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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### 7 CFR Part 210

**[FNS–2011–0025]**

**RIN 0584–AE15**

## Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010

**AGENCY:** Food and Nutrition Service, USDA

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, with some revisions, changes to the National School Lunch Program (NSLP) regulations, as set forth in the interim final rule published in the **Federal Register** on April 27, 2012. The changes conform to requirements contained in the Healthy, Hunger-Free Kids Act of 2010 regarding performance-based cash assistance for school food authorities (SFAs) certified compliant with meal pattern and nutrition standards. The changes finalized in this rule include requiring State agencies to certify participating SFAs that are in compliance with meal pattern and nutrition standard requirements as eligible to receive performance-based cash assistance for each reimbursable lunch. This rule also finalizes the requirement in the interim final rule that State agencies disburse performance-based cash assistance to certified SFAs, and withhold the performance-based cash assistance from SFAs determined to be out of compliance with meal pattern or nutrition standards during a subsequent administrative review. Additionally, this final rule is adopting minor changes based on comments on the interim final rule that will help to streamline the certification process. These changes include making permanent the flexibility that State agencies should consider any SFA compliant with the daily and weekly ranges for grain and meat/meat alternates if documentation is compliant with the daily and weekly *minimums.*

**DATES:** This final rule is effective March 4, 2014.

**FOR FURTHER INFORMATION CONTACT:** Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, FNS, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 305–2590.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296) (the HHFKA), enacted December 13, 2010, made significant changes to the meal pattern and reimbursement requirements for school breakfasts and lunches served in accordance with the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1751 et seq.).

Section 201 of the HHFKA amended section 4(b) of the NSLA, 42 U.S.C. 1753(b), by requiring the Secretary to update the meal patterns and nutrition standards for the NSLP and School Breakfast Program (SBP) and to issue regulations requiring all SFAs to comply with the updated meal patterns and nutrition standards. On January 26, 2012, the Department issued a final rule, titled *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088). With some exceptions, the implementation date of that final rule was July 1, 2012.

Section 201 of the HHFKA also amended the NSLA to provide for additional payments in the form of performance-based reimbursement of 6 cents per lunch served beginning on October 1, 2012, in SFAs certified by the State agency to be in compliance with the updated meal patterns and nutrition standards.

In response to statutorily imposed effective dates established by section 201 of the HHFKA, the Department published an interim final rule on April 27, 2012 (77 FR 25024), which amended 7 CFR part 210 to include criteria for the certification and validation processes and require State agencies to begin certifying SFAs beginning October 1, 2012. The interim final rule invited public comment for a 90-day period, beginning April 27, 2012 and ending July 26, 2012. During the comment period, FNS received 173 comments on the interim final rule: 117 comments from SFAs, 45 comments from advocacy organizations, 6 from individuals and 5 from State agencies.

### II. Discussion of Public Comments and FNS Response

Following an analysis of comments, this rule adopts, as final, the provisions of the interim final rule, with revisions as described below. The finalized provisions include the procedures for performance-based certifications, required documentation and timeframes, validation reviews, compliance and administrative reviews, reporting and recordkeeping, and technical assistance.

*Reporting and Recordkeeping*

The interim final rule established at 7 CFR 210.5, requirements for State agencies to submit a quarterly report, as specified by FNS, detailing the disbursement of performance-based reimbursements, including the total number of SFAs in the State, the names and locations of certified SFAs, and the total number of lunches earning the performance-based reimbursement for each month.

FNS received feedback from State agencies that some of this information would be particularly difficult and/or burdensome to report by SFAs. In an effort to reduce burden, FNS notified State agencies on January 22, 2013 in memorandum SP 31–2012 (*http://www.fns.usda.gov/cnd/governance/Policy-Memos/2012/SP31-2012osr3.pdf*), and later revisions, that FNS would collect on a quarterly basis, the total number of SFAs in the State and the names of certified SFAs.

Therefore, this rule finalizes this reporting change at 7 CFR 210.5(d)(2)(ii) to require that State agencies only include in this quarterly report the total number of SFAs in the State and the names of certified SFAs.

Additionally, FNS created the quarterly report as way to track the number of SFAs being certified throughout the country. FNS realizes that once all SFAs have been certified, the information reported on the quarterly report will become repetitive and will no longer be useful. Therefore, FNS will no longer require State agencies to submit the quarterly report

once all SFAs in the State have been certified.

*Certification Process*

The interim final rule established at 7 CFR 210.7, criteria for State agencies and SFAs to follow during the certification process. These criteria include requiring SFAs to submit to their State agency documentation demonstrating that they are in compliance with the new meal pattern and nutrition requirements. State agencies are then required to determine if SFAs are in compliance with meal pattern and nutrition standard requirements, and if so, certify the SFA as eligible to receive the 6 cents performance-based cash assistance for each reimbursable lunch served (an additional 6 cents per lunch became available beginning October 1, 2012 and is adjusted annually thereafter). The interim final rule also required that State agencies disburse performance-based cash assistance to certified SFAs, and withhold the performance-based cash assistance from SFAs determined to be out of compliance with meal pattern