prior to the start of its operations for the day, and during hours of operation the railroad shall either have a live person answer calls directly or use an automated answering system to receive reports regarding unsafe conditions at such a crossing.

§ 234.306 Multiple dispatching or maintaining railroads with respect to the same highway-rail or pathway grade crossing; appointment of responsible railroad.

(a) *Duty of multiple dispatching railroads to appoint a primary dispatching railroad for the crossing.* (1) Where more than one railroad dispatches a train through the same highway-rail or pathway grade crossing, the dispatching railroads for the crossing shall appoint one of the railroads to be the primary dispatching railroad for the crossing and, as such, the primary dispatching railroad for the crossing shall do the following:

(i) Provide its emergency telephone number to the railroad responsible for the placement and maintenance of the ENS sign(s) at the crossing;

(ii) Receive all reports through ENS of unsafe conditions at the crossing as required by § 234.303;

(iii) After receiving a report of an unsafe condition at the crossing, promptly contact all other railroads that dispatch trains through the crossing to warn them of the reported unsafe condition, and, as appropriate, promptly contact the maintaining railroad(s) for the crossing as required by § 234.305; and

(iv) Otherwise carry out its duties under this subpart as a dispatching railroad for the crossing, with respect to the crossing.

(2) After receiving a report of an unsafe condition at the crossing from the appointed dispatching railroad, each of the other dispatching railroad(s) to which the report pertains shall carry out the remedial action required by § 234.305 and the recordkeeping required by § 234.313.

(b) *Duty of multiple maintaining railroads to appoint a railroad responsible for the placement and maintenance of the ENS sign(s).* (1) Where more than one railroad maintains the same crossing, the maintaining railroads for the crossing shall appoint one of the railroads to be responsible for the placement and maintenance of the ENS sign(s) at the crossing pursuant to §§ 234.309 and 234.311.

(2) The railroad appointed under paragraph (b)(1) of this section shall display on the ENS sign(s) at the crossing the emergency telephone number of the dispatching railroad for the crossing or, if more than one railroad dispatches a train through the crossing, the emergency telephone number of the primary dispatching railroad for the crossing identified under paragraph (a) of this section.

(c) *Duty of multiple maintaining railroads with respect to remedial action*

at the crossing. Where there are multiple maintaining railroads for a crossing, the dispatching railroad (or, if more than one railroad dispatches a train through the crossing, the primary dispatching railroad for the crossing under paragraph (a) of this section) upon receipt of a report of an unsafe condition, shall promptly contact and inform the appropriate maintaining railroad(s) for the crossing of the reported problem. After each maintaining railroad for the crossing receives a report of an unsafe condition at the crossing that pertains to its maintenance responsibilities for the crossing, the maintaining railroad shall carry out the remedial action required by § 234.305 and the recordkeeping required by § 234.313.

§ 234.307 Use of third-party telephone service by dispatching and maintaining railroads.

(a) *General use of a third-party telephone service by a dispatching railroad.* A dispatching railroad may use a third-party telephone service to receive reports of unsafe conditions at highway-rail and pathway grade crossings pursuant to § 234.303. If a dispatching railroad chooses to use a third-party telephone service, the third-party telephone service shall be reached directly and promptly by the telephone number displayed on the ENS sign pursuant to § 234.309. The third-party telephone service may use an automated answering system for the purpose of receiving such reports. The dispatching railroad shall have a live person answer calls directly and promptly from the third-party telephone service, unless permitted pursuant to § 234.303(b) to use an answering machine. The dispatching railroad shall ensure that the third-party telephone service complies with the applicable requirements of § 234.307.

(b) *General use of a third-party telephone service by a maintaining railroad.* Pursuant to § 234.305(h)(2), a maintaining railroad that either maintains a highway-rail or pathway grade crossing on a seasonal or intermittent basis (*e.g.,* tourist, biweekly service, or non-24 hours service), or a crossing through which a railroad dispatches one or more trains, each of which is authorized to travel through the crossing at speeds not greater than 20 mph, may use a third-party telephone service to receive reports of unsafe conditions at such a crossing from a dispatching railroad. The third-party telephone service may use an automated answering system for the purpose of receiving such reports. The maintaining railroad shall receive reports from the third-party telephone service by either having a live person answer calls directly and promptly, or using an answering machine. If using an answering machine pursuant to this paragraph, the railroad must use the answering machine in accordance with § 234.305(h)(2). The maintaining railroad shall ensure that the third-party telephone service complies with the applicable requirements of § 234.307.

(c) *Duties of third-party telephone service in contacting dispatching and maintaining railroads.* Upon receiving a report pursuant to §§ 234.303 or 234.305, on behalf of either the dispatching railroad or maintaining railroad, respectively, the third-party telephone service shall immediately contact the railroad, and, at a minimum, provide it with the following information:

(1) The nature of the reported unsafe condition;

(2) The location of the unsafe condition, including the U.S. DOT National Crossing Inventory number for the crossing;

(3) Whether the person reporting the unsafe condition is a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity;

(4) The date and time that the report was received by the third-party telephone service; and

(5) Any additional information provided by the caller that may be useful to restore the crossing to a safe condition.

(d) *Duties of railroad using third-party telephone service.* If a dispatching or maintaining railroad uses a third-party telephone service to receive reports of unsafe conditions at a highway-rail or pathway grade crossing, the railroad shall—

(1) Provide the third-party telephone service with sufficient contact information by which the third-party telephone service may immediately contact the railroad upon receipt of a report;

(2) Inform FRA in writing, before the implementation of such a service, of the railroad's intent to use a third-party telephone service, and provide FRA with contact information for the third-party telephone service and information identifying the highway-rail and pathway grade crossings about which the third-party telephone service will receive reports;

(3) Inform FRA in writing within 30 days following any changes in the use or discontinuance of a third-party telephone service; and

(4) Take appropriate action required by § 234.305, upon being contacted by the third-party telephone service about a report.

(e) *Third-party telephone service and railroad responsibilities.* If a railroad uses a third-party telephone service to receive reports pursuant to §§ 234.303 or 234.305, the third-party telephone service is responsible for carrying out the duties of this section and recordkeeping duties under § 234.313, and, if applicable under § 234.315. In addition, the railroad remains responsible for any acts or omissions of the third-party telephone service it utilizes that violate the provisions of this section or the recordkeeping requirements under § 234.313, and, if applicable under § 234.315.

§ 234.309 ENS signs in general.

(a) *Provision of information.* If the dispatching railroad and the maintaining railroad(s) are not the same entity, the dispatching railroad for a highway-rail or pathway grade crossing shall provide to the maintaining railroad the telephone number that is to be displayed on the ENS sign at the crossing, not later than 180 calendar days before the date that implementation of an ENS is required.

(b) *Information to be displayed.* Each ENS sign located at each highway-rail or pathway grade crossing as required by § 234.311 shall display the necessary information for the dispatching railroad to receive reports of unsafe conditions at the crossing. This information, at a minimum, includes the following:

(1) The toll-free telephone number (or non-toll-free telephone number as provided for in § 234.303(e)) established to receive reports pursuant to § 234.303(a);

(2) An explanation of the purpose of the sign (*e.g.,* ''Report emergency or problem to __''); and

(3) The U.S. DOT National Crossing Inventory number assigned to that crossing.

(c) *Sign size and other physical features.* Each ENS sign shall—

(1) Measure at least 12 inches wide by 9 inches high;

(2) Be retroreflective;

(3) Have legible text (*i.e.,* letters and numerals) with a minimum character height of 1 inch for the information required in paragraph (b) of this section; and

(4) Have white text set on a blue background with a white border, except that the U.S. DOT National Crossing Inventory number may be black text set on a white rectangular background.

§ 234.311 ENS sign placement and maintenance.

(a) *Number of signs at highway-rail or pathway grade crossing.* (1) *In general.*

The maintaining railroad, or the railroad appointed pursuant to § 234.306(b), for a highway-rail or pathway grade crossing shall place and maintain a sign on each approach to the crossing that conforms to § 234.309, except as provided in paragraph (a)(2) of this section.

(2) *Exceptions.* (i) At a farm grade crossing, the responsible railroad shall place and maintain a minimum of one sign that conforms to § 234.309 at the crossing.

(ii) At a railroad yard, port or dock facility, or a private industrial facility that does not meet the definition of ''plant railroad'' in § 234.5, the responsible railroad shall place and maintain a minimum of one sign at each vehicular entrance to the facility in accordance with § 234.309, in lieu of placing signs at each crossing within the yard, port or dock facility, or private industrial facility. Each sign must be placed so that it is clearly visible to a driver of a motor vehicle located at the vehicular entrance to the facility.

(b) *Placement of sign(s).* (1) Each sign required by paragraph (a) of this section must be located at the crossing, except as provided in paragraph (a)(2)(ii) of this section, and maintained by the responsible railroad so that the sign—

(i) Is conspicuous to users of the roadway or pathway by day and night;

(ii) Does not obstruct any other sign or traffic control device at the crossing;

(iii) Does not limit the view of a train approaching the highway-rail or pathway grade crossing; and

(iv) If mounted on a post, has supports that are crashworthy (*i.e.,* breakaway or yielding).

(2) A sign placed on the signal bungalow does not comply with paragraph (b)(1)(i) of this section.

§ 234.313 Recordkeeping.

(a) *In general.* Each railroad subject to this subpart shall keep records in accordance with this section. Records may be kept either on paper forms provided by the railroad or by electronic means in a manner that conforms with § 234.315. Each dispatching railroad responsible for receiving reports pursuant to § 234.303(a), each third-party telephone service responsible for receiving reports pursuant to § 234.307, and, if applicable, each maintaining railroad shall keep, at a minimum, the following information for each report received under this subpart:

(1) The nature of the reported unsafe condition;

(2) The location of the highway-rail or pathway grade crossing, by highway name, if applicable, and the U.S. DOT National Crossing Inventory number.

(3) The time and date of receipt of the report by the railroad;

(4) If applicable, whether the person who provided the report was a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity;

(5) Actions taken by the railroad prior to resolving the reported unsafe condition at the grade crossing (*e.g.,* warning train crews, notifying the maintaining railroad, or contacting law enforcement or other public authorities);

(6) If the reported unsafe condition is substantiated, actions taken by the railroad to remedy the reported unsafe condition, if lawful and feasible;

(7) The time and date when the reported unsafe condition was remedied;

(8) If no remedial action was taken, the reason why; and

(9) If a dispatching railroad, in accordance with § 234.305, is required to contact a maintaining railroad, the time and date when it contacted the maintaining railroad.

(b) *Records of credible reports of warning system malfunction.* A railroad that has maintenance responsibility over warning devices at a highway-rail grade crossing and maintains records pursuant to § 234.109, shall be deemed to comply with the recordkeeping requirements of this subpart with regard to credible reports of warning system malfunctions.

(c) *Records involving multiple dispatching or maintaining railroads.* (1) Where multiple railroads dispatch trains through the same highway-rail or pathway grade crossing and appoint one railroad to receive telephonic reports regarding unsafe conditions at such crossings pursuant to § 234.306, the appointment must be recorded in writing and a copy of the document retained by each railroad for the duration of the appointment or for one year, whichever period is longer.

(2) Where multiple railroads have maintenance responsibility for the same highway-rail or pathway grade crossing and they appoint one railroad to be responsible for installing and maintaining the ENS sign(s) at the crossing pursuant to § 234.306, the appointment must be recorded in writing and a copy of the document retained by each railroad for the duration of the appointment or for one year, whichever period is longer.

(d) *Record retention period; records availability.* Each railroad shall retain for at least one year (from the latest date of railroad activity in response to a report received under this subpart) all records referred to in paragraphs (a) and (b) of this section. Records required to be kept under this subpart shall be made available to FRA as provided by 49 U.S.C. 20107.

§ 234.315 Electronic recordkeeping.

(a) If a railroad subject to this subpart maintains records required by this subpart in electronic format in lieu of on paper, the system for keeping the electronic records must meet all of the following conditions:

(1) The railroad adequately limits and controls accessibility to the records retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the location designated by the railroad as the general office for the railroad system and at each division headquarters;

(3) Each such terminal has a computer and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as a true and accurate copy of the electronically kept record; and

(5) The railroad provides FRA representatives with immediate access to the record(s) for inspection and copying during normal business hours and provides a printout of such record(s) upon request.

(b) If a record required by this subpart is in the form of an electronic record kept by an electronic recordkeeping system that does not comply with paragraph (a) of this section, then the record must be kept on paper.

§ 234.317 Compliance dates.

(a) *Railroads without an ENS of any kind.* If a railroad subject to this subpart does not have an ENS of any kind in place on August 13, 2012, the railroad shall implement an ENS that conforms to this subpart no later than September 1, 2015.

(b) *Railroads with nonconforming ENS telephone service.* If a railroad subject to this subpart already has its own ENS telephone service or is using a third-party ENS telephone service, and that telephone service does not conform to the requirements in § 234.303 or § 234.307, respectively, on August 13, 2012, the railroad shall comply with § 234.303 or § 234.307, respectively, no later than March 1, 2014.

(c) *Railroads with ENS signs of nonconforming size.* (1) If a railroad subject to this subpart already has ENS signs in place, and those signs do not conform to the requirements in

§ 234.309 on August 13, 2012, the railroad's ENS signs shall conform to § 234.309 no later than as required below:

(i) If the railroad's sign size is greater than or equal to 60 square inches and the height of the lettering on the sign is greater than or equal to ¾ inch for the information required in § 234.309(b) on August 13, 2012, the railroad may maintain the sign for its useful life.

(ii) If the railroad's sign size is greater than or equal to 60 square inches but the height of the lettering is less than ¾ inch for the information required in § 234.309(b) on August 13, 2012, the railroad's sign must conform to § 234.309 no later than September 1, 2017.

(iii) If the railroad's sign size is less than 60 square inches, regardless of the height of the lettering for the information required in § 234.309(b), on August 13, 2012, the railroad's sign must conform to § 234.309 no later than September 1, 2015.

(2) If the railroad chooses to replace an ENS sign of non-conforming size before the applicable compliance date stated, the railroad shall replace that sign with a sign that conforms to § 234.309.

(d) *Railroads with ENS signs having nonconforming placement.* If a railroad subject to this subpart already has ENS signs in place, and the placement of those signs does not conform to the requirements in § 234.311 on August 13, 2012, the placement of the railroad's ENS signs shall conform to § 234.311 no later than September 1, 2017. If a railroad changes the placement of the sign before September 1, 2017, the placement of the sign must conform to § 234.311. If a railroad replaces a sign before September 1, 2017, so that the sign conforms to § 234.309, and the placement of that sign does not conform to § 234.311, the railroad shall also change the placement of the sign so that it conforms to § 234.311.

(e) *Railroads with nonconforming ENS recordkeeping.* If a railroad subject to this subpart already conducts recordkeeping as part of its ENS, and that recordkeeping does not conform to § 234.313 or § 234.315, the railroad's recordkeeping shall conform to § 234.313 or § 234.315 no later than September 1, 2013.

Issued in Washington, DC, on June 1, 2012.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

[FR Doc. 2012–13843 Filed 6–11–12; 8:45 am]

BILLING CODE 4910–06–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 113 June 12, 2012

Part IV

Commodity Futures Trading Commission

17 CFR Part 46

Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 46

[3038–AD48]

Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting rules to further implement the Commodity Exchange Act (''CEA'' or ''Act'') with respect to the new statutory framework regarding swap data recordkeeping and reporting established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The Dodd-Frank Act, which amended the CEA, directs that rules adopted by the Commission shall provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act, the terms of which have not expired as of the date of enactment of the Dodd-Frank Act (''pre-enactment swaps'') and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the compliance date specified in the Commission's final swap data reporting rules (''transition swaps''). These final rules establish swap data recordkeeping and reporting requirements for pre-enactment swaps and transition swaps.

DATES: The effective date of this part is August 13, 2012. *Compliance dates:* (1) Swap dealers and major swap participants shall commence full compliance with this part with respect to credit swaps and interest rate swaps on the later of: July 16, 2012; or 60 calendar days after publication in the **Federal Register** of the later of the Commission's final rule defining the term ''swap'' or the Commission's final rule defining the terms ''swap dealer'' and ''major swap participant;'' (2) Swap dealers and major swap participants shall commence full compliance with this part with respect to equity swaps, foreign exchange swaps, and other commodity swaps on or before 90 days after the compliance date for credit swaps and interest rate swaps; (3) Non-SD/MSP counterparties shall commence full compliance with this part with respect to all swaps on or before 90 days after the compliance date applicable to swap dealers and major swap participants with respect to equity swaps, foreign exchange swaps, and other commodity swaps.

FOR FURTHER INFORMATION CONTACT: David Taylor, Associate Director, Division of Market Oversight, 202–418–5488, *dtaylor@cftc.gov*; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20851.

SUPPLEMENTARY INFORMATION: The Commission is adopting new part 46 of its regulations relating to recordkeeping and reporting requirements applicable to both pre-enactment and transition swaps. These rules, when adopted, will supersede interim final rules previously adopted by the Commission in part 44 of its regulations.

Table of Contents

I. Background
A. Introduction
B. Swap Data Provisions of the Dodd-Frank Act
C. The Commission's Part 45 Rules on Swap Data Recordkeeping and Reporting Requirements
D. The Interim Final Rules for Pre-Enactment and Transition Swaps
E. Summary of the Proposed Part 46 Rule
1. Fundamental Goals
2. Historical Swap Recordkeeping
3. Historical Swap Data Reporting
4. Unique Identifiers
5. Determination of Which Counterparty Must Report
6. Third-Party Facilitation of Reporting
7. Reporting a Swap to a Single SDR
8. Reporting Swaps in an Asset Class Not Accepted By Any SDR
9. Data Standards
10. Reporting Errors in Previously Reported Data
F. Overview of Comments Received
II. Part 46 of the Commission's Regulations
A. Recordkeeping Requirements
1. Proposed Rule
2. Comments Received
3. Final Rule
B. Swap Data Reporting
1. Proposed Rule
2. Comments Received
3. Final Rule
C. Unique Identifiers
1. Proposed Rule
2. Comments Received
3. Final Rule
D. Determination of the Reporting Counterparty
1. Proposed Rule
2. Comments Received
3. Final Rule
E. Third-Party Facilitation of Data Reporting
1. Proposed Rule
2. Comments Received
3. Final Rule
F. Reporting to a Single Swap Data Repository
1. Proposed Rule
2. Comments Received

3. Final Rule .....
G. Data Reporting for Swaps in a Swap Asset Class Not Accepted by any Swap Data Repository .....
1. Proposed Rule .....
2. Comments Received .....
3. Final Rule .....
H. Required Data Standards .....
1. Proposed Rule .....
2. Comments Received .....
3. Final Rule .....
I. Reporting of Errors and Omissions in Previously Reported Data .....
1. Proposed Rule .....
2. Comments Received .....
3. Final Rule .....
J. Compliance Dates .....
1. Proposed Rule .....
2. Comments Received .....
3. Final Rule .....
III. Related Matters .....
A. Regulatory Flexibility Act .....
B. Paperwork Reduction Act .....
1. Introduction .....
2. Need for Information Collection .....
3. Comment on proposed information collection .....
4. Recordkeeping burdens .....
5. Reporting Burdens .....
C. Consideration of Costs and Benefits .....
1. Introduction .....
2. Recordkeeping .....
3. Reporting .....
IV. Compliance Dates .....
A. Introduction .....
B. Compliance dates for swap dealers and major swap participants .....
C. Compliance date for non-SD/MSP counterparties .....
Final Rules .....

I. Background

A. Introduction

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act[2] amended the CEA[3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: providing for the registration and comprehensive regulation of swap dealers (''SDs'') and major swap participants (''MSPs''); imposing clearing and trade execution requirements on standardized derivatives products; creating robust recordkeeping and reporting regimes with respect to swaps, including real time reporting; and enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities, intermediaries and swap counterparties subject to the Commission's jurisdiction.

B. Swap Data Provisions of the Dodd-Frank Act

To enhance transparency, promote standardization, and reduce systemic risk, Section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G), which requires all swaps, whether cleared or uncleared, to be reported to swap data repositories (''SDRs''),[4] which are new registered entities created by section 728 of the Dodd-Frank Act to collect and maintain data related to swap transactions as prescribed by the Commission, and to make such data electronically available to regulators.[5] New section 21(b) of the CEA, added by section 728 of the Dodd-Frank Act, directs the Commission to prescribe standards for swap data recordkeeping and reporting. Specifically, CEA section 21(b)(1)(A) provides that:

> The Commission shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.

These standards are to apply to both registered entities and counterparties involved with swaps. CEA section 21(b)(1)(B) provides that:

> In carrying out [the duty to prescribe data element standards], the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

CEA section 21 also directs the Commission to prescribe data standards for SDRs. Specifically, CEA section 21(b)(2) provides that:

> The Commission shall prescribe data collection and data maintenance standards for swap data repositories.

These standards are to be comparable to those for clearing organizations. CEA section 21(b)(3) provides that:

> The [data] standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on derivatives clearing organizations in connection with their clearing of swaps.

In addition, CEA section 21(c)(3) provides that, once the data elements prescribed by the Commission are reported to an SDR, the SDR shall:

> maintain the data [prescribed by the Commission for each swap] in such form, in such manner, and for such period as may be required by the Commission.

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm*.

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.*

[4] *See also* CEA § 1a(40)(E).

[5] Regulations governing core principles and registration requirements for, and the duties of, SDRs are the subject of part 49 of this chapter.

Section 727 of the Dodd-Frank Act, which added to the CEA new section 2(a)(13)(G), provides that ''Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.'' Section 729 of the Dodd-Frank Act added to the CEA new section 4r, which addresses reporting and recordkeeping requirements for uncleared swaps. Pursuant to this section, each swap not accepted for clearing by any derivatives clearing organization (''DCO'') must be reported to an SDR (or to the Commission if no repository will accept the swap). In a July 15, 2010 floor statement concerning swap data reporting as well as other aspects of the Dodd-Frank Act, Senator Blanche Lincoln emphasized that these provisions should be interpreted as complementary to one another to assure consistency between them, stating that: ''All swap trades, even those which are not cleared, would still be reported to regulators, a swap data repository, and subject to the public reporting requirements under the legislation.'' [6]

CEA Section 4r(a)(3) ensures that at least one counterparty to a swap has an obligation to report data concerning that swap. The determination of this reporting counterparty depends on the status of the counterparties involved. If only one counterparty is an SD, the SD is required to report the swap. If one counterparty is an MSP, and the other counterparty is neither an SD nor an MSP (''non-SD/MSP counterparty''), the MSP must report. For any other swap, CEA section 4r(a)(3)(C) provides that the counterparties to the swap shall select a counterparty to report the swap as specified in section 4r.[7]

In addition, CEA section 4r provides for reporting to the Commission of swaps neither cleared nor accepted by any SDR. Under this provision, counterparties to such swaps must maintain books and records pertaining to their swaps in the manner and for the time required by the Commission, and must make these books and records available for inspection by the Commission or other specified regulators if requested to do so.[8] It also requires counterparties to such swaps to provide reports concerning such swaps to the Commission upon its request, in the form and manner specified by the Commission.[9] Such reports must be as comprehensive as the data required to be collected by SDRs.[10]

Section 729 of the Dodd-Frank Act establishes in new CEA section 4r(a)(2)(A) a transitional rule applicable to pre-enactment swaps. Section 4r(a)(2)(A) provides for the reporting of pre-enactment swaps the terms of which have not expired as of the enactment of the Dodd-Frank Act to an SDR or the Commission, by a date that the Commission determines to be appropriate.[11] Section 4r(a)(2)(B) directed the Commission to promulgate an interim final rule within 90 days of the date of enactment of the Dodd-Frank Act providing for the reporting of such pre-enactment swaps.[12]

Section 723 of the Dodd-Frank Act, which added to the CEA new Section 2(h)(5), addressed the reporting of swap data for both swaps executed before the enactment of the Dodd-Frank Act [13] and swaps executed on or after the date of that enactment but before the compliance date specified in the Commission's final swap data recordkeeping and reporting rules.[14] As discussed above, in a July 15, 2010 floor statement concerning swap data reporting as well as other aspects of the Dodd-Frank Act, Senator Lincoln emphasized that these provisions should be interpreted as complementary in order to assure consistency between them, and emphasized that ''[T]his is particularly true with respect to issues such as the effective dates of these reporting requirements, the applicability of these provisions to cleared and/or uncleared swaps, and their applicability—or non-applicability—to swaps whose terms have expired at the date of enactment.'' [15]

This part refers to the two types of swaps addressed in CEA Section 2(h)(5) as follows. ''Pre-enactment swap'' means a swap executed before date of enactment of the Dodd-Frank Act (*i.e.*, before July 21, 2010) the terms of which have not expired as of the date of enactment of Dodd-Frank Act.[16] ''Transition swap'' means a swap executed on or after the date of enactment of the Dodd-Frank Act (*i.e.*, July 21, 2010) and before the applicable compliance date set forth in this part and also specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.[17] Collectively, this part refers to pre-enactment swaps and transition swaps as ''historical swaps.''

C. The Commission's Part 45 Rules on Swap Data Recordkeeping and Reporting Requirements

On January 13, 2012, the Commission published in new part 45 of its regulations final rules establishing swap data recordkeeping and reporting requirements applicable to SDs, MSPs, and non-SD/MSP counterparties,[18] as well as to registered SDRs, DCOs, designated contract markets (''DCMs''), and swap execution facilities (''SEFs'').[19]

With respect to recordkeeping, part 45 requires SDs and MSPs to keep records of all activities relating to their business with respect to swaps, and requires non-SD/MSP counterparties to keep records with respect to each swap in which they are a counterparty. Required records must be kept by all swap counterparties throughout the existence of a swap and for five years following termination of the swap. In the case of an SD or MSP, the records must be readily accessible

[6] Senator Blanche Lincoln, ''Wall Street Transparency and Accountability Act,'' *Congressional Record,* July 15, 2010, at S5905.

[8] CEA § 4r(c)(2) requires individuals or entities that enter into a swap transaction that is neither cleared nor accepted by an SDR to make required books and records open to inspection by any representative of the Commission; an appropriate prudential regulator; the Securities and Exchange Commission; the Financial Stability Oversight Council; and the Department of Justice.

[9] CEA § 4r(a)(1)(B) and § 4r(c).

[10] CEA § 4r(d).

[11] Subsection (A) of CEA Section 4r(a)(2) provides: ''Each swap entered into before the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the terms of which have not expired as of the date of enactment of that Act, shall be reported to a registered swap data repository or the Commission by a date that is not later than—(i) 30 days after issuance of the interim final rule; or (ii) such other period as the Commission determines to be appropriate.''

[12] Pursuant to Section 4r(a)(2)(B), the Commission on October 14, 2010 published in part 44 of its regulations an interim final rule instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by a compliance date to be established in reporting rules to be promulgated under Section 2(h)(5)(A) of the CEA and advising counterparties of the necessity, inherent in the reporting requirement, to retain information pertaining to the terms of such swaps until reporting can be effectuated under permanent rules. *See* CFTC Interim Final Rule for Reporting Pre-Enactment Swap Transactions (''Pre-Enactment Swaps IFR''), 75 FR 63080 (Oct. 14, 2010).

[13] *See* Pre-Enactment Swaps IFR.

[14] *See* CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions (''Post-Enactment Swaps IFR'' or ''Transition Swaps IFR''), 75 FR 78892 (Dec. 17, 2010).

[15] Senator Blanche Lincoln, ''Wall Street Transparency and Accountability Act,'' *Congressional Record,* July 15, 2010, at S5923.

[16] Subsection (A) of CEA Section 2(h)(5) *Reporting Transition Rules* provides: ''Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection.''

[17] Subsection (B) of CEA Section 2(h)(5) *Reporting Transition Rules* provides: ''Swaps entered into on or after such date of enactment shall be reported to a registered swap data repository or the Commission no later than the later of (i) 90 days after [the] effective date [of Section 2(h)(5)] or (ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation.''

[18] The category of non-SD/MSP counterparties includes but is not limited to counterparties who are entitled, with respect to any swap, to elect the clearing requirement exception pursuant to CEA section 2(h)(7) with respect to particular swaps.

[19] 77 FR 2136 (February 13, 2012).

throughout the life of the swap and for two years following its termination, and retrievable by the SD or MSP within three business days during the remainder of the retention period. In the case of a non-SD/MSP counterparty, the records must be retrievable by the counterparty within five business days throughout the retention period.

In order to ensure that complete data concerning swaps is available to regulators, part 45 calls for electronic reporting to an SDR of swap data from each of two important stages of the existence of a swap: the creation of the swap, and the continuation of the swap over its existence until its final termination or expiration. Creation data required to be reported pursuant to part 45 includes both primary economic terms (''PET'') data and confirmation data for a swap. Continuation data required to be reported includes all changes to primary economic terms and all required valuation data. For swaps executed on or after the applicable compliance date, part 45 establishes a streamlined reporting regime calling for reporting by the entity or reporting counterparty the Commission believes has the easiest, fastest, and cheapest access to the data. For all swaps executed on a SEF or DCM, all required creation data is reported by the SEF or DCM. For off-facility swaps accepted for clearing within the applicable deadline for reporting PET data, all required swap creation data is reported by the DCO. For off-facility swaps not cleared or not accepted for clearing within the applicable deadline, required swap creation data is reported by the reporting counterparty. Continuation data for cleared swaps is reported by the DCO, though SD and MSP reporting counterparties must also report valuation data. For uncleared swaps, all continuation data is reported by the reporting counterparty.

Part 45 notes that the obligations of swap counterparties with respect to historical swaps, *i.e.,* swaps executed prior to the applicable compliance date and in existence on or after the date of enactment of the Dodd-Frank Act, will be as provided in part 46.

D. The Interim Final Rules for Pre-Enactment and Transition Swaps

Interim Final Rule for Pre-Enactment Swaps. New section 4r(a)(2) to the CEA, added by the Dodd-Frank Act, provided for the reporting of pre-enactment swaps and directed that the Commission promulgate, within 90 days of enactment of the Dodd-Frank Act, an interim final rule (''IFR'') providing for the reporting of such swaps. On October 14, 2010, pursuant to the mandate of section 4r(a)(2)(B), the Commission published in new part 44 of its regulations an IFR advising specified counterparties to pre-enactment of the Commission's intent to promulgate rules pursuant to CEA sections 2(h)(5) and 4r requiring that such data be reported to a registered SDR or to the Commission by a compliance date to be established in those rules, and advising such counterparties of the necessity, inherent in the reporting requirement, to preserve information pertaining to the terms of such swaps until reporting was effectuated under permanent rules.[20] This Pre-Enactment Swaps IFR stated that the reporting and recordkeeping provisions established by Section 4r and sections 44.00–44.02 of the Commission's regulations would remain in effect until the effective date of the permanent reporting rules to be adopted by the Commission pursuant to Section 2(h)(5) of the CEA.[21] A principal purpose of this IFR was to advise counterparties of the need to retain data related to swap transactions so that reporting could be effectuated under permanent rules subsequently to be adopted.

With respect to the scope and coverage of the Pre-Enactment Swaps IFR, the Commission acknowledged that while new CEA Section 4r(a)(2) limits reportable pre-enactment swaps to those whose terms have not expired on the date of enactment of the Dodd-Frank Act, Section 2(h)(5) does not contain the same qualifying language. As discussed in the Pre-Enactment Swaps IFR, the Commission believes that failure to limit the term ''pre-enactment swap'' to unexpired swaps would require reporting of every swap that has ever been entered into; accordingly, the Commission concluded that reportable pre-enactment swaps should be limited to those whose terms had not expired at the time of enactment.[22]

Interim Final Rule for Transition Swaps. Section 2(h)(5) also prescribes reporting requirements applicable to swaps entered into on or after the date of enactment (''Transition Swaps''). To provide clarity and guidance with respect to such swaps, the Commission promulgated an IFR for transition swaps to establish that these swaps will be subject to Commission regulations to be promulgated under Section 2(h)(5)(B). The Commission also believed it was prudent to advise potential counterparties to such swaps that implicit in this prospective reporting requirement is the need to retain relevant data until such time as reporting can be effected. Accordingly, on December 17, 2010 the Commission published under Part 44 of its regulations interim final rules establishing that counterparties to transition swaps will be subject to permanent recordkeeping and reporting requirements to be adopted by the Commission pursuant to Section 2(h)(5)(B) of the CEA.[23]

The Commission intended both the Pre-Enactment Swaps IFR and the Transition Swaps IFR to put counterparties on notice that swap data should be retained pending the adoption of permanent rules prescribing recordkeeping and reporting requirements for pre-enactment and transition swaps under part 46 of the Commission's regulations. With respect to both pre-enactment and transition swaps, the Commission stated that counterparties to these transactions should retain material information about such transactions. The Commission emphasized, however, that in the context of the interim rules, no counterparty was being required to create new records with respect to transactions that occurred in the past; instead, records relating to the terms of such transactions could be retained in their existing format to the extent and in such form as they presently exist.[24]

Comments Received. The Commission received a number of comments in response to each of the IFRs and considered them all. Comments generally fell into one or more of several broad categories and in a number of instances were common to both IFRs. Some commenters observed that issuance of IFRs in advance of regulations further defining the term ''swap'' (or defining other key terms in the Dodd-Frank Act) creates legal and regulatory uncertainty and increases compliance risk; most of these commenters urged the Commission to further detail the record retention aspects of the interim final rules.[25] In this connection, commenters requested that the Commission issue guidance

[20] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63083.

[21] *See* Pre-Enactment Swaps IFR, *supra* note 17.

[22] *Id.* at 63082.

[23] *See* Transition Swaps IFR, *supra* note 18.

[24] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63086, and Transition Swaps IFR, *supra* note 18, at 78894.

[25] *See,* e.g., letters dated November 15, 2010 and January 18, 2011 from the Working Group of Commercial Energy Firms (''Working Group letters''); letter dated November 15, 2010 from Hess Corporation (''Hess Corporation letter''); letter dated November 15, 2010 from the Edison Electric Institute (''EEI letter''); letters dated November 15, 2010 and January 18, 2011 from the Not-for-Profit Electric End User Coalition (''Coalition letters''); letter dated January 18, 2011 from the American Gas Association (''AGA letter'').

clarifying and limiting the information that must be retained,[26] or create a safe harbor for good faith compliance efforts.[27] Several commenters recommended that the Commission should ensure that end users need only report basic data in a simplified reporting scheme, or should outline categories of information that need not be retained by persons who anticipate becoming eligible for the end user exemption under the Dodd-Frank Act.[28] One commenter urged greater specificity with respect to the Pre-Enactment IFR's requirements, as well as consistency with the standards adopted by the Securities and Exchange Commission (''SEC'') and international regulators, and proposed alternatives to the requirements adopted in the IFR for pre-enactment swaps, particularly with respect to reporting protocols, record retention, and confidentiality issues (notably, those confidentiality issues arising in the context of cross-border transactions).[29] Another commenter urged that U.S. swap data reporting requirements should not apply with respect to foreign swaps transactions, where counterparties are non-U.S. entities.[30]

The Commission considered these comments in preparing its part 46 Notice of Proposed Rulemaking (''NOPR'') with respect to historical swaps.[31]

E. Summary of the Proposed Part 46 Rule

1. Fundamental Goals

The fundamental goals of the part 46 NOPR were to provide for recordkeeping and reporting with respect to pre-enactment swaps and transition swaps as required by the Dodd-Frank Act; to provide specificity and clarity, to the extent possible, concerning what records must be kept and what data must be reported with respect to such historical swaps; and to ensure that data needed by regulators concerning historical swaps is available to regulators through SDRs when swap data reporting begins.

2. Historical Swap Recordkeeping

The NOPR proposed limited recordkeeping requirements for counterparties to historical swaps. For swaps in existence on or after April 25, 2011, the date of publication of the NOPR, counterparties would be required to keep records of specified, minimum primary economic terms for a swap of the asset class in question, listed in Tables in the Appendix to the NOPR. In addition, if a historical swap counterparty had a confirmation of the historical swap as of that date, the NOPR called for the counterparty to keep it. For historical swaps that expired or were terminated prior to April 25, 2011, the NOPR provided that counterparties should keep the records they already have, in the form they are already kept. For all historical swaps, the required records would have to be kept throughout any remaining existence of a historical swap and for five years following its final termination or expiration.

3. Historical Swap Data Reporting

a. *Historical swaps in existence on or after April 25, 2011.* For each historical swap in existence on or after April 25, 2011, the NOPR called for an initial data report by the reporting counterparty on the applicable compliance date, and for ongoing reporting of data from the continuation of the historical swap during its remaining existence. As proposed, the initial data report would include the minimum primary economic terms for a historical swap of the asset class in question, as specified in the appropriate Table in the Appendix to the rule. If the reporting counterparty possessed a confirmation of the historical swap on or after April 25, 2011, the confirmation terms recorded in the automated system of the reporting counterparty would also be included in the initial data report. For historical swaps already reported to an existing repository prior to the effective date of the final reporting rules, the NOPR would not require duplicate reporting. With respect to ongoing reporting of continuation data during the remaining existence of a historical swap, the NOPR aligned with the proposed part 45 rule in following the life cycle approach for credit swaps and equity swaps, and the state or snapshot approach for interest rate swaps, currency swaps, and other commodity swaps.

b. *Historical swaps expired or terminated prior to April 25, 2011.* For each historical swap which expired or was terminated prior to April 25, 2011, the NOPR called for the reporting counterparty to report such information relating to the terms of the transaction as was in the reporting counterparty's possession as of issuance of the interim final rule, in either electronic or non-electronic form at the option of the reporting counterparty.

4. Unique Identifiers

The NOPR called for the initial data report for each historical swap in existence on or after April 25, 2011, to include the legal entity identifier (''LEI''),[32] as provided in part 45 of this chapter, of the reporting counterparty. The NOPR proposed giving the non-reporting counterparty for each such historical swap an additional 180 days after the applicable compliance date to obtain an LEI. Once this LEI was obtained, the NOPR called for it to be provided to the reporting counterparty and reported by the reporting counterparty to the SDR. After LEIs were obtained for either counterparty, the NOPR proposed requiring the counterparty identified by an LEI and the SDR to comply with the LEI requirements of part 45 of this chapter with respect to LEIs. The NOPR provided that the LEI requirements of parts 45 and 46 of this chapter would not apply to historical swaps expired or terminated prior to April 25, 2011.

The NOPR proposed that the unique swap identifier and unique product identifier requirements of part 45 of this chapter would not apply to historical swaps.

5. Determination of Which Counterparty Must Report

The NOPR provided that determination of which counterparty is the reporting counterparty for a historical swap would be made in the same way provided in part 45 of this chapter. Counterparty reporting would follow the hierarchy outlined in the statute, giving SDs or MSPs the duty to report when possible, and limiting reporting by non-SD/MSP counterparties to situations where there is no SD or MSP counterparty. Where both counterparties have the same hierarchical status, the NOPR required them to agree as one term of their swap which of them is to report. Where only one counterparty to a historical swap is a U.S. person, the NOPR called for that counterparty to be the reporting

[26] EEI letter.

[27] Working Group letters; EEI letter; Hess Corporation letter.

[28] AGA letter; Coalition letters.

[29] Letter dated November 12, 2010, from the International Swaps and Derivatives Association, Inc. and the Futures Industry Association.

[30] Letter dated January 11, 2011, from Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale and UBS AG.

[31] *See* CFTC Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 FR 22833 (April 25, 2011).

[32] The NOPRs for both parts 45 and 46 of this chapter used the term ''unique counterparty identifier'' in this context. As explained in the final part 45 rule, in response to comments the Commission has decided to use the term ''legal entity identifier,'' which refers to the same identifier and is in common international use, in order to prevent confusion.

counterparty. For historical swaps in existence as of the applicable compliance date, the NOPR called for determination of the reporting counterparty to be made by applying the above provisions to the current counterparties to the swap as of the compliance date. For historical swaps for which reporting is required, but which have terminated prior to the compliance date, the NOPR called for determination of the reporting counterparty to be made as of the date of the swap's expiration or termination.

6. Third-Party Facilitation of Reporting

The NOPR proposed explicit permission for third-party facilitation of data reporting with respect to historical swaps, without removing the reporting responsibility from the appropriate reporting counterparty.

7. Reporting a Swap To a Single SDR

To avoid fragmentation of data for a given historical swap across multiple SDRs, the NOPR provided that all data for a particular historical swap must be reported to the same SDR to which the initial data report concerning the swap is made.

8. Reporting Swaps in an Asset Class Not Accepted by any SDR

As required by section 729 of the Dodd-Frank Act, the NOPR provided that if there were an asset class for which no SDR currently accepted data, registered entities or counterparties required to report concerning historical swaps in such an asset class would be required to report the same data to the Commission at a time and in a form and manner determined by the Commission.

9. Data Standards

The NOPR required reporting counterparties for historical swaps to use the facilities, methods, or data standards provided or required by the SDR to which the counterparty reports swap data.

10. Reporting Errors in Previously Reported Data

Finally, the NOPR required reporting counterparties to report any errors or omissions in reported data, in the same format as the original data report, as soon as technologically practicable after their discovery. Non-reporting counterparties discovering an error or omission would be required to notify the reporting counterparty, who in turn would be required to report them to the SDR.

F. Overview of Comments Received

The Commission received 12 comment letters in response to its proposal. Commission staff also held three public roundtables relating to swap data reporting, on September 14, 2010, January 28, 2011, and June 6, 2011, which provided input from a broad cross-section of industry and private sector experts concerning issues relating to the NOPR. Comments are addressed in the discussion below. Some comments received by the Commission requested further clarification relating to definitions provided in the NOPR, or regarding the application of NOPR provisions in various contexts. Additional or modified definitions included in the final rule are provided for clarification and do not impose new substantive requirements.

II. Part 46 of the Commission's Regulations

New part 46 contains provisions governing swap data recordkeeping and reporting for pre-enactment swaps and transition swaps. Definitions are set forth in § 46.1. Section 46.2 establishes swap recordkeeping requirements for swap counterparties subject to the Commission's jurisdiction. Section 46.3 establishes swap data reporting requirements. Required use of unique identifiers in swap data recordkeeping and reporting for historical swaps is addressed in § 46.4. Determination of which counterparty must report swap data for each swap is established by § 46.5. Third-party facilitation of swap data reporting is addressed by § 46.6. Section 46.7 establishes requirements for reporting all data concerning a swap to a single SDR. Section 46.8 addresses data reporting for swaps in a swap asset class not accepted by any SDR. Section 46.9 addresses voluntary supplemental reporting. Section 46.10 establishes required data standards for swap data reporting. Finally, § 46.11 sets forth requirements for reporting concerning errors and omissions in previously reported swap data.

A. Recordkeeping Requirements

1. Proposed Rule

For historical swaps in existence on or after April 25, 2011, the NOPR imposed limited, specific recordkeeping obligations. Counterparties to such swaps would be required to keep records of an asset class-specific set of specified, minimum primary economic terms. They would also be required to keep records of a confirmation of their swaps if they had that information in their possession on or after April 25, 2011, the date from which public notice of specific recordkeeping requirements for historical swaps was available. In parallel with the proposed rules in part 45 of this chapter, the NOPR also called for counterparties to such swaps to keep copies of any master agreement or credit support agreement pertaining to the swap, if such copies were in the counterparty's possession on or after April 25, 2011. For a historical swap in existence on or after April 25, 2011, that remains in existence after the applicable compliance date, counterparties would also be required to keep for that swap any records required by § 45.2 of this chapter, to the extent that such records are created by or become available to the counterparty on or after the compliance date.

For a pre-enactment swap expired or terminated prior to April 25, 2011, the NOPR called for counterparties to keep the information and documents relating to the terms of the swap that were possessed by the counterparty on or after October 15, 2010, the publication date for the Interim Final Rule For Pre-Enactment Swaps. For a transition swap expired or terminated prior to April 25, 2011, the NOPR called for counterparties to keep the information and documents relating to the terms of the swap that were possessed by the counterparty on or after December 17, 2010, the date of publication of the Interim Final Rule For Transition Swaps. For all such historical swaps, the NOPR provided that counterparties could retain this information in the format in which it existed on or after the relevant Interim Final Rule publication date, or in such other format as the counterparty chooses to retain it.

For all historical swaps, the NOPR called for retention of required records through the life of the swap and for five years following its termination. Records kept by SDs and MSPs would be required to be readily accessible through the life of the swap and for two years following its termination, and retrievable within three business days during the remainder of the retention period. Records kept by non-SD/MSP counterparties would be required to be retrievable within three business days throughout the retention period.

2. Comments Received

a. *Recordkeeping for historical swaps in existence on or after April 25, 2011.* The Coalition of Physical Energy Companies (''COPE'') and the Electric Trade Association (''ETA'') supported limiting the records required for historical swaps in existence on or after April 25, 2011, to minimum PET data and related documentation as proposed.

Both these commenters stated that such data includes commercially relevant terms typically retained by most swap counterparties, although both noted that small entities involved in few swaps might not retain all such data. COPE also stated that requiring a counterparty to keep records of ''all terms'' of any confirmation in its possession is too vague, and that a counterparty could not be sure of meeting a requirement to keep records of any modification of a master or credit support agreement. The International Swaps and Derivatives Association (''ISDA'') stated that the scope and nature of the required minimum PET data, particularly time of trade data for credit swaps, could require some retroactive data creation. The Financial Services Roundtable (''FSR'') noted that its members might not necessarily have all the specified minimum PET data, particularly in the context of mergers or identification of settlement agents for historical currency swaps.

b. *Recordkeeping for historical swaps expired prior to April 25, 2011.* ISDA noted that, for historical swaps expired prior to April 25, 2011, the proposed rule did not require parties to alter the format in which they already retain records, and requested clarification concerning whether this conflicted with the NOPR's general requirement for records to be kept in a form and manner acceptable to the Commission. ISDA argued that reporting counterparties whose current recordkeeping format would not enable making records electronically accessible in real time should not have to meet this accessibility requirement for historical swaps already reported to a repository that registers as an SDR. ISDA further recommended that SDs and MSPs not be required to keep records readily accessible during the first two years of the five years following termination of the swap, but instead that they should be required to make such records accessible within a reasonable time during the five years following termination of the swap. The Working Group of Commercial Energy Firms (''WGCEF'') requested clarification that keeping records in the form in which they are already retained would be acceptable to the Commission for all historical swaps, and requested that its members be required to make records available within three business days throughout the retention period. COPE stated that the requirement for counterparties to keep whatever information and documents they have relating to the terms of a historical swap expired before April 25, 2011, is too vague and overbroad, and asked that the requirement be limited to only the PET data listed in the NOPR Appendix.

c. *Records relating to credit support agreements.* With respect to the NOPR requiring for counterparties to keep records of credit support agreements or ''equivalent documentation relating to the swap,'' WGCEF commented that the term ''equivalent documentation'' was overbroad, and asked for clarification of what constitutes such documentation.

3. Final Rule

a. *Recordkeeping for historical swaps in existence on or after April 25, 2011.* The Commission has considered all of the comments, including the comments stating that most counterparties to historical swaps will have records of the commercially relevant, limited set of minimum PET data called for in the NOPR. It has also considered the comments stating that all counterparties to historical swaps in existence on or after April 25, 2011, and particularly smaller counterparties not involved in large numbers of swaps, might not have records of all such terms for each such swap in which they were a counterparty, and the comments noting the undesirability of retroactive creation or recreation of records concerning historical swaps, particularly records of execution times, which some counterparties may not have. In light of these considerations, and in order to limit burdens on counterparties to the extent consistent with the minimum information the Commission will need concerning historical swaps, the Commission has determined that the final rule will require counterparties to historical swaps in existence on or after April 25, 2011 (the date on which publication of the NOPR provided notice of what records would be required) to keep records of all information specified in the minimum PET data tables included in Appendix 1 which was in their possession on or after April 25, 2011. The NOPR provided that a counterparty to such a swap must keep records of confirmation terms, and of master or credit support agreements and modifications thereto, only if such records are in the possession of the counterparty on or after April 25, 2011. The Commission does not believe this requirement is unclear or unduly burdensome, and has determined that it should be retained in the final rule.

b. *Recordkeeping for historical swaps expired prior to April 25, 2011.* The Commission has considered these comments, and has determined that the final rule should retain the NOPR provisions concerning limited recordkeeping for historical swaps expired prior to April 25, 2011, which required counterparties to keep only the information and documents concerning such swaps that were in their possession on or after the date of the applicable Interim Final Rule. The final rule provides that counterparties may keep these records in any format they choose. The final rule calls for all counterparties to historical swaps expired prior to April 25, 2011 to be able to retrieve such records within five business days throughout the retention period, rather than requiring counterparties to keep the records readily accessible for part of the retention period or to be able to retrieve records within three business days, as provided in the NOPR. This reduced retrievability requirement is designed to mitigate costs for counterparties to historical swaps expired prior to April 25, 2011, while achieving the same regulatory objective.

c. *Records relating to credit support agreements.* The Commission has considered the comment requesting clarification of the meaning of ''equivalent documentation'' in the context of records of credit support agreements for historical swaps. The Commission recognizes that, while some swap counterparties may enter into credit support agreements, others may enter into other agreements that fulfill the same function. The Commission believes that records of such agreements can be important for market supervision and enforcement purposes as well as for prudential supervision. To clarify the intent of the rule in this regard, the final rule eliminates the phrase ''equivalent documentation,'' and addresses records of credit support agreements or other agreements between counterparties having the same function as a credit support agreement.

B. Swap Data Reporting

1. Proposed Rule

a. *Reporting for historical swaps in existence on or after April 25, 2011.* For each pre-enactment or transition swap in existence on or after April 25, 2011, the NOPR called for an initial data report on the applicable compliance date; and, if the swap has not expired or been terminated as of the compliance date, for ongoing reporting of required swap continuation data, as defined in part 45 of this chapter, during the remaining existence of the swap.

The NOPR called for the initial data report for such swaps to include either all of the minimum primary economic terms specified in the NOPR Appendix,

or all of the terms of the confirmation of the swap if those terms include all of the minimum primary economic terms specified in the NOPR Appendix. It also called for the initial data report to include: the LEI of the reporting counterparty and the internal identifier used by the automated systems of the reporting counterparty to identify the non-reporting counterparty;[33] the internal transaction identifier used by the automated systems of the reporting counterparty to identify the swap; and the internal master agreement identifier (if any) used by the automated systems of the reporting counterparty to identify the master agreement governing the swap.

Where the reporting counterparty has reported any of the information required as part of the initial data report to a trade repository prior to the applicable compliance date, if that repository has registered as an SDR by the compliance date the NOPR provided that the reporting counterparty would not be required to report such previously reported information again, and would be required to report only such initial data report information as had not been previously reported.

With respect to continuation data reporting, the NOPR followed the proposed rules for part 45 of this chapter in calling for continuation data reporting to follow the life cycle approach for credit swaps and equity swaps, and the snapshot approach for interest rate swaps, currency swaps, and other commodity swaps. Where the snapshot approach was required, the NOPR called for SD and MSP reporting counterparties to report all continuation data required under part 45, but limited such reporting by non-SD/MSP reporting counterparties to the data elements in the PET data tables in the Appendix to part 46 in cases where they did not possess all continuation data specified in part 45 on the compliance date.

b. *Reporting for historical swaps expired or terminated prior to April 25, 2011.* For historical swaps expired or terminated prior to April 25, 2011, the NOPR proposed only a single data report, made on the applicable compliance date. In the case of a pre-enactment swap, this report would include such information relating to the terms of the swap as was in the reporting counterparty's possession on or after October 14, 2010, the date of publication of the Interim Final Rule for Pre-Enactment Swaps. In the case of a transition swap, this report would include such information relating to the terms of the swap as was in the reporting counterparty's possession on or after December 17, 2010, the date of publication of the Interim Final Rule for Transition Swaps. In both cases, the information would be permitted to be reported via any method or in any format selected by the reporting counterparty.

2. Comments Received

a. *PET data for historical swaps.* Commenters made a number of suggestions with respect to the PET data required to be reported for historical swaps in existence on or after April 25, 2011. Commenters generally viewed the NOPR requirement for reporting a specified, limited set of minimum PET data for historical swaps as reasonable, since they believed the specified PET data elements reflect the commercially relevant terms typically retained by swap counterparties. However, ETA, WGCEF, ISDA, and the Global Foreign Exchange Division (''Global Forex'') recommended that the requirement to report PET data should be limited to the data elements in the minimum PET data tables that are in the possession of the reporting counterparty. They argued that some counterparties, particularly smaller counterparties that may not trade swaps frequently, may not have captured or retained all of the specified data elements.

Three commenters, ISDA, ETA, and WGCEF, requested that the Commission drop the catch-all category of ''any other primary economic term'' verified or matched by the counterparties from the required PET data for historical swaps, arguing that it would be better to define PET data precisely for historical swaps. ETA stated that requiring such information could require extensive text submissions of non-standardized transaction terms, complicating the compilation task of the SDRs.

Both ISDA and Global Forex requested that the Commission not require reporting the time of trade for a historical swap, arguing that in many cases counterparties may not have recorded this information when a historical swap was executed.

ISDA recommended that the PET data tables should not include indications of whether either or both counterparties are SDs or MSPs, arguing that if the SDR already has this information from registration, it would be simpler and more reliable for this indication to be centrally supplied by the SDR. ISDA requested that reporting counterparties be permitted to report the legally binding record already present in an existing trade repository (called a ''gold record'' by some existing trade repositories), in lieu of reporting the required minimum PET data.

b. *Master agreement identifiers.* ISDA, ETA, Global Forex, and WGCEF recommended eliminating the requirement to report master agreement identifiers. Global Forex noted that providing this data would impose a significant burden because such information is not routinely stored on the same systems as the other PET data specified in the tables. WGCEF argued that counterparties are in the best position to make exposure calculations and that the Commission already has the ability to request such information from them. The Coalition of Derivative End-Users (''End-User Coalition'') requested that the Commission explain the use and value of reporting master agreement identifiers.

c. *Continuation data reporting.* ETA requested that non-SD/MSP reporting counterparties not be required to report continuation data, arguing that transactions not involving SDs and MSPs represent only a small portion of the swaps market, and that such a requirement would be unduly burdensome. Alternatively, ETA asked that non-SD/MSP reporting counterparties be permitted to report continuation data for historical energy swaps on a quarterly basis.

d. *Electronic images of swap documentation.* WGCEF disagreed with the Commission's proposed prohibition on the electronic transmission of an image of a document to satisfy the electronic reporting requirements of the proposed rule, arguing that by prohibiting the use of images for reporting, the Commission is effectively requiring market participants to rely on more burdensome, costly, and less efficient means of gathering and submitting required data to SDRs. WGCEF asked the Commission to allow reporting counterparties to submit images of confirmations and other paper swap documentation in lieu of submission of normalized data in data fields.

e. *Reporting of data beyond specified PET data.* WGCEF requested that reporting counterparties be permitted to report data beyond the data required in the proposed rules, including all data pertaining to the swap if that is less burdensome for the reporting counterparty, as long as the data required by the proposed rules is included in the data reported.

f. *Reporting by both counterparties to a swap.* WGCEF asked the Commission to allow both counterparties to a historical swap report the data to an

[33] The NOPR also called for later reporting of the LEI of the non-reporting counterparty, after that LEI was obtained as provided in the NOPR.

SDR if they so choose. WGCEF argued that permitting such dual reporting would avoid the need for counterparties of equal reporting hierarchy status to negotiate which will be the reporting counterparty.[34]

g. *Safe harbor for good faith reporting.* Global Forex asked that counterparties be allowed to meet their reporting and recordkeeping obligations on a best efforts basis without the need to recreate or report data that might have been lost. Global Forex expressed concerned that parties to FX swaps who use the SWIFT Accord system or use paper confirmations to keep records would need to transfer this information to new systems to meet the proposed reporting and retrieval requirements of the rules. It noted that in the time between the enactment of the Dodd-Frank Act and the compliance date for reporting, internal systems may have gone through a number of upgrades or migrations, potentially resulting in loss of information and thus in incomplete data. The Financial Services Roundtable (''FSR'') also requested a safe harbor for institutions that have complied with the previously issued interim-final rules by preserving all information on file, yet do not have full records for pre-enactment swaps. ETA also asked the Commission to create a safe harbor for non-financial entities that keep records for historical swaps consisting of data elements routinely captured prior to enactment of the Dodd-Frank Act, in the format in which they are already kept, and report only such data, whether or not it includes all of the data required by the final rules, without having to gather any required data from paper records.

3. Final Rule

a. *PET data for historical swaps.* The Commission has considered the comments stating that the minimum PET data proposed to be reported for historical swaps reflects the commercially relevant terms typically retained by swap counterparties. It has also considered the comments noting that some counterparties, particularly smaller counterparties that may not trade swaps frequently, may not have captured or retained all of the specified data elements. In order to mitigate costs and burdens for swap counterparties while achieving the same regulatory objective, the Commission has determined that the final rule will require reporting of all of the minimum primary economic terms specified in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011. The final rule will not require reporting of unspecified, additional primary economic terms matched or verified by the counterparties to such swaps. With respect to execution times, the final rule will require reporting the date of execution, and call for reporting the time of execution only if that time was recorded when the trade was executed and is known to the reporting counterparty on or after April 25, 2011.

The Commission believes that the minimum PET data for historical swaps should include indications of whether either or both counterparties are SDs or MSPs, and that this information should be provided to SDRs. SDs and MSPs will register with the Commission, and their status will be determined by Commission rules. SDs and MSP will need to possess this information in order to comply with the final rule, and the Commission believes they will have automated systems capable of recording and reporting it. The Commission has also determined that the final rule will not provide for reporting a legally binding record already present in an existing trade repository in lieu of reporting the required minimum PET data. Both the NOPR and the final rule provide that reporting counterparties need not re-report required PET data already reported to an existing trade repository that registers with the Commission as an SDR prior to the applicable compliance date for reporting.

b. *Master agreement identifiers.* The Commission has considered the comments recommending elimination of the requirement to report master agreement identifiers for historical swaps. In the final swap data reporting rules in part 45 of this chapter, the Commission has already determined that it should not require master agreement reporting in its first swap data reporting final rules. As noted in the *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives* released by the CFTC and SEC in April 2011, at present the terms of such agreements are not readily reportable in an electronic format, as market participants have not developed electronic fields representing terms of a master agreement.[35] For these reasons, the Commission has determined that the final rule will not require reporting of master agreement identifiers. The Commission may choose to revisit this issue at some point in the future, if and when market participants and SDRs develop ways to represent the terms of such agreements electronically.

c. *Continuation data reporting.* The Commission believes that continuation data reporting for uncleared historical swaps must be retained to enable regulators to monitor exposures and systemic risk, and to fulfill their market supervision and enforcement responsibilities.[36] Quarterly reports concerning changes to the primary economic terms of such a swap would impede regulators' ability to see a current and accurate picture of the swap market. To take just one example, delaying reporting of a partial novation for a quarter would give regulators an inaccurate picture of what counterparties are exposed to the swap for a substantial period of time. The Commission has therefore determined that the final rule will retain the NOPR requirements with respect to continuation data reporting for uncleared historical swaps.[37]

Continuation data reporting for cleared historical swaps in existence on or after April 25, 2011, is affected by the fact that such swaps will have been cleared prior to the start of reporting on the applicable compliance date. Part 45 requires DCOs to report continuation data, including valuation data, for cleared swaps, and limits continuation data reporting by reporting counterparties to reporting of valuation data by SD or MSP reporting counterparties. For swaps executed after the applicable compliance date, continuation data reporting will be linked to the original swap through use of unique swap identifiers. However, the Interim Final Rules for pre-enactment and transition swaps and the

[34] WGCEF also stated that dual reporting may be necessary if the Commission has not issued a final rule on entity definitions before data reporting begins, since in that event counterparties would be unable to determine which of them has the obligation to report. The compliance dates established in parts 45 and 46 for swap data reporting eliminate this issue, since the initial compliance date will be the later of July 16, 2012 or 60 days after issuance of entity and product definitions.

[35] Commodity Futures Trading Commission and Securities and Exchange Commission, *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives,* April 7, 2011, available at *http://www.sec.gov/news/studies/2011/719b-study.pdf.*

[36] The final part 45 rules, which apply to continuation data reporting for uncleared historical swaps, extend and phase in continuation data reporting for non-SD/MSP counterparties in order to reduce burdens to the extent consistent with the purposes of such reporting.

[37] Section 46.3(a)(2) of this final rule provides that ''For each uncleared pre-enactment or transition swap in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty must report all required swap continuation data * * *.'' This means that reporting counterparties for such swaps must report changes to primary economic terms occurring after the applicable compliance date. It does not require reporting of changes occurring after execution of the historical swap but prior to the compliance date.

NOPR took the fundamental approach that the data reported for historical swaps should be the data possessed by those involved in originating such swaps. Neither the Interim Final Rules nor the NOPR placed an obligation on DCOs to report to an SDR or to be able to trace the link between a historical swap submitted for clearing on or after April 25, 2011, and the transactions or positions resulting from novation of such a historical swap to the clearing house.[38] The Commission understands that it therefore could be problematic for a DCO to be able to report valuation data for historical swaps cleared prior to the applicable compliance date. In addition, neither the Interim Final Rules nor the NOPR directly addressed the effect of clearing on the reporting requirements for the swap. In light of these factors, and in order to reduce burdens to the extent consistent with the purposes of the Dodd-Frank Act, the Commission has determined that this final rule regarding swap data reporting for historical swaps will not require reporting of continuation data for cleared historical swaps. This determination is limited to the reporting of cleared historical swaps pursuant to part 46 and has no effect on reporting required under part 45. As noted above, all historical swaps in existence on or after April 25, 2011 that have been accepted for clearing will be reported by the reporting counterparty, and these reports will include an indication that the swap has been accepted for clearing and the identity of the DCO clearing the swap.[39] Under part 46, a DCO will have no duty to make an initial data report for the resulting novated swaps. The Commission plans to further clarify how novated and cleared historical swaps should be reported under the Commission's data reporting rules

d. *Electronic images of swap documentation.* The Commission believes that permitting reporting to be limited to submission of images would prevent regulators from searching, retrieving, aggregating, and manipulating historical swap data in SDRs for essential purposes, including monitoring systemic risk, conducting market oversight and enforcement, and calculating block trade sizes relevant to real time reporting, among others. The NOPR proposed to reduce the reporting burden to the extent possible in this respect, by allowing submission of images to fulfill reporting requirements for historical swaps that expired prior to April 25, 2011. The Commission is adopting the rule as proposed and, in so doing, notes that a reporting counterparty that maintained information concerning a historical swap in paper form could fulfill the final rule electronic reporting requirements by entering the minimum PET data from a paper confirmation into a web interface provided by the SDR.

e. *Reporting of data beyond specified PET data.* With respect to the comment requesting that reporting counterparties be permitted to report data beyond the data required by the final rule, as long as the required data is included in the data reported, the Commission notes that neither the NOPR nor the final rule bars reporting of additional data beyond the minimum required, provided that such additional data is accepted by the SDR to which required swap data is reported. The Commission also notes that it is a business decision of the SDR whether to accept such additional data.

f. *Reporting by both counterparties to a swap.* The Commission has considered the comment asking that the final rule permit voluntary reporting for a historical swap by the non-reporting counterparty. The Commission received a number of comments to the same effect in connection with the swap data reporting rules in part 45 of this chapter.

The Commission determined in part 45 that voluntary supplement reporting is technologically feasible and may have benefits for both data accuracy and counterparty business processes.[40] As noted in part 45, while the Dodd-Frank Act requires swap data reporting by only one counterparty and establishes a hierarchy for choosing the reporting counterparty, it does not prohibit voluntary swap data reporting to an SDR that supplements required reporting. The Commission's final part 49 rules permit counterparties to access to information in SDRs concerning their own swaps, and notes that nothing forbids swap counterparties to use an SDR as a provider of third-party services going beyond acceptance of required swap data reports for regulatory purposes. For these reasons, the final rules in part 45 provide for voluntary supplemental reporting to any SDR by either counterparty of swap data that part 45 does not require that counterparty to report.

The Commission also determined in part 45 that, to avoid double-counting of the same swap due to voluntary supplemental reports, and to ensure that data reported via a voluntary supplemental report (''VSR'') to the same SDR to which required data is reported is integrated into that SDR's record for the swap, each VSR must include minimum VSR information that ensures achievement of these purposes. As provided in part 45, this required VSR information includes: an indication that the report is a VSR; the USI for the swap that has been created as required by this part; the identity of the SDR to which all required creation data and continuation data is reported for the swap, if the VSR is made to a different SDR; the LEI of the counterparty making the VSR; and if applicable, an indication that the VSR is made pursuant to the law of a jurisdiction outside the U.S. To avoid confusion and double-counting, and to ensure that each VSR includes the USI for the swap, part 45 also provides that a VSR may not be made until after the USI for the swap has been created as provided in § 45.5 and transmitted to the counterparty making the VSR.

In light of these comments and considerations, the Commission has determined that the final rules in this part should align with part 45 and permit voluntary supplemental reporting for historical swaps in existence on or after April 25, 2011. The Commission believes, for the reasons noted above, and as provided in part 45, that appropriate safeguards are needed with respect to such VSRs, to avoid confusion and double counting with respect to these swaps. The final rule therefore provides that a VSR concerning a historical swap may not be made until after the initial data report required by part 46 concerning the swap is made. The final rule also provides that a VSR concerning a historical swap must include: an indication that the report is a VSR; the identity of the SDR to which the required initial data report concerning the swap has been made; the LEI of the counterparty making the VSR; and, if applicable, an indication that the VSR is made pursuant to the law of a jurisdiction outside the U.S.

One of the safeguards provided in part 45 is the inclusion in each VSR of the USI for the swap in question. SDRs are required by part 45 to create USIs for swaps with a non-SD/MSP reporting counterparty through what is known as the ''name space'' method, under which the first characters of each USI created by an SDR will consist of a unique code that identifies that SDR, given to the SDR by the Commission during the SDR registration process. The automated systems of SDRs will create an identifier for each historical swap reported in the normal course of SDR operation. Due to the above-mentioned requirements of part 45, SDRs will have the capacity to

[38] Unique swap identifiers will not be available for such swaps.

[39] If further information concerning a cleared historical swap is needed, the Commission will have ability to obtain it through its special call authority.

[40] 77 FR 2136 (January 13, 2012), at 2171.

create SDR identifiers for historical swaps using the name space technique. This would make the SDR identifiers for historical swaps functionally equivalent to USIs. The part 46 NOPR provided that the USI requirements of part 45 would not apply to historical swaps, and the final rule retains this provision. To provide for historical swaps an essential safeguard against confusion and double-counting in the context of VSRs similar to the safeguard provided for swaps reported pursuant to part 45 by USIs, the final part 46 rule requires that each VSR for a historical swap in existence on or after April 25, 2011, must include the SDR identifier assigned to the swap by the automated systems of the SDR to which the required initial data report concerning the swap is made. The Commission strongly encourages all SDRs to use the name space capability they are required to have pursuant to part 45 to create such SDR identifiers using the name space technique, making them functionally equivalent to USIs.[41] This would enhance the safeguard provided by such SDR identifiers.

g. *Safe harbor for good faith reporting.* The Commission has considered the comments which addressed possible safe harbor provisions. As discussed above, the Commission has determined in response to comments that the final rule will only require counterparties to historical swaps in existence on or after April 25, 2011, the publication date of the NOPR, to report specified information in their possession as of that date. The final rule will only require counterparties to historical swaps expired or terminated prior to April 25, 2011, to report whatever information was in their possession as of publication of the relevant Interim Final Rule. The Commission believes this is the appropriate way to address the fundamental concerns raised in these comments, which centered on problems that could be caused by requiring reporting of information not possessed by some counterparties and on the technological burdens involved.

[41] The Commission is mindful in this connection of a comment made by TriOptima in the context of part 45 of this chapter concerning USIs. TriOptima noted that the swap market has a relatively large outstanding stock of transactions, some quite long-dated, and a relatively thin flow of new transactions, and stated that having USIs for new transactions only would result in a long transition period where there are live contracts both with and without USIs, something TriOptima stated would be problematic from a technology perspective. TriOptima recommended the creation of USIs via the name-space technique as the best way to resolve the issue.

C. Unique Identifiers

1. Proposed Rule

The NOPR called for the initial data report for each historical swap in existence on or after April 25, 2011, to include the legal entity identifier (''LEI''),[42] as provided in part 45 of this chapter, of the reporting counterparty, as well as the reporting counterparty's internal system identifiers for the non-reporting counterparty and the particular swap transaction in question. The NOPR proposed giving the non-reporting counterparty for each such historical swap an additional 180 days after the applicable compliance date to obtain an LEI. Once this LEI was obtained, the NOPR called for it to be provided to the reporting counterparty and reported by the reporting counterparty to the SDR. After LEIs were obtained for either counterparty, the NOPR proposed requiring the counterparty identified by an LEI and the SDR to to comply with the LEI requirements of part 45 of this chapter with respect to LEIs. The NOPR provided that the LEI requirements of parts 45 and 46 would not apply to historical swaps expired or terminated prior to April 25, 2011. The NOPR proposed that the unique swap identifier and unique product identifier requirements of part 45 of this chapter would not apply to historical swaps.

2. Comments Received

a. *Obtaining LEIs by the compliance date.* The End-User Coalition, ETA, and ISDA raised concerns regarding whether counterparties will be able to obtain LEIs by the compliance date. ISDA commented that the requirement for reporting an LEI for each counterparty would require finalization of parts 45 and 46 in advance of the compliance date to allow the LEI system to be built. In the event that LEIs are not available by the applicable compliance date, WGCEF asked that the final rule LEI provisions not require re-reporting a historical swap in order to include LEIs in the data for such a swap, but instead permit submission of a cross-referenced table of counterparties' internal counterparty identifiers matched with the new LEIs.

b. *Non-SD/MSPs and LEIs.* ETA asked that non-SD/MSP counterparties be placed on a compliance schedule separate from SDs and MSPs to allow time for entities to develop and implement the requisite systems and procedures to input and report identifiers. The End-User Coalition asked that non-SD/MSP counterparties be given at least 18 months after the final rule is issued to obtain LEIs, stating that a potential ''logistical traffic jam'' of entities seeking LEIs, as well as the currently undefined process for obtaining the identifiers, could make obtaining LEIs difficult for non-SD/MSP counterparties.

[42] The NOPRs for both parts 45 and 46 of this chapter used the term ''unique counterparty identifier'' in this context. As explained in the final part 45 rule, in response to comments the Commission has decided to use the term ''legal entity identifier,'' which refers to the same identifier and is in common international use, in order to prevent confusion.

3. Final Rule

a. *Obtaining LEIs by the compliance date.* The Commission has determined that the final rule should maintain the NOPR provisions requiring use of LEIs in data reporting for historical swaps in existence on or after April 25, 2011. LEIs will be a crucial tool for enabling the Commission and other regulators to search, aggregate, and use the swap data reported to SDRs to fulfill the purposes of the Dodd-Frank Act. Both the NOPR and the final rule address concerns regarding whether a Commission-approved LEI will be available by the compliance date by applying the provisions of part 45 of this chapter, including the provision for use of a substitute counterparty identifier in the event that an LEI is not available on the compliance date, until a Commission-approved LEI is available.

b. *Non-SD/MSPs and LEIs.* The Commission has determined that the final rule should maintain the NOPR provisions concerning LEIs for non-SD/MSP counterparties. The applicable compliance date set in the final rule for non-SD/MSP counterparties is 180 days after the compliance date for SDs and MSPs, and the final rule provides an additional 180 days after the applicable compliance date for non-reporting counterparties to obtain an LEI. The Commission believe this appropriately addresses commenters' concerns relating to obtaining LEIs for non-SD/MSP counterparties.

c. *USIs and UPIs.* The final rule retains the NOPR provision stating that the USI and UPI requirements of part 45 do not apply to historical swaps.

D. Determination of the Reporting Counterparty

1. Proposed Rule

The NOPR provided that determination of which counterparty is the reporting counterparty for a historical swap would be made in the same way provided in part 45 of this chapter. Counterparty reporting would follow the hierarchy outlined in the

statute, giving SDs or MSPs the duty to report when possible, and limiting reporting by non-SD/MSP counterparties to situations where there is no SD or MSP counterparty. Where both counterparties have the same hierarchical status, the NOPR required them to agree as one term of their swap which of them is to report. Where only one counterparty to a historical swap is a U.S. person, the NOPR called for that counterparty to be the reporting counterparty. For historical swaps in existence as of the applicable compliance date, the NOPR called for determination of the reporting counterparty to be made by applying the above provisions to the current counterparties to the swap as of the compliance date. For historical swaps for which reporting is required, but which have terminated prior to the compliance date, the NOPR called for determination of the reporting counterparty to be made as of the date of the swap's expiration or termination.

2. Comments Received

a. *Non-agreement by counterparties at the same hierarchical level.* WGCEF, Global Forex, ISDA, ETA, and Encana Marketing (''Encana'') each raised the issue of how to assign the reporting obligation in cases where counterparties cannot come to an agreement. ETA recommended that the Commission clarify that the parties are under no obligation to renegotiate the transaction to provide for additional consideration, and should structure its rules to assume that the transaction data will be reported by one or both counterparties, or neither. WGCEF recommended allowing both counterparties to report if they cannot agree. ISDA stated that in cases where the hierarchy does not resolve the issue, the final rules should designate the calculation agent as the reporting counterparty. Global Forex recommended not requiring reporting of historical swaps that expire prior to the compliance date, to reduce the number of instances where counterparties would need to agree on which of them should report.

b. *Date for determining counterparty reporting obligations.* For historical swaps which must be reported but which have expired prior to the compliance date, the proposed regulations called for determining the reporting counterparty by applying the statutory reporting hierarchy to the parties who were counterparties to the swap when it expired. ISDA noted that it may be difficult or impossible to determine whether a counterparty was an SD or MSP as of an expiration that occurred before final SD or MSP definitions and a registration system are put in place, and recommended that the reporting counterparty for such swaps be determined as of the compliance date.

c. *Non-U.S. counterparties.* The End-User Coalition, ETA, WGCEF and ISDA recommended that a foreign SD or MSP should be the reporting counterparty for a historical swap in which the other counterparty is a U.S. non-SD/MSP. ISDA argued that requiring a non-SD/MSP to report in circumstances where the counterparty is a foreign SD could dissuade U.S. parties from engaging in transactions with foreign SDs. In contrast, Encana supported the proposed rule provision requiring the U.S. person to be the reporting counterparty in circumstances where only one of the parties is a U.S. person.

d. *Historical swaps platform-executed or cleared prior to the compliance date.* ETA recommended that the final regulations should provide that, if a reportable historical swap between non-SD/MSP counterparties was executed prior to the compliance date on a platform later registered as a SEF or DCM, or was cleared prior to the compliance date by a DCO, the SEF, DCM, or DCO should be required to make the initial data report for the swap, in lieu of a report by either non-SD/MSP counterparty.

3. Final Rule

a. *Non-agreement by counterparties at the same hierarchical level.* The Commission has determined that the final rule should substantially maintain the NOPR provisions concerning determination of the reporting counterparty. The Commission believes that requiring swap counterparties to agree on which of them is the reporting counterparty ''as one term of their swap transaction'' could require potentially problematic renegotiation of a pre-existing swap agreement. Accordingly, the final regulations remove the phrase ''as one term of their swap transaction'' from § 46.5. The final rule requires counterparties to a historical swap at the same hierarchical level to agree prior to the applicable compliance date on which of them is the reporting counterparty, but does not require them to do so as a term of the swap.[43] The final rule follows part 45 of this chapter in providing an additional decision factor for determining the reporting counterparty for a swap between two non-SD/MSP counterparties: in such situations, if only one of the two non-SD/MSP counterparties is a financial entity as defined in the Dodd-Frank Act, the financial entity will be the reporting counterparty. The final rule addresses the concern raised in one comment about the difficulty of determining the reporting counterparty in the absence of definitions of swap dealer and major swap participant, by providing that the compliance dates on which historical swaps must be reported will come no less than 60 days after publication of such definitions.

b. *Date for determining counterparty reporting obligations.* The Commission believes that it is prudent to determine the reporting counterparty for a historical swap as of the applicable compliance date where possible. The final rule provides that for historical swaps in existence as of the applicable compliance date, the reporting counterparty shall be determined by applying § 46.5 to the current counterparties as of that date. For historical swaps expired or terminated prior to the compliance date, the final rule requires determination of the reporting counterparty by applying § 46.5 to the counterparties to the swap as of the date of its expiration or termination (except for determination of a counterparty's status as an SD or MSP, which shall be determined as of the compliance date).

c. *Non-U.S. counterparties.* The Commission has considered the comments recommending that a non-U.S. SD or MSP in a historical swap with a U.S. counterparty at a lower hierarchical level should be the reporting counterparty despite its status as a non-U.S. person. The Commission received a large number of similar comments in connection with its part 45 rules. It determined in part 45 in response to those comments that, because non-U.S. SDs and MSPs will be required to register with the Commission in this connection, the Commission will have sufficient oversight and enforcement authority with respect to such counterparties.[44] The Commission therefore determined in part 45 that, with a single exception, the determination of the reporting counterparty in situations where only one counterparty is a U.S. person should be made by applying the normal counterparty determination procedure. In cases where both counterparties are non-SD/MSP counterparties and only one counterparty is a U.S. person, part 45 requires the U.S. person to be the reporting counterparty, which is

[43] The Commission expects to provide interpretative guidance concerning determination of the reporting counterparty in situations where a historical swap was executed and submitted for clearing via a platform on which the counterparties to the swap do not know each other's identity.

[44] 77 FR 22136 (January 13, 2012), at 2167.

necessary in such situations because the non-U.S. non-SD/MSP counterparty will not be required to register with the Commission. Where neither counterparty to a swap executed on a SEF or DCM, otherwise executed in the U.S., or cleared on a DCO is a U.S. person, part 45 applies the same hierarchical selection criteria as for other swaps. In response to the comments on this subject made in connection with both parts 45 and 46, and for the same reasons, the Commission has determined that this final rule will follow part 45, as set forth above, with respect to determination of the reporting counterparty in this context.

d. *Historical swaps platform-executed or cleared prior to the compliance date.* The NOPR did not call for platform reporting of PET data or DCO reporting of confirmation data with respect to historical swaps, but mandated reporting by the reporting counterparty. The Commission has determined that the final rule should maintain these NOPR provisions. Counterparties to historical swaps in existence on or after April 25, 2011, were put on notice by the NOPR to retain records of the minimum PET data that will be required to be reported for such swaps, and as discussed above, the final rule limits required reporting for such swaps to the specified minimum PET data in the possession of the reporting counterparty as of April 25, 2011. Such reporting by the reporting counterparty should therefore be practicable. The Commission believes it may be impracticable to require execution facilities or DCOs to report data for swaps executed or cleared by them at a time when they were neither required by a rule nor on notice pursuant to a notice of proposed rulemaking to retain data for the purpose of making such a report.[45]

E. Third-Party Facilitation of Data Reporting

1. Proposed Rule

The NOPR proposed explicit permission for third-party facilitation of data reporting with respect to historical swaps, without removing the reporting responsibility from the appropriate reporting counterparty.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain this NOPR provision as proposed.

F. Reporting to a Single Swap Data Repository

1. Proposed Rule

To avoid fragmentation of data for a given historical swap across multiple SDRs, the NOPR provided that all data for a particular historical swap must be reported to the same SDR to which the initial data report concerning the swap is made.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain this NOPR provision as proposed.

G. Data Reporting for Swaps in a Swap Asset Class Not Accepted by Any Swap Data Repository

1. Proposed Rule

As required by section 729 of the Dodd-Frank Act, the NOPR provided that if there were an asset class for which no SDR currently accepted data, registered entities or counterparties required to report concerning historical swaps in such an asset class would be required to report the same data to the Commission at a time and in a form and manner determined by the Commission.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission determined in part 45 that, in this circumstance, data should be reported at times announced by the Commission and in an electronic format acceptable to the Commission. Part 45 delegates to the Commission's Chief Information Officer the authority to determine such times and formats. Since the part 46 NOPR called for reporting in this context at a time and in a form and manner determined by the Commission, the final rule must specify the Commission's requirements in these respects. The Commission has determined that, for historical swaps in existence on or after April 25, 2011, the final rule should provide, in parallel with part 45, that in this circumstance, data must be reported at times announced by the Commission and in an electronic format acceptable to the Commission. The final rule delegates to the Commission's Chief Information Officer, also in parallel with part 45, the authority to determine such times, and to determine with respect to historical swaps in existence on or after April 25, 2011, the electronic format for making the report. For historical swaps expired or terminated as of that date, the final rule permits reporting in any format chosen by the reporting counterparty.

H. Required Data Standards

1. Proposed Rule

The NOPR required reporting counterparties for historical swaps to use the facilities, methods, or data standards provided or required by the SDR to which the counterparty reports swap data.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain these NOPR provisions as proposed.

I. Reporting of Errors and Omissions in Previously Reported Data

1. Proposed Rule

The NOPR required reporting counterparties to report any errors or omissions in reported data, in the same format as the original data report, as soon as technologically practicable after their discovery. Non-reporting counterparties discovering an error or omission would be required to notify the reporting counterparty, who in turn would be required to report them to the SDR.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain these NOPR provisions as proposed.

J. Compliance Dates

1. Proposed Rule

The proposed rules require swap data reporting for historical swaps to commence on the compliance date specified in the Commission's final swap data recordkeeping and reporting regulations in part 45.

2. Comments Received

a. *Compliance date on which reporting begins.* Due to the dependence

[45] As discussed above at pages 31–33, the Commission plans to further clarify how novated and cleared historical swaps should be reported under the Commission's data reporting rules.

of part 46 on other rulemakings, especially final rules defining ''swap,'' ''swap dealer,'' and ''major swap participant,'' several commenters requested that Part 46 compliance and implementation take place on a staggered basis that takes the need for such definitions into account. Commenters stated that differences between asset classes with respect to both existing automation and existing data normalization are significant and should also be taken into account. Commenters made several specific recommendations concerning compliance dates and phasing also made by them in connection with part 45, which the Commission has already considered and addressed in part 45, and will not address again here.

b. *Using the same compliance dates for parts 45 and 46.* WGCEF stated that the compliance date on which the initial data report for historical swaps must be made should not be the same compliance date provided for the beginning of swap data reporting pursuant to part 45, in order to avoid subjecting SDRs to a logjam of data on that date, and advocated setting the part 46 compliance date for historical swap data reporting somewhat earlier than the part 45 compliance date.

3. Final Rule

a. *Compliance date on which reporting begins.* The Commission believes that the compliance dates for swap data reporting under part 46 should take into account the need for Commission definitions of ''swap,'' ''swap dealer,'' and ''major swap participant.'' The Commission also believes that the compliance dates for swap data reporting should take both asset class differences and the needs of non-SD/MSP reporting counterparties into account. As set forth in part 45, the compliance dates established in part 45 phase in compliance dates in both these respects. Accordingly, the Commission has determined that this final rule will maintain the NOPR provision setting the same compliance dates for both parts 45 and 46. The Commission believes that these compliance dates strike the appropriate balance between the need for swaps data by the Commission charged with achieving the purposes of the Dodd-Frank Act and potential costs and burdens that may be imposed on market participants.

b. *Using the same compliance dates for parts 45 and 46.* Since automated systems for swap data reporting must be developed, tested, and used for reporting with respect to both historical and new swaps, the Commission believes that setting the same compliance dates for data reporting in both part 45 and part 46, as provided in the proposed rules, remains appropriate. However, the Commission recognizes that having some initial data reporting for historical swaps pursuant to part 46 precede the start of data reporting for new swaps pursuant to part 45 could have the practical benefit of reducing the volume of data SDRs would have to receive on a single day if data reporting for all historical swaps as well as new swaps began on the same date. In light of comments and these considerations, the final rule will permit voluntary initial data reporting for historical swaps prior to the applicable compliance date, if a registered SDR is prepared to accept the initial data report required by this part prior to the applicable compliance date. Where such a voluntary early initial data report is made, continuation data reporting for the swap in question will still be required to commence as of the applicable compliance date.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires that agencies consider the impact of their rules on ''small entities.'' As provided in the NOPR, this part will have a direct effect on SDs, MSPs, and non-SD/MSP counterparties who are counterparties to one or more pre-enactment or transition swaps and subject to the Commission's jurisdiction.

As stated in the NOPR,[46] the Commission proposed that certain entities for which the Commission had not previously made a determination for RFA purposes—namely SDs, and MSPs—should not be considered to be small entities, for reasons set forth in the NOPR.

As noted in the NOPR, this part requires limited swap data reporting by a non-SD/MSP counterparty regarding pre-enactment and transition swaps only with respect to the swaps in which neither counterparty is an SD or MSP. With respect to such swaps, which represent a minority of swap transactions, only one of the swap non-SD/MSP counterparties will be required to report—the counterparty designated as the reporting counterparty. In addition, the Commission has determined that the final rule provides that for swaps between non-SD/MSP counterparties where only one counterparty is a ''financial entity'' as defined in CEA section 2(h)(7)(C), the financial entity shall be the reporting counterparty. As the NOPR noted, most end users and other non-SD/MSP counterparties who are regulated by the Employee Retirement Income Security Act of 1974 (''ERISA''), such as pension funds, which are among the most active participants in the swap market, are prohibited from transacting directly with other ERISA-regulated participants.[47]

With respect to SDs, the Commission previously has determined that Futures Commission Merchants (''FCMs'') should not be considered to be small entities for purposes of the RFA.[48] Like FCMs, SDs will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms.[49] Similarly, with respect to MSPs, the Commission has previously determined that large traders are not ''small entities'' for RFA purposes.[50] Like large traders, MSPs will maintain substantial positions, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.

For these reasons, the Commission does not believe that the regulations would have a significant economic impact on a substantial number of small entities. The Commission believes these provisions of the final rule reduce the economic impact on any non-SD/MSP counterparties that may be considered to be small entities under the RFA.

Due to the operation of certain provisions of the CEA and the final rule, non-SD/MSP counterparties who may be considered small entities for RFA purposes are never required to report any swap creation data. Under the CEA, a non-SD/MSP counterparty is required to transact on a SEF or DCM unless that non-SD/MSP is an Eligible Contract Participant (''ECP'').[51] The Commission

[46] 76 FR 22833.

[47] 29 U.S.C. 1106.

[48] 47 FR 18618 (Apr. 30, 1982).

[49] Additionally, the Commission is required to exempt from designation entities that engage in a de minimis level of swaps. *Id.* at 18619.

[50] 47 FR at 18620.

[51] CEA section 2(e) provides that ''It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.'' Congress created the ECP category in the Commodity Futures Modernization Act in 2000, to include individuals and entities that Congress determined to be sufficiently sophisticated in financial matters that they should be permitted to trade over-the-counter swaps without the protection of federal regulation. *See, e.g.,* ''Report of the President's Working Group on Financial Markets'' (Nov. 1999) at 16 (recommending that ''sophisticated counterparties that use OTC derivatives simply do not require the

Continued

has previously determined that ECPs are not ''small entities'' for RFA purposes.[52] For all swaps executed on a SEF or DCM, the final rule requires the SEF or DCM to report all required swap creation data. Therefore, no ''small entities'' for RFA purposes are required to report any swap creation data under the final rule.

In the NOPR, the Chairman, on behalf of the Commission, certified that the rulemaking would not have a significant economic effect on a substantial number of small entities. Nonetheless, the Commission specifically requested comment on the impact these proposed rules may have on small entities. The Commission received one comment on its RFA statement, from the Electric Coalition, stating that the vast majority of members of the National Rural Electric Cooperative Association and the American Public Power Association are considered small entities for purposes of the RFA. The Electric Coalition recommended that the Commission should consider the overall impact of its Dodd-Frank Act rules on nonfinancial entities, including small entities, and conduct a comprehensive analysis under the RFA.

In response to this comment, and to other comments by non-SD/MSP counterparties, the Commission has adjusted the final reporting regime to reduce burdens and costs for non-SD/MSP counterparties in a variety of ways, as set forth in detail in the discussion above concerning §§ 45.3 and 45.4 of the final rule. The Commission notes that the commenter did not dispute the reasons for the Commission's conclusion that this part does not have a significant impact on a substantial number of small entities. For these reasons, and for the reasons stated above and in the NOPR, the Commission continues to believe that this part will not have a significant 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 this part as finally adopted will not have a significant economic impact on a substantial number of small entities.

same protections under the CEA as those required by retail investors''). In the Dodd-Frank Act, Congress made two changes to the statutory ECP definition, both of which increased the thresholds to qualify as an ECP, making it harder for some entities and individuals to qualify. *Compare* CEA section 1a(12), 7 U.S.C. 1a(12) (2009), with §§ 721(a)(1) and (9) of the Dodd-Frank Act, respectively redesignating section 1a(12) as section 1a(18) and increasing thresholds for certain categories of ECP.

[52] 66 FR 20740, 20743, Apr. 25, 2001.

B. Paperwork Reduction Act

1. Introduction

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 issued by the Office of Management and Budget (''OMB''). Provisions of Commission Regulations 46.2, 46.3, 46.4, 45.8, 45.10 and 45.11 result in information collection requirements within the meaning of the Paperwork Reduction Act (''PRA'').[53] The Commission submitted the NOPR and supporting documentation to 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 NOPR.

The title for the proposed collection of information under part 46 is ''Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps.'' The OMB has assigned this collection control number 3038–0089. The responses to this new collection of information are mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

2. Need for Information Collection

To the extent that the recordkeeping and reporting requirements in this rulemaking overlap with the requirements of other rulemakings for which the Commission prepared and submitted an information collection request to OMB, the burdens associated with those requirements are not being accounted for in the information collection request for this rulemaking, to avoid unnecessary duplication of information collection burdens.

The collection of information under these regulations is necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Specifically, it is essential to reducing risk, achieve market transparency, and for market supervision purposes for which the Dodd-Frank Act was enacted. Such data will be needed to give the Commission a complete picture of the swap market. Data concerning historical swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress regarding the swap market.

[53] 44 U.S.C. 3301 *et. seq.*

3. Comment on Proposed Information Collection

The Commission invited the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens estimates. There was one comment from Encana relating to the collection of information estimates. Encana commented that the 10 hour one-time burden estimate in the proposal for non-reporting entities was too low. The Commission addresses this and other related comments as follows.

Under the final rules, the Commission has revised its estimates provided for in the proposal for reporting entities and persons who will provide information under sections 46.2, 46.3, 46.4, 45.8, 45.10 and 45.11 of this part. The information provided under each regulation is set forth below, together with burden estimates that were calculated, through research and through consultation with the Commission's technology staff, using wage rate estimates based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA'').[54]

[54] These wage estimates are derived from an industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may vary from the average. The Commission estimated the dollar costs of hourly burdens for each type of professional using the following calculations:

(1) [(2009 salary + bonus) * (salary growth per professional type, 2009–2010)] = Estimated 2010 total annual compensation. The most recent data provided by the SIFMA report describe the 2009 total compensation (salary + bonus) by professional type, the growth in base salary from 2009 to 2010 for each professional type, and the 2010 base salary for each professional type; thus, the Commission estimated the 2010 total compensation for each professional type, but, in the absence of similarly granular data on salary growth or compensation from 2010 to 2011 and beyond, did not estimate dollar costs beyond 2010.

(2) [(Estimated 2010 total annual compensation)/(1,800 annual work hours)] = Hourly wage per professional type.]

(3) [Hourly wage) * (Adjustment factor for overhead and other benefits, which the Commission has estimated to be 1.3)] = Adjusted hourly wage per professional type.]

(4) [(Adjusted hourly wage) * (Estimated hour burden for compliance)] = Dollar cost of compliance for each hour burden estimate per professional type.]

4. Recordkeeping Burdens

Section 46.2. Under § 46.2, counterparties to a swap unexpired on or after April 25, 2011 are required to keep records containing minimum primary economic terms data, and (if they have them) confirmation documentation, master agreements, credit support or similar agreements, and any records required by § 45.2 if the swap remains unexpired after the compliance date. The final rules allow counterparties to keep either paper or electronic records as long as they are reportable but require swap dealers and major swap participants to keep electronic records unless their paper records were ''originally created and exclusively maintained'' in paper form.

For historical swaps that expired prior to April 25, 2011, the final rules require that each counterparty ''retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 for transition swaps). They do not require counterparties to create or confirm any data that they possessed prior to October 14, 2010 for pre-enactment swaps or December 17, 2010 for transition swaps. The Commission has not calculated the burden for this requirement to the extent the Commission has previously calculated such burden in the PRA analyses for the Interim Final Rules covering ''pre-enactment swaps'' and ''transition swaps.''

For historical swaps still in existence on or after April 25, 2011, the final rules require that records kept by swap dealers or major swap participants be readily accessible via real time electronic access throughout the life of the swap and for two years following termination. Following this two year-post expiration period, the final rules require that records be retrievable within three business days ''through the remainder of the period following final termination of the swap during which it is required to be kept.'' For records maintained by non-SD/MSP counterparties the final rules require that they be retrievable within five business days ''through the remainder of the period following final termination of the swap during which it is required to be kept.'' The Commission has calculated the recordkeeping burden for the time period beginning on or after April 25, 2011, and ending on the compliance date; the burden occurring after the compliance date having been already considered in the Commission's final swap data rules.[55]

The Commission believes that some percentage of the estimated 30,000 non-SD/MSP counterparties who would be subject to the recordkeeping requirements of section 46.2 would contract with third-party service providers to fulfill these requirements, and would therefore pay some fee to such providers in lieu of incurring the Commission's estimated costs of reporting. The identity of such third parties, the composition of the marketplace for third party services, and the costs to third parties to provide recordkeeping services given the economies of scale and scope they may realize in providing those services are all presently unknowable. Therefore, the Commission does not believe it is feasible to quantify the fees charged by third parties to non-SD/MSPs at the present time, but believes that they will likely vary with the volume of records to be retained. The remaining non-SD/MSP counterparties would elect to perform these functions themselves and incur the costs enumerated below.[56] The Commission notes that this final rule allows non-SD/MSP counterparties to retain records in either an electronic or paper form, which will facilitate recordkeeping for less technologically resourced counterparties, who will likely choose to retain the records in the form in which they currently exist. For historical swaps still in existence on or after April 25, 2011, non-SD/MSP counterparties will already be required to normalize the data for those swaps to the minimum PET data tables, and the burdens associated with this task are addressed in the discussion of reporting burdens below; however, the recordkeeping requirements of section 46.2 do not require non-SD/MSP counterparties to retroactively revise or recreate data for those swaps. Non-SD/MSP counterparties will therefore not be required to manipulate, move, or update swap records in any way to comply with the recordkeeping requirements of the final rule; accordingly, the Commission believes that the recordkeeping requirements of this final rule will not impose costs on non-SD/MSP counterparties.[57]

With respect to SDs and MSPs (an estimated 125 entities or persons),[58] which will have higher levels of swap recording activity[59] than non-SD/MSP counterparties, the Commission estimates that this requirement would impose an initial non-recurring burden of 335 hours per SD/MSP reporting counterparty at a cost of $22,172, equating to an aggregate estimated one-time burden of 41,875 hours at a cost of $2,771,500 for all SD/MSP reporting counterparties. The Commission also estimates that § 46.2 will result in retrieval costs for swap counterparties that do not currently have the ability to retrieve records within the required timeframe. The Commission expects that this requirement will present costs to registered entities and swap counterparties in the form of non-recurring investments in technological systems and personnel associated with establishing data retrieval processes, and recurring expenses associated with the actual retrieval of swap data records. These same costs (including non-recurring investments in technological

The sum of each of these calculations for all professional types involved in compliance with a given element of the final rule represents the total cost for each counterparty, reporting counterparty, SD, MSP, SEF, DCM, or SDR, as applicable to that element of the final rule.

[55] These are one-time recordkeeping costs, which necessarily take place in the period prior to the compliance date; therefore, the applicable recordkeeping burden applies during the period between the publication date and compliance date of Part 46, rather than the one year noted in the proposal.

[56] The proposed rule estimated an average one-time per-entity burden of 40 hours (for SD/MSP reporting counterparties) and 10 hours (for non-SD/MSP counterparties). These estimates have been revised following additional research by OCE staff and consultation with staff in the Commission's Office of Data and Technology.

[57] The Commission estimates that the percentage of non-SD/MSP counterparties that will contract with a third-party service provider to perform this function will likely be very low, given that the Commission has estimated that the recordkeeping requirements of section 46.2 would not impose costs on non-SD/MSP counterparties, which would not be required to manipulate, move, or update records, and would therefore not present a burden that could be more efficiently satisfied by contracting with a third-party service provider. Nevertheless, the Commission recognizes that some non-SD/MSP counterparties may contract with third-party service providers for a variety of regulatory compliance services, and may elect to engage a third-party service provider to manage its historical swap records, either as an individual service to satisfy the recordkeeping requirements of section 46.2, as part of a broader set of data management services for regulatory compliance, or to otherwise facilitate its own internal recordkeeping.

[58] The Commission previously estimated that as many as 250 SDs and 50 MSPs would register. After recently receiving additional information, particularly a letter from Thomas Sexton, NFA Senior Vice President and General Counsel to Gary Barnett, Director of the Division of Swap Dealer and Intermediary Oversight, the Commission is revising its estimate downward. Accordingly, the Commission now believes that approximately 125 Swaps Entities, including only a handful of MSPs, will register with the Commission as SDs or MSPs.

[59] For purposes of this Paperwork Reduction Act analysis, the Commission estimates that ''high activity'' entities or persons are those who process or enter into hundreds or thousands of swaps per week that are subject to the jurisdiction of the Commission. Low activity users would be those who process or enter into substantially fewer than the high activity users.

systems and personnel associated with establishing data storage and retrieval systems, and recurring expenses associated with data storage and retrieval, and maintenance of data storage systems), however, are required to comply with the requirements of part 45. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.[60]

5. Reporting Burdens

Sections 46.3, 46.4, 46.8, 46.10 and 46.11. Pursuant to §§ 46.3 and 46.4, each historical swap in existence on or after April 25, 2011 will be reported to an SDR electronically [on or before the applicable compliance date], or to the Commission if no SDR accepts such a swap under § 46.8. The initial data report must contain all of the minimum primary economic terms data listed in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011, the legal entity identifier of the reporting counterparty, the internal counterparty identifier used by the reporting counterparty to identify the non-reporting counterparty, and the internal transaction identifier used by the reporting counterparty to identify the swap. For each such swap that remains in existence after the compliance date, the reporting counterparty must report swap continuation data as provided in part 45 of this chapter, with the exception that such reports need only include changes to the minimum primary economic terms listed in Appendix 1 to this part, rather than changes to the larger list of primary economic terms provided in part 45. Continuation data must be reported to the same SDR which received the initial data report. In parallel with part 45 of this chapter, the final rule provides that multi-asset historical swaps must be reported to a single SDR that accepts swaps in the asset class that is treated as the primary asset class involved in the swap by the reporting counterparty; and provides that mixed historical swaps must be reported to an SDR or security-based SDR registered with both the Commission and the SEC.

For historical swaps that expired prior to April 25, 2011, the final rules require that counterparties report to a SDR on the compliance date such information relating to the terms of the transaction as was in the counterparty's possession on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 in the case of transition swaps.) This information may be reported via any method selected by the reporting counterparty. The Commission has not calculated the burden for this requirement to the extent the Commission has previously calculated such burden in the PRA analyses for the Interim Final Rule covering ''pre-enactment swaps'' and ''transition swaps.''

For historical swaps still in existence on or after April 25, 2011, the Commission anticipates that the reporting required by §§ 46.3 and 46.4 will to a significant extent be automatically completed by electronic computer systems; the following burden hours are calculated based on the annual burden hours necessary to oversee, maintain, and utilize the reporting functionality. SDs and MSPs (an estimated 125 entities or persons) are anticipated to have high levels of reporting activity; the Commission estimates that their average one-time burden may be approximately 285 hours per MSP or SD reporting counterparty at a cost of $20,169,[61] equating to an estimated one-time aggregate burden of 35,625 hours at a cost of $2,521,125 for all SD/MSP reporting counterparties. The Commission believes that this is a reasonable assumption due to the volume of swap transactions that will be processed or entered into by these entities, the varied nature of the information required to be reported, and the frequency with which information may be required to be reported.[62]

Non-SD/MSP counterparties who would be required to report—which presently would include an estimated 1,000 entities [63]—are anticipated to have lower levels of activity with respect to reporting. Of those 1,000 non-SD/MSPs, the Commission believes that a majority, estimated now at 75%, or 750 entities, will contract with third parties to satisfy their reporting obligations. The identity of such third parties, the composition of the marketplace for third party services, and the costs to third parties to provide reporting services given the economies of scale and scope they may realize in providing those services are all presently unknowable. Therefore, the Commission does not believe it is feasibly to quantify the fees charged by third parties to non-SD/MSPs at the present time, but believes that they will likely vary with the volume of reports to be made. For those estimated 250 non-SDs/non-MSPs who are required to report swap transaction and pricing data to an SDR and do not contract with a third party, the Commission estimates a one-time burden of 55 hours per non-SD/MSP reporting counterparty at a cost of $4,191, equating to an aggregate estimated one-time burden of 13,750 hours at a cost of $1,047,750 for all non-SD/MSP reporting counterparties that do not contract with a third party.[64] For swaps unexpired on or after April 25, 2011, the reporting counterparty shall obtain for itself an LEI as provided in § 45.6 (or substitute LEI if applicable) and include such identifier in the relevant initial report. Within 180 days of the compliance date non-reporting counterparties must provide their LEI (or substitute if applicable) to the reporting counterparty, which then must report it to the relevant SDR, as set forth in part 45. Final § 46.5 sets forth the criteria for determining which counterparty must report. For unexpired swaps the provisions apply to the current counterparties as of the compliance date, notwithstanding whether they were the original counterparties.

Final § 46.9 permits voluntary early submission of the initial data report (and of subsequent continuation data reports) prior to the applicable compliance date if a registered SDR is prepared to accept the reports and § 46.10 require that each counterparty use the ''facilities, methods, or data standards provided for or required by'' the SDR to which the counterparty reports the data. Final § 46.11 also requires that corrections be reported ''as soon as technologically practicable'' to the applicable SDR in the same format that data was reported erroneously or omitted. It provides that reporting counterparties who report state data can report error corrections by updating

[60] These are one-time recordkeeping costs, which necessarily take place in the period prior to the compliance date. For the purposes of this rulemaking, the Commission has considered only the one-time costs associated with recordkeeping; as noted in the Part 46 Consideration of Costs and Benefits section, the forward-looking (recurring) costs associated with recordkeeping are already covered by the recurring costs of recordkeeping enumerated in the Part 45 Consideration of Costs and Benefits section. *See* Final Data Rules, 77 FR 2136, 2171.

[61] The Commission obtained this estimate in consultation with the Commission's information technology staff.

[62] The estimated burden hours have been adjusted from the proposal. The estimated burden hours were obtained in consultation with the Commission's information technology staff.

[63] The estimated burden hours have been adjusted from the proposal. This is the estimated number of non-SD/MSP counterparties who will be required to report in a given year. Only one counterparty to a swap is required to report, typically an SD or a MSP as determined by § 45.8. Therefore, a non-SD/MSP counterparty that is in a swap with an SD or MSP counterparty will not be subject to the reporting obligations of §§ 45.3 and 45.4.

[64] In the event that all estimated 1,000 non-SD/MSP reporting counterparties elect to perform their reporting functions themselves, rather than contract with a third-party service provider, the aggregate burden would be 55,000 hours at a cost of $4,191,000.

their next daily report. Recordkeeping and reporting requirements that exist after compliance dates and those of §§ 46.9, 46.10 and 46.11 are covered by other rulemakings for which the Commission prepared and submitted an information collection request to OMB, the burdens associated with those requirements are not being accounted for in the information collection request for this rulemaking.[65]

C. Consideration of Costs and Benefits

1. Introduction

The Dodd-Frank Act's swap reporting requirements apply to all swaps in existence on or after the date of the legislation's enactment. Previously, in its separate Part 45 rulemaking, the Commission adopted final rules to implement the data reporting and recordkeeping requirements for swaps entered into on or after the applicable compliance date specified in Part 45. This final Part 46 rulemaking implements the mandate of sections 723 and 729 of the Dodd-Frank Act[66] requiring that data be reported to SDRs for historical swaps. In so doing, the final rule specifies the Commission's recordkeeping requirements with respect to historical swaps; and specifies the manner and form for reporting historical swap transaction data to an SDR, including the identification of entities and transactions through unique identifiers.

As discussed in more detail below, the requirements of Part 46, working in tandem with Part 45, will enhance swaps market transparency beyond the level afforded by Part 45 alone; this enriches its value to regulators for the ultimate benefit of swap market participants and the general public. More specifically, the benefits of the improved transparency engendered by this rule include improved regulatory oversight of markets (with respect to surveillance, enforcement, and analysis); improved regulatory understanding of the behavior of swap market participants; improved regulatory understanding of the concentrations of risk in swap markets; and greater market integrity. In addition, the requirements of the regulation, in tandem with the requirements of Part 45, promote the development of firm-level infrastructure and practices well-suited to improve market participants' risk management capabilities. Further, market participants will be able to use data associated with their own historical swaps for which continuation data reporting extends past the Part 45 compliance date to better understand and manage the risk associated with their swap exposure.

The Commission also recognizes that compliance with these rules will impose costs. However, because certain non-SD/MSP counterparties are subject to the Commission's part 45 regulations, which impose swap data recordkeeping and reporting requirements similar in certain key respects to those of part 46, the Commission does not consider expenditures to be costs of this regulation if they are also required to comply with part 45. These expenditures would only constitute costs of this final rule, independent of the costs of part 45, in the case of a market participant that exits the swap market entirely immediately following the part 45 compliance date.[67] Such an entity would not be required to comply with part 45, having no active swap data to report, but would still be required to report its historical swap data pursuant to part 46, because it was active during the pre-compliance date time period affected by this rule. The Commission cannot presently estimate the number of entities that may exit the swap market immediately after the compliance date.

The two chief cost-driver categories in this final rulemaking are recordkeeping and reporting (including unique identifier requirements). For both categories, the Commission identifies the costs and benefits of the final rule, discusses comments regarding them, and considers them in relation to the five broad areas of market and public concern as required by section 15(a) of the CEA.

a. Section 15(a) of the CEA

Section 15(a) of the CEA[68] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission considers is the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

b. Cost Estimation Methodology

In the NOPR, the Commission asked for public comment on the costs and benefits of the proposed regulations, and specifically invited commenters ''to submit any data or other information that they may have quantifying or qualifying the costs and benefits'' of the proposed requirements.[69] The Commission also asked for comments on the overall costs and benefits of the proposed rules implementing the Dodd-Frank Act.[70] The Commission received numerous comments addressing various cost and benefit considerations of the proposed rule, including several that recommended alternatives, but none provided data from which the costs and benefits of the rule could be quantified. Nevertheless, the Commission has endeavored to estimate quantifiable costs and benefits of the final rule where possible.[71] Where estimation or quantification is not feasible, the Commission provides a qualitative assessment of the costs and benefits.

The Part 46 final rules will affect three types of market participants, including SD/MSP counterparties, non-SD/MSP counterparties, and SDRs. To serve as the reference point for estimating the costs of these rules to non-SD/MSP counterparties, the Commission selected a non-SD/MSP counterparty that is not a financial entity as defined in CEA section (2)(h)(7)(C).[72]

[65] Costs associated with reporting are already covered by the Part 45 rules. *See* Data Final Rules, 77 FR 2136, 2171.

[66] These sections established new sections 2(h)(5) and 4r(a)(2)(A) of the CEA, respectively. This rulemaking is undertaken to implement those two CEA sections. They are discussed in greater detail in section [ ], *supra,* including their interrelationship and the import of the Commission's October 14, 2010 and December 17, 2010 Part 44 interim final rules.

[67] For discussion of costs of compliance with part 45, see 77 FR 2136 (January 13, 2012) at 2176 *et seq.*

[68] 7 U.S.C. 19(a).

[69] 75 FR 76574 (December 8, 2010), at 76597.

[70] *Id.*

[71] The Commission made these estimates in consultation with experts on its information technology staff through a collaborative process that involved determining the types of personnel needed to complete each aspect of the tasks necessary for compliance, determining the number of hours required of each of those personnel types, and comparing the burden estimates for separate tasks to identify and eliminate any redundancies.

[72] To aid in cost estimates, the Commission at times has used wage rate estimates compiled by the Securities Industry and Financial Markets Association (''SIFMA''). These wage estimates are derived from a securities industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may differ.

The Commission estimated the dollar costs of hourly burdens for each type of professional using the following calculations:

(5) [(2009 salary + bonus) * (salary growth per professional type, 2009–2010)] = Estimated 2010 total annual compensation. The most recent data provided by the SIFMA report describe the 2009 total compensation (salary + bonus) by professional

Continued

The Commission expects that the actual costs to established market participants will often be lower than this reference point—perhaps significantly so, depending on the extent to which swap counterparties currently format, organize, and store swap transaction data that would be reported as historical swap data pursuant to this final rule.

To address costs specific to SDRs, the Commission has estimated the incremental costs SDRs would incur to comply with the reporting and recordkeeping requirements of this rulemaking above the base operating costs for SDRs to comply with part 45 regulations.[73]

2. Recordkeeping

a. Summary of Final Rule

The final rule requires counterparties to a historical swap in existence on or after April 25, 2011 to keep records of the minimum primary economic terms data specified in the Appendix to the rule, as well as copies (if they have them) of confirmation documentation, master agreements, credit support or similar agreements. If the swap remains unexpired after the applicable compliance date, counterparties must also keep any records required by section 45.2 of this chapter. Non-SD counterparties may keep records in either paper or electronic form so long as they are retrievable and reportable as required, while SD or MSP counterparties must keep electronic records unless their paper records were originally created and are exclusively maintained in paper form. Records kept by SDs and MSPs must be readily accessible during the existence of the swap and for two years thereafter, and be retrievable within three business days during the remainder of the retention period, while records kept by non-SD/MSP counterparties must be retrievable within five business days throughout the retention period.

For historical swaps that expired prior to April 25, 2011, each counterparty must retain the information and documents relating to the terms of the transaction that were in its possession on or after the date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 for transition swaps). The final rule does not require counterparties to create or retain records of information regarding such swaps that was not in their possession as of those dates, or to alter how the records are organized or stored.

For all historical swaps, the final rule requires retention of records throughout the existence of the swap and for five years following expiration of the swap.

b. Benefits

By providing for the collection and retention of historical swap data (as well as its reporting), part 46 ensures the availability of data that will enhance the transparency of the swap markets. The Commission believes that improved swap market transparency (including transparency with respect to the historical swap transaction activity subject to Part 46's recordkeeping requirements) is important to the Commission's efforts to better identify, assess, and respond to risks, including systemic risks that swaps market may pose for market participants and the public in the future. The recordkeeping requirements of part 46 will increase the Commission's and other regulatory agencies' visibility into the activities and exposures of swap market participants and the dynamics of the swap market at large. This serves the public interest in effective regulatory enforcement. These recordkeeping requirements will enable Commission oversight and enforcement staff to reconstruct a comprehensive, sequenced record of swap transactions active between the enactment of the Dodd-Frank Act and this final rule's compliance date. This data is necessary to effectively monitor and investigate activities that could compromise the integrity of swap markets. Additionally, the presence of an effective monitoring and investigation regime may deter parties from engaging in behavior that undermines the integrity of swap markets.

In addition, the requirement to retain historical swap records for five years provides substantial benefit to market participants and the public because it affords the Commission the capability to analyze market trends through time-series analysis for a reasonable period of time in the future. This in turn enhances the Commission's ability to efficiently regulate the markets subject to its jurisdiction. A swap can continue to exist for a substantial period of time prior to its final termination or expiration, and key economic terms of the swap can change during this time. Thus, recordkeeping requirements with respect to a swap must necessarily cover the entire period of time during which the swap exists, as well as an appropriate period following final termination or expiration of the swap. A five-year retention period following termination of the swap also will ensure document retention consistent with the information that the Commission needs to carry out its oversight and enforcement responsibilities. It parallels the Commission's existing five-year record retention requirement in the context of futures and is consistent with the Commission's final part 49 rules regarding SDR registration. The identical retention periods provided in parts 45 and 46 will ensure that a single, comprehensive record is produced in the event that regulators require a data set spanning both Part 45 and Part 46 data. Additionally, data collected on swap market activity both before and after the compliance date of part 45 and part 46 will be available to inform any pre/post-Dodd-Frank Act comparative analysis that might be performed in the future. Part 46 data would provide the starting point for such an assessment.

c. Costs

The Commission believes that the incremental[74] costs to comply with the recordkeeping requirements of this part are limited to those related to historical swap data storage. The rules do not require counterparties to recreate data that does not presently exist, and thus imposes no costs in this respect.[75]

type, the growth in base salary from 2009 to 2010 for each professional type, and the 2010 base salary for each professional type; using this, the Commission estimated the 2010 total compensation for each professional type. In the absence of similar data for 2011 and beyond, the Commission did not estimate dollar costs beyond 2010.

(6) [(Estimated 2010 total annual compensation)/(1,800 annual work hours)] = Hourly wage per professional type.

(7) [(Hourly wage) * (Adjustment factor for overhead and other benefits, which the Commission has estimated to be 1.3)] = Adjusted hourly wage per professional type.

(8) [(Adjusted hourly wage) * (Estimated hour burden for compliance)] = Dollar cost of compliance for each hour burden estimate per professional type.

The sum of each of these calculations for all professional types involved in compliance with a given element of the final rule represents the total cost for each counterparty, reporting party, SD, MSP, SEF, DCM, or SDR, as applicable to that element of the final rule.

[73] Again, because these costs have been considered in the context of the part 45 rulemaking, to reconsider them in this rulemaking would double-count them.

[74] Swap counterparties that currently do not retain historical swap records for the period of time and in the form required by this final rule will incur costs to comply with these requirements. These same costs (including non-recurring investments in technological systems and personnel associated with establishing data storage and retrieval systems, and recurring expenses associated with data storage and retrieval, and maintenance of data storage systems), however, are required to comply with the requirements of part 45. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.

[75] For pre-enactment swaps, the rule allows swap counterparties to retain swap data in whatever form it currently exists. For transition swaps, the rule only requires the retention of data to populate the minimum PET data tables for swaps that were in existence after the issuance of the proposed rule.

The Commission believes that any incremental costs will be incurred primarily by SD/MSP swap counterparties, which are required to retain historical swap data according to the format and retrieval requirements of § 46.2. The costs to SDRs of retaining historical swap data reported by swap counterparties pursuant to this final rule will be addressed in the discussion of the costs and benefits of reporting historical swap data in this Consideration of Costs and Benefits.

Historical swap data storage. The Commission believes that storing historical swap data for the period of time required by this final rule will impose a one-time burden on swap counterparties associated with gathering and transferring the historical swap data onto a server for secure storage.[76]

Non-SD/MSP counterparties are permitted by the rule to keep records in either electronic or paper form at their discretion, so as to eliminate the burden of gathering and transferring historical swap data for recordkeeping. To satisfy the recordkeeping provision of this final rule, non-SD/MSP counterparties can simply retain their records as and wherever they currently exist.

For SD/MSPs, the Commission estimates a one-time burden of 335 hours per SD/MSP counterparty[77] at an estimated cost of $22,172.[78] The Commission anticipates that SD/MSPs will likely be required to process a larger volume of historical swap data than non-SD/MSPs, though many may be able to leverage existing technology and personnel expertise to reduce the burden to perform this function.

d. Comments, Alternatives, and Cost Mitigation

Recordkeeping for historical swaps in existence on or after April 25, 2011. The Commission received several comments related to the costs of recordkeeping for swaps in existence on or after April 25, 2011. COPE supported the NOPR provision that limited the records required to be kept for such swaps to the minimum PET data specified in the NOPR Appendix (plus any confirmation, master agreement, or credit support agreement that the counterparty has), stating this is a reasonable requirement. COPE added that the specified PET data elements reflect the commercially relevant terms typically retained by swap counterparties, although a counterparty involved in few swaps might not retain all of this data in the ordinary course of its business. ETA also supported the requirement to keep records of the specified minimum PET data, stating that it believes all or most counterparties will have this data, although it could not be certain that all smaller non-financial entities in the energy sector will have all of it.

As noted above, ISDA and Global Forex requested that the Commission eliminate the time of trade from the NOPR's required PET data, arguing that including the time of trade would require some participants to retroactively create data they do not possess. FSR stated that its members have made best efforts to comply with the interim final rules for historical swaps by retaining the records in their possession, but that they do not necessarily have all of the required minimum PET data. The specific concerns FSR raised include identifying the settlement agent for pre-enactment currency swaps, and having data for pre-enactment swaps that were acquired through merger or acquisition.

The Commission made two important modifications in the final rule in an effort to address these comments and mitigate the costs of the final rule while achieve the same regulatory benefits.

First, as discussed above, the final rule requires counterparties to keep records of only the minimum PET data specified in Appendix 1 that was in their possession as of publication of the NOPR, which gave notice of what records would be required. The Commission believes that this will reduce costs and burdens associated with recordkeeping by counterparties to historical swaps to the extent consistent with ensuring the availability of swap data needed to fulfill the purposes of the Dodd-Frank Act.

Second, as discussed above, the final rule will require reporting the date of execution for a historical swap, and require reporting the time of execution only if that time was recorded when the trade was executed and is known to the reporting counterparty on or after April 25, 2011, the NOPR publication date. As noted above, the Commission believes that it would be undesirable for counterparties who did not record the execution time when a historical swap was executed to attempt to assign an execution time retroactively.

Recordkeeping for historical swaps expired prior to April 25, 2011. ISDA noted that, for historical swaps expired prior to the publication date of the NOPR, the NOPR does not require parties to alter the format in which they already retain records concerning such swaps. ISDA asked the Commission to clarify whether this requirement allowed counterparties to keep records in the form already used. Similarly, WGCEF requested clarification that keeping records in the form in which they are already retained will be acceptable to the Commission for all historical swaps.

As discussed above, and in order to achieve the benefits of the rule, the Commission has determined that the final rule should retain the NOPR provisions concerning limited recordkeeping for such swaps, which required counterparties to keep only the information and documents concerning such swaps that were in their possession on or after the publication date of the applicable Interim Final Rule. The final rule provides that counterparties may keep such records in any format they choose. The retrievability requirement for all counterparties to such swaps will require counterparties to be able to retrieve such records within five business days throughout the retention period, rather than to keep records readily accessible for part of the retention period or to be able to retrieve records within three business days, as provided in the NOPR. This reduced retrievability requirement is designed to further reduce costs and burdens for counterparties to historical swaps that have expired prior to April 25, 2011.

e. Recordkeeping in Light of CEA Section 15(a)

The Commission has evaluated the benefits of the recordkeeping provisions of this part in light of the specific considerations identified in section 15(a) of the CEA as follows:

Protection of market participants and the public. The Commission believes that the recordkeeping requirements in

[76] While swap counterparties also may have costs to maintain data storage infrastructure and/or costs to require the necessary data retrieval ability, these costs duplicate those that would be incurred to comply with part 45. Accordingly, they are not incremental to, and appropriate for, consideration in this rulemaking.

[77] The costs of historical swap data storage were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Computer Operations Supervisor at 80 hours) + (Computer Operations Group/Section Manager at 80 hours) + (Computer Operations Department Manager at 40 hours) + (Sr. Database Administrator at 40 hours) + (Programmer at 40 hours) + (Systems Analyst at 20 hours) + (Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours)] = 335 hours per SD/MSP counterparty; [(335 hours per SD/MSP) × (125 SD/MSPs) = 41,875 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[78] See Table 2.

the final rule protect market participants and the public by improving the ability of the Commission and other regulatory agencies to fulfill their oversight and enforcement responsibilities, and contributing to improved transparency necessary to identify and assess risks that swaps markets may pose.

The record retention periods in the final rule are consistent with both the Commission's existing retention requirement in the context of futures, pursuant to Commission Regulation 1.31, and with applicable statutes of limitation. A general five-year record retention requirement helps assure the Commission ready access to records and data essential to its mission to protect market participants and the public from violations of the CEA and Commission regulations. For example, records retained pursuant to Part 46 will enable Commission staff to reconstruct a comprehensive, sequenced record of swap transactions active during the window between statutory enactment and the final rule's compliance date for purposes of analysis; investigation; and, if appropriate, prosecution of an enforcement action.

Moreover, by providing for the collection and retention of historical swap data (as well as its reporting), Part 46 assures that data valuable to enrich the depth and perspective of regulators' understanding of swap markets over time is available for reporting and regulatory analysis. In this way, historical recordkeeping requirements serve an important role in counteracting the swap market opacity and potential for under-appreciation of systemic risk that contributed to the financial crisis of 2008. The Commission believes that improved swap market transparency (including transparency with respect to the historical swap transaction activity subject to Part 46's recordkeeping requirements) is critical to the Commission's efforts to better identify, assess, and respond to risks that swap markets may pose for market participants and the public in the future.

Efficiency, competitiveness, and financial integrity. This rule promotes efficiency and competitiveness. The historical swaps transaction data subject to these recordkeeping requirements will provide a basis for comparative assessments of the swap markets that might be conducted in the future (including potential comparative assessments of market efficiency and competitiveness [79]). In addition, electronic recordkeeping, which will aid required electronic reporting, may improve efficiency and reduce initiation and maintenance costs in the future.

Further, the Commission believes that the final Part 46 recordkeeping requirements promote swap market financial integrity. As previously discussed, the Commission believes that historical swap transaction data as collected and retained under these final rules will aid it in effective swap market oversight and legal enforcement, including by helping to assure the availability of records needed to monitor and investigate market abuses. Also, by ensuring a data pool that provides historical swap transaction transparency to better inform regulators' swap market analysis, the recordkeeping requirements serve an important role in counteracting swap market opacity that, as evidenced in the 2008 financial crisis, may contribute to a loss of confidence in market integrity.

The Commission does not believe that costs of these recordkeeping requirements will impede swaps market efficiency, competitiveness, or integrity.

Price discovery. The Commission does not believe that this requirement has a significant effect on the price discovery process.

Sound risk management practices. The Commission believes that the final rule's recordkeeping requirements, in tandem with the recordkeeping requirements of Part 45, will serve to improve the soundness of the risk management practices of market participants. The Commission is essentially requiring the maintenance of accurate records in a manner that makes them appropriately available for reproduction to regulators. Market participants may leverage the highly organized and streamlined internal records system they will possess in order to comply with Parts 45 and 46 for an ancillary risk management benefit; the system will be useful for analysis and for development of enhanced risk management practices.[80] The cost of implementation of the recordkeeping rule may be partially compensated by error avoidance and the mitigation of internal risk.

3. Reporting

a. Summary of Final Rule

The final rule requires that each historical swap in existence on or after April 25, 2011 be reported to a SDR electronically on or before the applicable compliance date. The initial data report must contain all of the minimum primary economic terms data listed in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011, the legal entity identifier of the reporting counterparty, the internal counterparty identifier used by the reporting counterparty to identify the non-reporting counterparty, and the internal transaction identifier used by the reporting counterparty to identify the swap. For each such swap that remains in existence after the compliance date, the reporting counterparty must report swap continuation data as provided in part 45 of this chapter, with the exception that such reports need only include changes to the minimum primary economic terms listed in Appendix 1 to this part, rather than change to the larger list of primary economic terms provided in part 45. Continuation data must be reported to the same SDR that received the initial data report. In parallel with part 45 of this chapter, the final rule provides that multi-asset historical swaps must be reported to a single SDR that accepts swaps in the asset class that is treated as the primary asset class involved in the swap by the reporting counterparty, and that mixed historical swaps must be reported to an SDR or security-based SDR registered with both the Commission and the SEC.

For historical swaps that expired prior to April 25, 2011, the final rule requires that counterparties report to an SDR on the applicable compliance date such information relating to the terms of the transaction as was in the counterparty's possession on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 in the case of transition swaps). This information may be reported via any method selected by the reporting counterparty.

The rule permits voluntary early submission of the initial data report (and of subsequent continuation data reports) prior to the applicable compliance date if a registered SDR is prepared to accept the reports.

For historical swaps in existence on or after April 25, 2011, by the applicable compliance date the reporting counterparty must obtain, report, and provide to its counterparty an LEI as

[79] For example, such assessments may compare measures such as the concentration of swap activity by type of market participant, the volumes of cleared and uncleared swap transactions, or the effective cost to the user of engaging in similar swap transactions in the pre- and post-compliance marketplace.

[80] The Commission notes that non-SD/MSP counterparties will be able to retain either electronic or paper records at their discretion; if paper rather than electronic records are retained, this system will not be necessary for compliance, and thus this ancillary risk management benefit will not apply.

provided in part 45. Within 180 days of the applicable compliance date, the non-reporting counterparty must obtain an LEI and provide it to the reporting counterparty, which then must report it to the relevant SDR.

The final rule sets forth the criteria for determining which counterparty must report. For historical swaps in existence on the applicable compliance date, these provisions apply to the current counterparties as of the compliance date, notwithstanding whether they were the original counterparties. If only one counterparty is an SD, the SD reports. If neither counterparty is an SD and only one is an MSP, the MSP reports. If both counterparties are non-SD/MSP counterparties, and only one is a financial entity as defined in CEA section 2(h)(7)(C), the financial entity reports. If the counterparties share the same status, the rule requires them to agree which of them is the reporting counterparty for that swap. If both counterparties are non-SD/MSP counterparties but only one is a U.S. person, the U.S person must report. After the initial data report is made, if the reporting counterparty exits the original transaction (*e.g.,* through an assignment), the new reporting counterparty will be: The SD (or the MSP if there is no SD) if only one is present; the U.S. person if both counterparties are non-SD/MSP counterparties and only one is a U.S. person; or, in all other cases, the counterparty that replaced the previous reporting counterparty, unless otherwise agreed by the counterparties.

The final rule provides for third-party facilitation of reporting. It also requires that all data for a historical swap must be reported to the same SDR to which the initial data report is made. It permits either counterparty to make voluntary supplemental reports (''VSRs''), to either the same or a different SDR. To provide minimum safeguards against confusion or double-counting resulting from VSRs, the rule requires that each VSR must include an indication that it is a VSR, as well as the SDR identifier created for the swap by the automated systems of the SDR to which the required, initial data report is made.

The final rule requires the reporting counterparty to use the facilities, methods, or data standards provided or required by the SDR to which it reports the data. Corrections must be reported, as soon as technologically practicable after discovery of an error or omission, to the same SDR that received the initial data report.

b. Benefits

The Commission believes that the part 46 reporting requirements will improve regulatory oversight, enforcement, and understanding of systemic risks.

The Commission's harmonization of the reporting requirements of this part with those of part 45 will benefit market participants by enabling reporting counterparties to satisfy the reporting requirements of both parts in the same way, and avoiding redundant costs that could be caused by differing reporting requirements.

Historical swap reporting under part 46 also benefits the general public by supporting the Commission's supervision of the swaps market. As considered above in the discussion of the benefits of historical swap recordkeeping in this final rule, the reporting requirements provide a means for the Commission to gain a better understanding of the swaps market.

The incorporation of unique identifier requirements within the part 46 reporting regime also provides important benefits to market participants and the public by enhancing the quality and usability of the historical swap data that will be provided to the Commission.[81]

The beneficial contributions attributable to the specific unique identifiers addressed in the final rule, including both SDR identifiers for VSRs and LEIs, are as follows:

• *SDR identifiers* will facilitate the collating of various data reports concerning a swap into a single, accurate data record. Through them it is possible to identify the origins of each swap as well as events that affect the swap during its existence; aggregate transaction information without double-counting swaps reported to different SDRs or to foreign trade repositories, or reported in VSRs; and create a clear and unified data stream that spans the pre- and post-part 46 compliance date periods. Accordingly, the Commission believes they provide a vital tool for regulatory agencies' analysis of historical swap market data to better protect market participants and the public from systemic risk.

• *LEIs* will enhance the ability of the Commission and other regulatory agencies to oversee swap markets by providing necessary clarity and cohesion to the swap data used for regulatory analyses, particularly with regard to clearly understanding the activities of participants in the pre- and post- part 46 compliance date periods. Among the benefits of an LEI regime, GFMA identified more efficient data aggregation; more powerful modeling and risk analysis; facilitation of information sharing and reconciliation between regulators; better supervision of cross-border firms and firms whose business lines are overseen by multiple regulators; and facilitating identification of affiliates and parent companies. GFMA also called the LEI regime ''a powerful tool for regulators in monitoring and managing systemic risks.''[82] As recognized in the CPSS–IOSCO Report on OTC Derivatives Data Reporting and Aggregation Requirement, which recommends expeditious development of a global LEI:

[A] standard system of LEIs is an essential tool for aggregation of OTC derivatives data. An LEI would contribute to the ability of authorities to fulfill the systemic risk mitigation, transparency, and market abuse protection goals established by the G20 commitments related to OTC derivatives, and would benefit efficiency and transparency in many other areas. As a universally available system for uniquely identifying legal entities in multiple financial data applications, LEIs would constitute a global public good.[83]

c. Costs

Incremental[84] costs to comply with the reporting requirements of this part

[81] Unique identifier use also reflects a harmonized approach between the part 45 and part 46 regulations. Accordingly, historic swaps will be reported in a consistent fashion with part 45 swaps, ensuring comparable data for analysis. The use of unique identifiers also enabled the Commission to allow for historical swap reporting through a VSR; without unique identifiers, the value and usability of the data reported in a VSR would be greatly diminished because of potential double-counting (recording the same transaction from the reporting counterparty and from the VSR reported by the non-reporting counterparty), and would not be readily comparable to the data reported pursuant to Part 45 after the compliance date (which are required to incorporate unique identifiers).

[82] GFMA, *Creating a Global Legal Entity Identifier (LEI) Standard,* September 21, 2001, p. 10. Publicly available at *http://www.sifma.org/uploadedfiles/issues/technology_and_operations/legal_entity_identifier/lei-project-summary-slides.pdf.*

[83] CPSS–IOSCO *Report on OTC Derivatives Data Reporting and Aggregation Requirement,* August 2011, p.36. Publicly available at *http://www.bis.org/publ/cpss96.pdf.*

[84] Swap counterparties that have not previously established a reporting infrastructure, including connectivity to an SDR (or the Commission in the absence of an SDR that collects data for a given asset class), will incur costs to comply with these requirements. The Commission anticipates, however, that swap counterparties will satisfy the reporting requirements of part 46 with a single, non-recurring transmission of data to an SDR occurring at the same time and through the same mechanism as its initial transmission of swap creation and continuation data pursuant to part 45. Thus, the costs (including non-recurring investments to train personnel, implement data reporting technology, and establish the required data connectivity; and recurring expenses associated with personnel hours and maintenance of the data reporting technology infrastructure), to comply with part 46 are already necessitated by part 45 and were considered in that rulemaking. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.

Similarly, swap counterparties will experience a one-time cost to format swap records subject to part 46 and part 45 to the same minimum PET data tables required in both regulations. Because these costs were considered previously in the part 45 rulemaking, they are not incremental to, and inappropriate for, consideration in this rulemaking.

Continued

will be incurred only by reporting counterparties for historical swaps, most of whom will be SDs or MSPs. The reporting requirements of the final rule apply only to reporting counterparties. They will incur costs associated with normalizing required PET data for historical swaps in existence on or after April 25, 2011 in data fields for electronic reporting, and obtaining LEIs and including them in reported data as required by the rule. SDRs will incur costs for data receipt and storage. The SDR identifiers used to provide a safeguard against confusion and double-counting of historical swaps in the context of VSRs will be created automatically by the automated systems of SDRs when they receive the initial data report for a historical swap and transmit that identifier to the counterparties to the swap in the normal course of their business. SDRs are already required by part 45 to have the systems and personnel necessary to create unique swap identifiers, and the creation of SDR identifiers by SDR automated systems will not impose any additional costs in these respects due to the requirements of part 46.

Normalizing data for electronic reporting. The Commission anticipates that formatting transition swaps to populate the minimum PET data tables would impose a one-time burden on swap counterparties associated with the manipulation of the electronic files from their existing form to the form required by the final rule. For SDs and MSPs, the Commission estimates a one-time burden of 285 hours per SD or MSP counterparty [85] at an estimated cost of $20,169.[86] For non-SD/MSPs, the Commission estimates a one-time burden of 55 hours per non-SD/MSP counterparty [87] at an estimated cost of $4,191.[88] The Commission estimates that this requirement will present a larger burden for SD and MSP counterparties than for non-SD/MSP counterparties, because SDs and MSPs are likely to be required to process a larger volume of historical swap data. The Commission notes that this burden may be reduced for swap counterparties, especially SDs or MSPs that are able to leverage existing technology and personnel expertise to perform this function.

Applying unique identifiers. The Commission anticipates that including LEIs in historical swap data, as required by this final rule, would impose a one-time burden on swap counterparties associated with reviewing the subset of historical swap data and appending the LEIs. The Commission believes that it may be possible to achieve a high degree of automation or computer-assisted processing for the task of reporting the LEI and adding it to the historical swap data files in storage.

For SD and MSP reporting counterparties, the Commission estimates a one-time burden of 440 hours per SD or MSP reporting counterparty [89] at an estimated cost of $29,681.[90] For non-SD/MSP reporting counterparties, the Commission estimates a one-time burden of 220 hours per non-SD/MSP reporting counterparty [91] at an estimated cost of $18,481.[92] The Commission estimates that this requirement will present a larger burden for SDs and MSPs than for non-SD/MSP reporting counterparties because SDs and MSPs are likely to be required to process a larger volume of historical swap data. The Commission notes that this burden may be reduced for swap counterparties, especially SDs or MSPs that are able to leverage existing technology and personnel expertise to perform this function.

Receiving and storing data. The Commission believes that receiving and storing historical swap data, as required by this final rule, would impose a one-time burden on SDRs associated with importing, examining/approving, and organizing/storing the historical swap data. The Commission anticipates that this incremental burden will involve the additional usage of the processes and personnel time and expertise necessary for receiving the stream of swap data reported by market participants for Part 45 compliance.

The Commission anticipates that some aspects of this task, such as programming a code to process historical swap data, will require manual intervention; for other aspects of this task, such as submitting the code and updating the historical swap data files in storage, it may be possible to achieve a high degree of automation or computer-assisted processing. Furthermore, the Commission notes that this burden may be further reduced to an extent dependent on the ability of an

SDRs will also incur recurring costs to maintain their data storage infrastructure. Since the same SDR infrastructure expectedly will support storage activities under part 45, however, the Commission believes that the same maintenance activities undertaken to support part 45 will support part 46. Because these costs were considered previously in the part 45 rulemaking, they are not incremental to, and inappropriate for, consideration in this rulemaking.

[85] The costs of normalizing data for historical swaps in existence on or after April 25, 2011 in data fields for electronic reporting were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 80 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours)] = 285 hours per SD/MSP counterparty; [(285 hours per SD/MSP) x (125 SD/MSPs) = 35,625 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[86] See Table 1.

[87] The costs of formatting transition swaps for storage were estimated based on the costs to non-SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours) + (Compliance Clerk at 20 hours)] = 55 hours per non-SD/MSP counterparty; [(55 hours per non-SD/MSP) x (1,000 non-SD/MSPs) = 55,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[88] See Table 1.

[89] The costs of applying unique identifiers to historical swap data were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping/reporting requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 80 hours) + (Programmer at 160 hours) + (Systems Analyst at 160 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 10 hours) + (Compliance Attorney at 10 hours)] = 440 hours per SD/MSP counterparty; [(440 hours per SD/MSP) x (125 SD/MSPs) = 55,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[90] See Table 3. The Commission notes that while tasks required for compliance with the unique identifier requirements of this rule may ultimately overlap to some extent with the tasks required for compliance with the unique identifier requirements of part 45, the Commission believes that the process of appending a unique identifier to historical data submissions will be substantially different than the process of incorporating a unique identifier into the submissions of active swaps from a technological implementation perspective, and has therefore estimated the burden of the two processes separately. The Commission notes that, in the event that SD/MSP counterparties find it practical to combine duplicative elements of the two task (for example, writing a single program to process both historical and active swaps), the burden of compliance with the unique identifier requirements of this rule may be reduced for those entities.

[91] The costs of applying unique identifiers to historical swap data were estimated based on the costs to non-SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 40 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 5 hours)] = 220 hours per non-SD/MSP counterparty; [(220 hours per non-SD/MSP) x (1,000 non-SD/MSPs) = 220,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[92] See Table 3.

SDR to leverage existing technology and personnel expertise to perform this function. Finally, the Commission notes that SDRs will be required by Part 45 to have the automated technological systems in place to assign SDR identifiers to swap data; therefore, assigning SDR identifiers to VSRs should not impose costs on SDRS. The Commission estimates a one-time burden of 460 hours per SDR [93] at a cost of $29,882 [94] for receiving and storing historical swap data.

d. Comments, Alternatives, and Cost Mitigation

Parties required to report certain historical swap data. Numerous commenters urged the Commission to phase in swap data reporting by both asset class and counterparty type. The Financial Services Roundtable recommended a phased implementation timeline based on a participant's level of sophistication, resources and swap trading volume. Global Forex advocated phased implementation of reporting that takes into account both the readiness of a particular asset class for reporting and the type of reporting counterparty involved. ETA urged that reporting be phased in by asset class and product type, and noted that one or more SDRs must be prepared to accept data for an asset class before effective reporting can begin. ETA also advocated beginning reporting by SDs and MSPs before non-SD/MSP counterparties are required to report. ISDA called for reporting to be phased in based on the state of readiness of different asset classes and market participant types.

After considering these comments, the Commission made a number of modifications in the final rule. The final rule phases in the start of reporting by counterparty type, by setting the compliance date for non-SD/MSP reporting counterparties six months after the compliance date for SDs and MSPs. The Commission believes that this approach reduces the costs of compliance for reporting counterparties that are likely to be smaller or less technologically sophisticated, while retaining the essential benefits of receiving historical swap transaction data from all swap market participants. This approach parallels that of the part 45 rulemaking, which recognized the appropriateness of a phase-in period for non-SD/MSP counterparties.

ETA urged that non-SD/MSP reporting counterparties not be required to report continuation data, arguing that transactions not involving SDs and MSPs represent only a small portion of the swaps market, and that such a requirement would be unduly burdensome. Alternatively, they asked that non-SD/MSP reporting counterparties be permitted to report continuation data for historical energy swaps on a quarterly basis.

The Commission has determined that the final rule will require continuation data reporting as provided in part 45 of this chapter. Timely reporting of changes to primary economic terms of all swaps, including historical swaps, is necessary to give the Commission and other regulators the ability to see a current and accurate picture of the swap market as called for by the Dodd-Frank Act. In light of this comment, and after further considering the costs to non-SD/MSP counterparties, the Commission extended and phased in the continuation data reporting deadlines for non-SD/MSP reporting counterparties. For non-SD/MSP reporting counterparties, the NOPR applied the same continuation data reporting deadlines found in Part 45. The final rule's deadlines for continuation data reporting by non-SD/MSP counterparties require such reporting no later than the end of the first business day following a relevant change to a primary economic term during the first year of reporting, and require such reporting no later than the end of the second business day following a relevant change to the primary economic terms of the swap thereafter. This approach should reduce the costs of Part 46 compliance to non-SD/MSP counterparties, while retaining the benefits of receiving continuation data.

Scope of reporting requirements. ISDA and Global Forex requested that the Commission not require reporting of the time of trade for a historical swap, arguing that in many cases counterparties may not have recorded this information when a historical swap was executed. ISDA argues that it would be undesirable, if not impossible, for a participant to attempt to recreate an execution time not previously recorded.

The Commission believes that it would not be desirable for counterparties to assign an execution time retroactively when no record exists, and the Commission also recognizes that the costs of doing so could be significant to reporting counterparties. To mitigate costs and maintain the integrity of the historical swap data record, the final rule limits the execution timestamp reporting requirement to the transaction date, calling for reporting the time of the trade only if the time was recorded when the trade was executed and is known to the reporting counterparty when the report is made.

Three commenters, ISDA, ETA, and WGCEF, requested that the Commission drop the catchall category of ''any other primary economic term(s)'' from the required PET data for historical swaps, arguing that it would be better to define PET data precisely. ETA stated reporting such information could require extensive text submissions of non-standardized transaction terms, complicating the compilation task of the SDRs.

In response, the Commission has removed ''any other primary economic term(s) of the swap matched by the counterparties in verifying the swap'' from the minimum PET data tables. The Commission believes the PET data in the NOPR tables provides the minimum information regulators will need concerning historical swaps, information counterparties almost surely will possess (*e.g.,* trade date, price, expiration date). Other primary economic terms that might be captured by the catch-all category are not crucial to fulfill the purposes of reporting data on historical swaps under Dodd-Frank, and the PET data elements specified in the tables should be sufficient in this respect. In addition, the burden of reporting data on swaps executed prior to issuance of the Commission's final Dodd-Frank rules would be reduced by limiting required PET data for historical swaps to specified data elements.

The End User Coalition requested that the Commission explain the use and value of reporting Master Agreement Identifiers. ISDA, ETA, and Global Forex stated that eliminating the requirement to report such identifiers, arguing that they would not necessarily allow regulators to calculate net exposures. Global Forex stated that providing this data would impose a significant burden because such information is not routinely stored on the same systems as the other PET data specified in the tables. WGCEF also asked that this requirement be eliminated, arguing that counterparties are in the best position to make exposure calculations and that the Commission already has the ability to request such information from them.

[93] The costs of receiving and storing historical swap data were estimated based on the costs to SDRs. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Computer Operations Supervisor at 80 hours) + (Computer Operations Group/Section Manager at 80 hours) + (Computer Operations Department Manager at 20 hours) + (Sr. Database Administrator at 80 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 10 hours) + (Compliance Attorney at 10 hours)] = 460 hours per SDR; [(460 hours per SDR) x (15 SDRs) = 6,900 aggregate hours.

[94] See Table 4.

In response, the Commission has eliminated the requirement to report master agreement identifiers. The terms of master agreements are not readily reportable in an electronic format, since no schema for reporting these terms in data fields has yet been developed. In addition, Dodd-Frank does not provide explicit authority for requiring such reporting; Dodd-Frank authorizes transaction-based reporting of the terms of a swap, and a master agreement is not a transactional agreement. Furthermore, the Commission notes that reporting of master agreements may eventually be initiated by the Office of Financial Research under its statutory authority. Eliminating this requirement therefore represents a reduction in the costs associated with Part 46 compliance. In addition, because master agreement identifiers are not required to be reported pursuant to Part 45, eliminating this requirement also represents improved harmonization between Parts 45 and 46.

Reporting of Valuation Information

ISDA recommended that data elements necessary for a person to determine the market value of a transaction be dropped from the proposed data reporting requirements for historical credit swaps. ISDA stated that such a requirement would be overly burdensome in that it would require a trader to retain a variety of information irrelevant to the purposes of the rule, is not currently retained by traders, and may be proprietary to the trader.

The Commission considered this comment, and does not require these data elements in the final rule. The Commission eliminated the requirement to report data elements necessary to value a swap from the final Part 45 data reporting rule; for the same reasons explained in that rulemaking, the Commission believes that such a requirement is not appropriate for inclusion in the historical swaps data reporting rule.

Alternative Submission Formats

WGCEF requested that the Commission allow reporting counterparties to submit images of confirmations and other paper swap documentation in lieu of submission of normalized data in data fields, arguing that prohibiting the use of images for reporting would make the requirement more burdensome.

The Commission considered this comment, but determined to maintain the NOPR's requirement for electronic reporting of normalized data for historical swaps in existence on or after the date the NOPR was issued. Permitting submission of images in lieu of submission of normalized data in data fields would hinder regulators' ability to efficiently search, retrieve, aggregate, and manipulate historical swap data in SDRs for essential purposes intended in the Dodd-Frank Act, including monitoring systemic risk and conducting market oversight and enforcement. In light of these considerations, the Commission believes that this final rule, by allowing submission of images to fulfill reporting requirements for swaps that expired prior to issuance of the NOPR on April 25, 2011 reduces the reporting burden to the extent appropriate.

e. Reporting in Light of CEA Section 15(a)

The Commission has evaluated the costs and benefits of the reporting provisions of this part in light of the specific considerations identified in Section 15(a) of the CEA as follows.

Protection of market participants and the public. The Commission believes that historical swap data reporting as provided in part 46 enhances protections for market participants and the public in important ways. Information revealed through the requirements of § 46.3 and the use of unique identifiers as provided in § 46.4 will provide the Commission with a significant body of previously unavailable data in a cohesive form that will enhance oversight and enforcement abilities to the benefit of both market participants and the public. For reasons identified above in the discussion of reporting requirement benefits, reporting of historical swap data in the manner prescribed in part 46 promotes the Commission's market participant and public protection goals by improving the ability to: (1) Detect and protect market participants against fraud, manipulation, and abusive trading practices; (2) conduct effective surveillance to oversee the integrity and efficiency of market operation; and, (3) understand, monitor, and appropriately react to systemic risk indicators.

Furthermore, the Commission believes that the requirements of this final rule, and the associated compliance costs, represent a transfer of the costs associated with the systemic risks inherent in transacting in opaque swap markets from the public to private entities, particularly to those that are better positioned to realize economies of scale and scope in assuming those costs; the Commission believes that because historical swap data could be used as a benchmark to better understand systemic risks associated with swap market activity in the future, the costs of reporting historical swap data relate to the systemic risks of ongoing swap market activity, as well as historical swap market activity.

Efficiency, competitiveness, and financial integrity. This rule promotes efficiency and competitiveness in several ways. First, the Commission has exercised its discretion to specify reporting requirements in a manner designed to mitigate costs to the extent consistent with statutory requirements and fulfillment of the purposes of the Dodd-Frank Act.

Second, by allowing reporting parties to utilize third-party service providers to transmit required data, the Commission provides flexibility for reporting parties to utilize the most efficient means for compliance. The Commission believes that, relative to the capabilities of at least certain reporting parties, third-party providers likely will have a comparative advantage in data processing costs. The rule affords reporting parties the opportunity to avail themselves of potential efficiencies that use of such a third-party provider could provide.

Third, the reporting hierarchy employed in the final rule assigns reporting responsibility based on factors including the relative size and sophistication of market participants (for example, SD/MSP counterparties, which are likely to have technological resources more readily available for reporting than non-SD/MSP counterparties, will serve as the reporting counterparty when facing a non-SD/MSP counterparty in a swap). The Commission believes that this is an efficient approach to swap reporting, as it provides the opportunity for larger, more sophisticated entities to realize economies of scale and scope in their reporting processes (for example, a swap dealer can collect data from swaps to which it is a counterparty from a variety of asset classes and send the data to an SDR in a single report; this allows for the creation of fewer reports and a reduced burden vis-à-vis a system in which numerous small non-SD/MSP counterparties would need to collect and report data).

Fourth, the Commission believes that the provisions of the final rule that relate to the format of the historical swap data to be reported will serve to reduce costs and burdens for registered entities and swap counterparties by (a) Allowing reporting counterparties to report data for pre-enactment swaps in the form in which it currently exists, thereby removing the need for (and costs associated with) reformatting or recreating the data; (b) allowing reporting entities and counterparties to

use whatever facilities, methods, or data standards are provided or required by the SDR to which data is reported; (c) allowing SDRs to use various facilities, methods, and data standards to receive data, so long as the SDR can provide data to the Commission in the format required by the Commission; and (d) allowing for the dual reporting, additional information reporting, and early submission of historical swap data in the form of a VSR. The Commission believes this approach is preferable to having the Commission mandate that reporting entities or counterparties adopt a particular format or data standard for reporting historical swap data and/or a particular form for pre-enactment swap data, which in some cases could impose the additional burden of acquiring new technological capability different or more extensive that what the entity or counterparty already possesses. The Commission believes that, in light of this provision of the final rule, market competition is likely to lead SDRs to allow reporting entities and counterparties to report using data formats or standards that are easiest and least costly for them. Costs for market participants may also be lowered by the final rule provision authorizing the Commission's Chief Information Officer to require use of a particular data standard in order to accommodate the needs of different communities of users.[95]

Furthermore, the Commission does not anticipate that the reporting requirements (including unique identifier requirements) of this final rule present costs that would impede the efficiency of swaps markets.

The Commission anticipates that the reporting requirements of this final rule will work in concert with the recordkeeping requirements of this final rule to improve the integrity of swap markets. Accordingly, the manner in which these reporting requirements will aid market integrity mirrors those considered in the preceding discussion of the integrity benefits of recordkeeping— namely, by aiding the prosecution and deterrence of market abuses and assisting regulatory supervision of markets through improved transparency.

Price discovery. The Commission does not believe that the historical swap data reporting requirements (including unique identifier requirements) of this final rule will impact the price discovery process.

Sound risk management practices. The Commission does not believe that the historical swap data reporting requirements (including unique identifier requirements) of this final rule have a significant effect on sound risk management practices.

Other public interest considerations. The Commission believes that the data reporting requirements of this final rule will allow the Commission to readily acquire and analyze market data, thus streamlining the surveillance process. The Commission believes that by receiving historical swap data from the same market participants that will likely report a comparable stream of creation and continuation data pursuant to part 45, part 46 will allow the economists and other analysts employed by the Commission the opportunity to compare aspects of the swap market before and after the effective date of parts 45 and 46. This will likely create the potential for an analysis of the effects of implementing these rules.

With regard to unique identifiers, the Commission anticipates that the unique identifier requirements of this final rule will facilitate the Commission's efforts in the course of their investigations by providing a clear framework for data aggregation and comparison across financial instruments and between the pre- and post- part 46 compliance date periods.

TABLE 1—NORMALIZING DATA FOR ELECTRONIC REPORTING

	Hours	Personnel cost
SD/MSPs	285	$20,169
Non-SD/MSPs	55	4,191

TABLE 2—HISTORICAL SWAP DATA STORAGE

	Hours	Personnel cost
SD/MSPs	335	$22,172

TABLE 3—APPLYING UNIQUE IDENTIFIER

	Hours	Personnel cost
SD/MSPs	440	$29,681
Non-SD/MSPs	220	18,481

TABLE 4—RECEIVING AND STORING DATA

	Hours	Personnel cost
SDRs	460	$29,882

IV. Compliance Dates

A. Introduction

As discussed above, the final rule retains the NOPR provision requiring compliance with recordkeeping and reporting requirements for historical swaps to commence on the same compliance dates specified in the Commission's final swap data recordkeeping and reporting regulations in part 45 of this chapter. The provisions of both part 45 and part 46 phase in compliance dates by both asset class and counterparty type. As noted above, this final rule permits voluntary initial data reporting for historical swaps prior to the applicable compliance date, if a registered SDR is prepared to accept the required initial data report prior to the applicable compliance date. Where such a voluntary early initial data report is made, continuation data reporting for the swap in question, if applicable, is still required to commence as of the applicable compliance date.

Accordingly, the Commission has determined that each swap dealer, major swap participant, and non-SD/MSP counterparty subject to the jurisdiction of the Commission shall commence full compliance with all provisions of this part on the applicable compliance dates set forth below.

B. Compliance Dates for Swap Dealers and Major Swap Participants

Swap dealers, and major swap participants shall commence full compliance with all provisions of this part as follows:

Credit swaps and interest rate swaps. Compliance date 1, the compliance date with respect to credit swaps and interest rate swaps, shall be the later of: July 16, 2012; or 60 calendar days after the publication in the **Federal Register** of the later of the Commission's final rule defining the term ''swap'' or the Commission's final rule defining the terms ''swap dealer'' and ''major swap participant.''

Equity swaps, foreign exchange swaps, and other commodity swaps. Compliance date 2, the compliance date with respect to equity swaps, foreign exchange swaps, and other commodity swaps, shall be 90 calendar days after compliance date 1.

[95] This authority could be used, for example, to require SDRs to accept swap data reports using a particular computer language already used by firms in a particular segment of the swap marketplace, so that they are not forced to incur additional cost by acquiring the capability needed to report using a different computer language.

C. Compliance Date for Non-SD/MSP Counterparties

Non-SD/MSP counterparties shall commence full compliance with all provisions of this part for all pre-enactment and transition swaps on compliance date 3, which shall be 90 calendar days after compliance date 2.

Final Rules

List of Subjects in 17 CFR Part 46

Swaps, data recordkeeping requirements and data reporting requirements.

For the reasons set forth in the preamble, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 2(h)(5) and 4r(a), the Commission amends Chapter 1 of Title 17 of the Code of Federal Regulations by adding Part 46 to read as follows:

PART 46—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS: PRE–ENACTMENT AND TRANSITION SWAPS

Sec.
46.1 Definitions.
46.2 Recordkeeping for pre-enactment swaps and transition swaps.
46.3 Swap data reporting for pre-enactment swaps and transition swaps.
46.4 Unique identifiers.
46.5 Determination of which counterparty must report.
46.6 Third-party facilitation of data reporting.
46.7 Reporting to a single swap data repository.
46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.
46.9 Voluntary supplemental reporting
46.10 Required data standards.
46.11 Reporting of errors and omissions in previously reported data.
Appendix to Part 46—Tables of Minimum Primary Economic Terms Data for Pre-Enactment and Transition Swaps.

Authority: Title VII, sections 723 and 729, Pub. L. 111–203, 124 Stat. 1738.

§ 46.1 Definitions.

Terms used in this part are defined as follows:

Asset class means the broad category of goods, services or commodities, including any ''excluded commodity'' as defined in CEA section 1a(19), with common characteristics underlying a swap. The asset classes include credit, equity, foreign exchange (excluding cross-currency), interest rate (including cross-currency), other commodity, and such other asset classes as may be determined by the Commission.

Compliance date means the applicable date, as specified in part 45 of this chapter, on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part and with all applicable provisions of part 45 of this chapter, as set forth in the preamble to this part.

Confirmation (*confirming*) means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

Confirmation data means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.

Credit swap means any swap that is primarily based on instruments of indebtedness, including, without limitation: any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.

Electronic reporting (''report electronically'') means the reporting of data normalized in data fields as required by the data standard or standards used by the swap data repository to which the data is reported. Except where specifically otherwise provided in this chapter, electronic reporting does not include submission of an image of a document or text file.

Equity swap means any swap that is primarily based on equity securities, including, without limitation: any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices.

Financial entity has the meaning set forth in CEA section 2(h)(7)(C).

Foreign exchange forward has the meaning set forth in CEA section 1a(24).

Foreign exchange instrument means an instrument that is both defined as a swap in part 1 of this chapter and included in the foreign exchange asset class. Instruments in the foreign exchange asset class include: any currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; any foreign exchange forward as defined in CEA section 1a(24); any foreign exchange swap as defined in CEA section 1a(25); and any non-deliverable forward involving foreign exchange.

Foreign exchange swap has the meaning set forth in CEA section 1a(25). It does not include swaps primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as ''cross-currency swaps'').

Interest rate swap means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as ''cross-currency swaps'').

International swap means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

Major swap participant has the meaning set forth in CEA section 1a(33) and in part 1 of this chapter.

Minimum primary economic terms means, with respect to a historical swap, the terms included in the list of minimum primary economic terms for swaps in each swap asset class found in Appendix 1 to this part.

Minimum primary economic terms data means all of the data elements necessary to fully report all of the minimum primary economic terms required by this part to be reported for a swap in the swap asset class of the swap in question.

Mixed swap has the meaning set forth in CEA section 1a(47)(D), and refers to an instrument that is in part a swap subject to the jurisdiction of the Commission, and in part a security-based swap subject to the jurisdiction of the SEC.

Multi-asset swap means a swap that does not have one easily identifiable primary underlying notional item, but instead involves multiple underlying notional items within the Commission's jurisdiction that belong to different asset classes.

Non-SD/MSP counterparty means a swap counterparty that is neither a swap dealer nor a major swap participant.

Other commodity swap means any swap not included in the credit, equity, foreign exchange, or interest rate asset classes, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Reporting counterparty means the counterparty required to report swap

data pursuant to this part, selected as provided in § 46.5.

Required swap continuation data means all of the data elements that must be reported during the existence of a swap as required by part 45 of this chapter.

Swap data repository has the meaning set forth in CEA section 1a(48), and in part 49 of this chapter.

Swap dealer has the meaning set forth in CEA section 1a(49), and in part 1 of this chapter.

Transition swap means any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part.

§ 46.2 Recordkeeping for pre-enactment swaps and transition swaps.

(a) *Recordkeeping for pre-enactment and transition swaps in existence on or after April 25, 2011.* Each counterparty subject to the jurisdiction of the Commission that is a counterparty to any pre-enactment swap or transition swap that is in existence on or after April 25, 2011 shall keep the following records concerning each such swap:

(1) *Minimum records required.* Each counterparty shall keep records of all of the minimum primary economic terms data specified in Appendix 1 to this part.

(2) *Additional records required to be kept if possessed by a counterparty.* In addition to the minimum records required pursuant to paragraph (a)(1) of this part, a counterparty that is in possession at any time on or after April 25, 2011 of any of the following documentation shall keep copies thereof:

(i) Any confirmation of the swap executed by the counterparties.

(ii) Any master agreement governing the swap, and any modification or amendment thereof.

(iii) Any credit support agreement, or other agreement between the counterparties having the same function as a credit support agreement, relating to the swap, and any modification or amendment thereof.

(3) *Records created or available after the compliance date.* In addition to the records required to be kept pursuant to paragraphs (a)(1) and (2) of this section, each counterparty to any pre-enactment swap or transition swap that remains in existence on the compliance date shall keep for each such swap, from the compliance date forward, all of the records required to be kept by section 45.2 of this chapter, to the extent that any such records are created by or become available to the counterparty on or after the compliance date.

(4) *Retention form.* Records required to be kept pursuant to this section with respect to historical swaps in existence on or after April 25, 2011, must be kept as required by paragraph (a)(4)(i) or (ii) of this section, as applicable.

(i) Records required to be kept by swap dealers or major swap participants may be kept in electronic form, or kept in paper form if originally created and exclusively maintained in paper form, so long as they are retrievable, and information in them is reportable as required by this part.

(ii) Records required to be kept by non-SD/MSP counterparties may be kept in either electronic or paper form, so long as they are retrievable, and information in them is reportable, as required by this part.

(b) *Recordkeeping for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* Each counterparty subject to the jurisdiction of the Commission that is a counterparty to any pre-enactment swap or transition swap that is expired or terminated prior to April 25, 2011 shall keep the following records concerning each such swap:

(1) *Pre-enactment swaps expired prior to April 25, 2011.* Each counterparty to any pre-enactment swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14, 2010 (17 CFR 44.00 through 44.02). Such information may be retained in the format in which it existed on or after October 14, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(1) does not require the counterparty to create or retain records of information not in its possession on or after October 14, 2010, or to alter the format, *i.e.,* the method by which the information is organized and stored.

(2) *Transition swaps expired prior to April 25, 2011.* Each counterparty to any transition swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after December 17, 2010 (17 CFR 44.03). Such information may be retained in the format in which it existed on or after December 17, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(2) does not require the counterparty to create or retain records of information not in its possession on or after December 17, 2010, or to alter the format, *i.e.,* the method by which the information is organized and stored.

(c) *Retention period.* All records required to be kept by this section shall be kept from the applicable dates specified in paragraphs (a) or (b) of this section through the life of the swap, and for a period of at least five years from the final termination of the swap.

(d) *Retrieval.* Records required to be kept pursuant to this section shall be retrievable as follows.

(1) *Retrieval for pre-enactment and transition swaps in existence on or after April 25, 2011.* Records concerning pre-enactment and transition swaps in existence on or after April 25, 2011, shall be retrievable as follows:

(i) Each record required to be kept by a counterparty that is a swap dealer or major swap participant shall be readily accessible via real time electronic access by the counterparty throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant or its affiliates within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.

(ii) Each record required to be kept by a non-SD/MSP counterparty shall be retrievable by the counterparty within five business days throughout the period during which it is required to be kept.

(2) *Retrieval for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* Records concerning pre-enactment and transition swaps expired or terminated prior to April 25, 2011, shall be retrievable by the counterparty within five business days throughout the period during which they are required to be kept.

(e) *Inspection.* All records required to be kept pursuant to this section by any registrant or its affiliates or by any counterparty subject to the jurisdiction of the Commission shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request. With respect to historical swaps in existence on or after April 25, 2011, copies of records required to be kept by any swap dealer or major swap participant shall

be provided either by electronic means, in hard copy, or both, as requested by the Commission, with the sole exception that copies of records originally created and exclusively maintained in paper form may be provided in hard copy only; and copies of records required to be kept by any non-SD/MSP counterparty shall be provided in the form, whether electronic or paper, in which the records are kept. With respect to historical swaps expired or terminated prior to April 25, 2011, records shall be provided in the form, whether electronic or paper, in which the records are kept.

§ 46.3 Swap data reporting for pre-enactment swaps and transition swaps.

(a) *Reporting for pre-enactment and transition swaps in existence on or after April 25, 2011.* (1) *Initial data report.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, the reporting counterparty shall report electronically to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, the following:

(i) All of the minimum primary economic terms data specified in Appendix 1 to this part that were in the possession of the reporting counterparty on or after April 25, 2011;

(ii) The legal entity identifier of the reporting counterparty required pursuant to § 46.4; and

(iii) The following additional identifiers:

(A) The internal counterparty identifier or legal entity identifier used by the reporting counterparty to identify the non-reporting counterparty; and

(B) The internal transaction identifier used by the reporting counterparty to identify the swap.

(2) *Reporting of required swap continuation data.* (i) For each uncleared pre-enactment or transition swap in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty must report all required swap continuation data required to be reported pursuant to part 45 of this chapter, with the exception that when a reporting counterparty reports changes to minimum primary economic terms for a pre-enactment or transition swap, the reporting counterparty is required to report only changes to the minimum primary economic terms listed in Appendix 1 to this part and reported in the initial data report made pursuant to paragraph (a)(1) of this section, rather than changes to all minimum primary economic terms listed in Appendix 1 to part 45.

(ii) Swap continuation data reporting is not required for a pre-enactment or transition swap in existence on or after April 25, 2011, that has been cleared by a designated clearing organization.

(3) *Data reporting for multi-asset swaps and mixed swaps.* (i) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a multi-asset swap, all data required to be reported by this part shall be reported to a single swap data repository that accepts swaps in the asset class treated as the primary asset class involved in the swap by the reporting counterparty making the first report of required swap creation data pursuant to this section.

(ii) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a mixed swap, all data required to be reported pursuant to this part shall be reported to a swap data repository registered with the Commission and to a security-based swap data repository registered with the Securities and Exchange Commission. This requirement may be satisfied by reporting the mixed swap to a swap data repository or security-based swap data repository registered with both Commissions.

(b) *Reporting for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* (1) *Pre-enactment swaps expired or terminated prior to April 25, 2011.* For each pre-enactment swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after October 14, 2010 (17 CFR 44.00 through 44.02). This information may be reported via any method selected by the reporting counterparty.

(2) *Transition swaps expired or terminated prior to April 25, 2011.* For each transition swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after December 17, 2010 (17 CFR 44.03). This information may be reported via any method selected by the reporting counterparty.

(c) *Voluntary early submission of initial data report.* For all pre-enactment and transition swaps required to be reported pursuant to this part, the reporting counterparty may make the initial data report required by paragraph (a)(1) of this section, or the data report required by paragraph (b) of this section, prior to the applicable compliance date, if a swap data repository accepting swaps in the asset class in question is prepared to accept the report. The obligation to report continuation data as required by paragraph (a)(2) of this section with respect to a swap for which a voluntary early submission is made commences on the applicable compliance date. However, the reporting counterparty may submit continuation data at any time after a voluntary early submission made pursuant to this paragraph, if the swap data repository is prepared to accept such continuation data, and if that repository has registered with the Commission as a swap data repository as of the applicable compliance date.

(d) *Non-duplication of previous reporting.* If the reporting counterparty for a pre-enactment or transition swap has reported any of the information required as paragraphs (a) or (b) of this section to a trade repository prior to the compliance date, and if as of the compliance date that repository has registered with the Commission as a swap data repository, then:

(1) The counterparty shall not be required to report such previously reported information to the swap data repository again;

(2) The counterparty shall be required to report to the swap data repository on the compliance date any information required as part of the initial data report by paragraph (a) of this section that has not been reported prior to the compliance date: and

(3) In the case of pre-enactment and transition swaps in existence on or after April 25, 2011, the initial data report required by paragraph (a) of this section and all subsequent data reporting concerning the swap shall be made to the same swap data repository to which data concerning the swap was first reported prior to the compliance date (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.4 Unique identifiers.

The unique identifier requirements for swap data reporting with respect to pre-enactment or transition swaps shall be as follows:

(a) By the compliance date, the reporting counterparty (as defined by part 45 of this chapter) for each pre-

enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain for itself a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall include its own legal entity identifier (or substitute counterparty identifier) in the initial data report concerning the swap. With respect to the legal entity identifier (or substitute counterparty identifier) of the reporting counterparty, the reporting counterparty and the swap data repository to which the swap is reported shall comply thereafter with all unique identifier requirements of § 45.6 of this chapter.

(b) Within 180 days after the compliance date, the non-reporting counterparty for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall provide its legal entity identifier (or substitute counterparty identifier) to the reporting counterparty. Upon receipt of the non-reporting counterparty's legal entity identifier (or substitute counterparty identifier), the reporting counterparty shall provide it to the swap data repository to which swap data for the swap was reported. Thereafter, with respect to the legal entity identifier (or substitute counterparty identifier) of the non-reporting counterparty, the counterparties to the swap and the swap data repository to which it is reported shall comply with all requirements of § 45.6 of this chapter.

(c) The legal entity identifier requirements of parts 46 and 45 of this chapter shall not apply to pre-enactment or transition swaps expired or terminated prior to April 25, 2011.

(d) The unique swap identifier and unique product identifier requirements of part 45 of this chapter shall not apply to pre-enactment or transition swaps.

§ 46.5 Determination of which counterparty must report.

(a) Determination of which counterparty must report swap data concerning each pre-enactment or transition swap shall be made as follows:

(1) If only one counterparty is a swap dealer, the swap dealer shall fulfill all counterparty reporting obligations.

(2) If neither party is an swap dealer, and only one counterparty is an major swap participant, the major swap participant shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparty that is a financial entity shall be the reporting counterparty.

(4) For each pre-enactment swap or transition swap for which both counterparties are swap dealers, or both counterparties are major swap participants, or both counterparties are non-SD/MSP counterparties that are financial entities as defined in CEA section 2(h)(7)(C), or both counterparties are non-SD/MSP counterparties and neither counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparties shall agree which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

(5) Notwithstanding the provisions of paragraphs (a)(1) through (3) of this section, for pre-enactment or transition swaps for which both counterparties are non-SD/MSP counterparties, if only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(b) For pre-enactment and transition swaps in existence as of the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section with respect to the current counterparties to the swap as of the compliance date, regardless of whether either or both were original counterparties to the swap when it was first executed.

(c) For pre-enactment and transition swaps for which reporting is required, but which have expired or been terminated prior to the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section to the counterparties to the swap as of the date of its expiration or termination (except for determination of a counterparty's status as an SD or MSP, which shall be made as of the compliance date), regardless of whether either or both were original counterparties to the swap when it was first executed.

(d) After the initial report required by § 46.3 is made, if a reporting counterparty selected pursuant to this section ceases to be a counterparty to a swap due to an assignment or novation, the reporting counterparty for reporting of required swap continuation data following the assignment or novation shall be selected from the two current counterparties as provided in paragraphs (d)(1) through (4) of this section.

(1) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(2) If neither counterparty is a swap dealer, and only one counterparty is a major swap participant, the major swap participant shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(4) In all other cases, the counterparty that replaced the previous reporting counterparty by reason of the assignment or novation shall be the reporting counterparty, unless otherwise agreed by the counterparties.

§ 46.6 Third-party facilitation of data reporting.

Counterparties required by this part 46 to report swap data for any pre-enactment or transition swap, while remaining fully responsible for reporting as required by this part 46, may contract with third-party service providers to facilitate reporting.

§ 46.7 Reporting to a single swap data repository.

All data reported for each pre-enactment or transition swap pursuant to this part 46, and all corrections of errors and omissions in previously reported data for the swap, shall be reported to the same swap data repository to which the initial data report concerning the swap is made (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.

(a) Should there be a swap asset class for which no swap data repository registered with the Commission currently accepts swap data, each registered entity or counterparty required by this part to report any required swap creation data or required swap continuation data with respect to a swap in that asset class must report that same data to the Commission.

(b) Data reported to the Commission pursuant to this section shall be reported at times announced by the Commission. Data reported to the Commission pursuant to this section with respect to pre-enactment and transition swaps in existence on or after April 25, 2011 shall be reported in an electronic format acceptable to the Commission.

(c) Delegation of authority to the Chief Information Officer: The Commission hereby delegates to its Chief Information Officer, until the Commission orders otherwise, the authority set forth in paragraph (c) of this section, to be exercised by the Chief Information Officer or by such other employee or employees of the Commission as may be designated from time to time by the Chief Information Officer. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph. The authority delegated to the Chief Information Officer by paragraph (c) of this section shall include:

(1) With respect to all pre-enactment and transition swaps required to be reported by this part, the authority to determine the dates and times at which data concerning such swaps shall be reported pursuant to this part.

(2) With respect to all pre-enactment swaps or transition swaps in existence on or after April 25, 2011:

(i) The authority to determine the manner, format, coding structure, and electronic data transmission standards and procedures acceptable to the Commission for the purposes of paragraphs (a) and (b) of this section; and

(ii) The authority to determine whether the Commission may permit or require use by reporting entities or counterparties in reporting pre-enactment or transition swaps in existence on or after April 25, 2011, of one or more particular data standards (such as FIX, FpML, ISO 20022, or some other standard), in order to accommodate the needs of different communities of users.

(d) The Chief Information Officer shall publish from time to time in the **Federal Register** and on the Web site of the Commission the dates and times, format, data schema, and electronic data transmission methods and procedures for reporting acceptable to the Commission with respect to swap data reporting pursuant to this section.

§ 46.9 Voluntary supplemental reporting

(a) For purposes of this section, the term *voluntary, supplemental report* means any report of swap data for a pre-enactment or transition swap to a swap data repository that is not required to be made pursuant to this part or any other part in this chapter.

(b) A voluntary, supplemental report for a pre-enactment or transition swap may be made only by a counterparty to the swap in connection with which the voluntary, supplemental report is made, or by a third-party service provider acting on behalf of a counterparty to the swap.

(c) A voluntary, supplemental report for a pre-enactment or transition swap may be made only after the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(d) A voluntary, supplemental report for a pre-enactment or transition swap may be made either to the swap data repository to which the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, or to a different swap data repository.

(e) A voluntary, supplemental report for a pre-enactment or transition swap must contain:

(1) An indication that the report is a voluntary, supplemental report.

(2) The swap data repository identifier created for the swap by the automated systems of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(3) An indication of the identity of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, if the voluntary supplemental report is made to a different swap data repository.

(4) If the pre-enactment or transition swap was in existence on or after April 25, 2011, the legal entity identifier (or substitute identifier) of the counterparty making the voluntary, supplemental report.

(5) If applicable, an indication that the voluntary, supplemental report is made pursuant to the laws or regulations of any jurisdiction outside the United States.

(f) If a counterparty that has made a voluntary, supplemental report discovers any errors in the swap data included in the voluntary, supplemental report, the counterparty must report a correction of each such error to the swap data repository to which the voluntary, supplemental report was made, as soon as technologically practicable after discovery of any such error.

§ 46.10 Required data standards.

In reporting swap data to a swap data repository as required by this part 46, each reporting counterparty shall use the facilities, methods, or data standards provided or required by the swap data repository to which counterparty reports the data.

§ 46.11 Reporting of errors and omissions in previously reported data.

(a) Each swap counterparty required by this part 46 to report swap data shall report any errors and omissions in the data so reported. Corrections of errors or omissions shall be reported as soon as technologically practicable after discovery of any such error or omission.

(b) For pre-enactment or transition swaps for which this part requires reporting of continuation data, reporting counterparties reporting state data as provided in part 45 of this chapter may fulfill the requirement to report errors or omissions by making appropriate corrections in their next daily report of state data pursuant to part 45 of this chapter.

(c) Each counterparty to a pre-enactment or transition swap that is not the reporting counterparty as determined pursuant to § 46.5, and that discovers any error or omission with respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. As soon as technologically practicable after receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository.

(d) Each swap counterparty reporting corrections to errors or omissions in data previously reported as required by this part shall report such corrections in the same format as it reported the erroneous or omitted data.

Appendix 1 to Part 46—Tables of Minimum Primary Economic Terms Data For Pre-Enactment and Transition Swaps

BILLING CODE P

EXHIBIT A

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

CREDIT SWAPS AND EQUITY SWAPS

(Enter N/A for fields that are not applicable)

Data categories and fields	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No

An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
An indication of the counterparty purchasing protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
An indication of the counterparty selling protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Information identifying the reference entity	The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI if available, or substitute identifier as above if LEI is not yet available, or name
Contract type	E.g., swap, swaption, forward, option, basis swap, index swap, basket swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires
The price	E.g., strike price, initial price, spread
The notional amount, and the currency in which the notional amount is expressed	
The amount and currency (or currencies) of any up-front payment	
Payment frequency of the reporting counterparty	A description of the payment stream of the reporting counterparty, e.g., coupon
Payment frequency of the non-reporting counterparty	A description of the payment stream of the non-reporting counterparty, e.g., coupon
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

EXHIBIT B

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

FOREIGN EXCHANGE TRANSACTIONS

(OTHER THAN CROSS-CURRENCY SWAPS)

(Enter N/A for fields that are not applicable)

Data fields	**Comments**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity

For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Currency 1	ISO code
Currency 2	ISO code
Notional amount 1	For currency 1
Notional amount 2	For currency 2
Exchange rate	Contractual rate of exchange of the currencies
Delivery type	Physical (deliverable) or cash (non-deliverable)
Settlement or expiration date	Settlement date, or for an option the contract expiration date
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

EXHIBIT C

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

INTEREST RATE SWAPS (INCLUDING CROSS-CURRENCY SWAPS)

(Enter N/A for fields that are not applicable)

Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting counterparty	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires or ends
Day count convention	
Notional amount (leg 1)	The current active notional amount
Notional currency (leg 1)	ISO code
Notional amount (leg 2)	The current active notional amount
Notional currency (leg 2)	ISO code
Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable
Payer (floating rate leg 1)	If two floating legs, the payer for leg 1
Payer (floating rate leg 2)	If two floating legs, the payer for leg 2
Direction	For swaps: whether the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps: indicate N/A. For non-swap instruments and swaptions: indicate the instrument that was bought or sold.
Option type	E.g., put, call, straddle
Fixed rate	
Fixed rate day count fraction	E.g., actual 360
Floating rate payment frequency	
Floating rate reset frequency	
Floating rate index name/rate period	E.g., USD-Libor-BBA
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

EXHIBIT D

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

OTHER COMMODITY SWAPS

(Enter N/A for fields that are not applicable)

Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)
Maturity, termination, or end date	The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)
Buyer	The counterparty purchasing the product: e.g., the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Seller	The counterparty offering the product: e.g., the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Quantity unit	The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons
Quantity	The amount of the commodity (the number of quantity units) quoted on the swap
Quantity frequency	The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly
Total quantity	The quantity of the commodity for the entire term of the swap
Settlement method	Physical delivery or cash
Price	The price of the swap. For options, the strike price
Price unit	The unit of measure applicable for the price of the swap
Price currency	ISO code

Buyer pay index	The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap
Buyer pay averaging method	The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap
Seller pay index	The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap
Seller pay averaging method	The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap
Grade	If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product
Option type	Descriptor for the type of option transaction. E.g., put, call, straddle
Option style	E.g., American, European, European Daily, European Monthly, Asian
Option premium	The total amount paid by the option buyer
Hours from through	For electric power, the hours of the day for which the swap is effective
Hours from through time zone	For electric power, the time zone prevailing for the hours during which electricity is transmitted
Days of week	For electric power, the profile applicable for the delivery of power
Load type	For electric power, the load profile for the delivery of power
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

BILLING CODE C

Issued in Washington, DC on May 17, 2012 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendix to Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps—Commission Voting Summary and Statement of Chairman Gensler

Note: The following appendix will not appear in the Code of Federal Regulations.

On this matter, Chairman Gensler and Commissioner Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule establishing swap data recordkeeping and reporting requirements for pre-enactment and transition swaps, collectively called ''historical swaps.'' One of the main goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is to bring transparency to the unregulated swaps market. Starting this summer, light will shine for the first time on this market with the reporting both to the public and to regulators of nearly every swap transaction.

The historical swaps rule builds on already completed swaps market transparency rules. It will help give regulators a complete picture of the swaps market, including data on swaps in existence at the time of the Dodd-Frank Act's passage.

The rule provides market participants guidance on the reporting requirements for pre-enactment swaps (those entered into before the enactment of the Dodd-Frank Act) as well as transition swaps (those entered into between the enactment date of the law and the applicable compliance date for swap data reporting). The rule specifies clearly what records must be kept and what data must be reported to swap data repositories (SDRs) with respect to these historical swaps. It ensures that the historical swaps data needed by regulators is available through SDRs beginning on the compliance date for swap data reporting.

The rule achieves the reporting benefits of Dodd-Frank while reducing the costs and burdens associated with recordkeeping for historical swaps. Recordkeeping requirements for these swaps are minimized for counterparties who are not swap dealers or major swap participants. These counterparties are permitted to maintain records in any format they choose, and are allowed five days to retrieve their records.

[FR Doc. 2012–12531 Filed 6–11–12; 8:45 am]

BILLING CODE P

Reader Aids

Federal Register

Vol. 77, No. 113

Tuesday, June 12, 2012

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **www.ofr.gov.**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, JUNE

32391–32880 1
32881–33062 4
33063–33288 5
33289–33594 6
33595–33944 7
33945–34178 8
34179–34780 11
34781–35240 12

CFR PARTS AFFECTED DURING JUNE

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
8829 32875
8830 32877
8831 32879
8832 33595
8833 33597
8834 33599
8835 33601
8836 33603

Administrative Orders:
Memorandums:
Memorandum of April 24, 2012 33945
Memorandum of May 23, 2012 32391
Presidential Determinations:
No. 2012–07 of April 24, 2012 33947

5 CFR

Ch. LXXXIII 34179
9301 34179

Proposed Rules:
532 34854
1200 33663
1201 33663
1203 33663
1208 33663
1209 33663

6 CFR

5 33605

Proposed Rules:
5 33683

7 CFR

7 33063
28 33289
205 33290
319 34781
614 34186
930 33303
985 33076

Proposed Rules:
932 33104
1205 34855
1280 34868
3201 33270

9 CFR

11 33607
93 34783
94 34783
95 34783

10 CFR

26 33619
71 34194
73 34194

Proposed Rules:
430 33106
431 32916
1703 .....32433, 33980

12 CFR

225 33949
241 32881
1236 33950

Proposed Rules:
1026 33120
1282 34263

14 CFR

39 .....32884, 32887, 32889, 32892, 33083, 33619, 33622, 34206
71 .....32393, 32895, 32896, 34208, 34209, 34210, 34211
97 .....33085, 33087
121 34784

Proposed Rules:
39 .....32433, 32437, 32439, 32918, 33125, 33127, 33129, 33332, 33334, 34281, 34283, 34870, 34872, 34874, 34876, 34878, 34881
71 .....32921, 33685, 33687
121 32441

15 CFR

Proposed Rules:
740 33688
742 33688
774 33688
906 33980
1400 34883

16 CFR

Proposed Rules:
305 33337

17 CFR

46 35200

19 CFR

12 33624
111 33964
163 33964

21 CFR

179 34212
510 32897

22 CFR

120 33089
123 33089
124 33089
126 33089
127 33089
129 33089

Proposed Rules:
121 33698

25 CFR

Proposed Rules:
543 32444
547 32465

26 CFR

1 ....34785, 34788

Proposed Rules:
1 ....34884, 34887

27 CFR

478 ....33625, 33630

Proposed Rules:
9 33985

29 CFR

Proposed Rules:
1206 33701

30 CFR

Proposed Rules:
917 34888
936 34890
944 34892
950 34894

31 CFR

344 33634
1010 33635
1020 33638

33 CFR

100 ....33089, 33337, 33967, 34215
117 ....32393, 32394, 33337, 34797
151 33969
165 ....32394, 32898, 33089, 33094, 33308, 33309, 33312, 33970, 34797, 34798

Proposed Rules:
100 33130
165 ....34285, 34894

38 CFR

3 34218
9 32397

39 CFR

20 33640
111 33314

40 CFR

51 33642
52 ....32398, 33642, 33659, 34218, 34801, 34808, 34810, 34819
81 ....34221, 34819
82 33315
85 34130
86 34130
97 34830
180 ....32400, 32401
271 34229
1039 34130

Proposed Rules:
52 ....32481, 32483, 32493, 33022, 33360, 33363, 33372, 33380, 34288, 34297, 34300, 34302, 34306, 34897, 34898, 34906
60 33812
63 33812
80 34915
85 34149
86 34149
122 ....34315, 34927
123 ....34315, 34927
124 ....34315, 34927
125 ....34315, 34927
1039 34149

42 CFR

417 32407
422 32407
423 32407

Proposed Rules:
412 34326
413 34326
424 34326
476 34326
489 34326

45 CFR

Proposed Rules:
156 33133

46 CFR

25 33860
27 33860
28 33860
31 33860
34 33860
35 33860
62 33860
71 33860
76 33860
78 33860
91 33860
95 33860
97 33860
107 33860
108 33860
112 33860
115 33860
118 33860
119 33860
122 33860
131 33860
132 33860
147 33860
162 ....33860, 33969
167 33860
169 33860
176 33860
181 33860
182 33860
185 33860
189 33860
190 33860
193 33860
194 33860
196 33860
532 33971

47 CFR

1 33097
11 33661
15 33098
54 33097
64 ....33662, 34233
73 32900
90 33972

Proposed Rules:
11 33995
54 33896
73 33997

49 CFR

234 35164
371 32901
375 32901
386 ....32901, 34249
387 32901
390 34846
395 ....33098, 33331
396 34846
541 32903

Proposed Rules:
595 33998

50 CFR

17 ....33100, 35118
226 32909
622 ....32408, 32913, 32914, 34254
665 34260
679 ....33103, 34262, 34853
697 32420

Proposed Rules:
17 ....32483, 32922, 33142, 33143, 34338
20 34931
665 ....34331, 34334

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

H.R. 2415/P.L. 112–124
To designate the facility of the United States Postal Service located at 11 Dock Street in Pittston, Pennsylvania, as the "Trooper Joshua D. Miller Post Office Building". (June 5, 2012; 126 Stat. 367)

H.R. 3220/P.L. 112–125
To designate the facility of the United States Postal Service located at 170 Evergreen Square SW in Pine City, Minnesota, as the "Master Sergeant Daniel L. Fedder Post Office". (June 5, 2012; 126 Stat. 368)

H.R. 3413/P.L. 112–126
To designate the facility of the United States Postal Service located at 1449 West Avenue in Bronx, New York, as the "Private Isaac T. Cortes Post Office". (June 5, 2012; 126 Stat. 369)

H.R. 4119/P.L. 112–127
Border Tunnel Prevention Act of 2012 (June 5, 2012; 126 Stat. 370)

H.R. 4849/P.L. 112–128
Sequoia and King Canyon National Parks Backcountry Access Act (June 5, 2012; 126 Stat. 373)

Last List June 4, 2012

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.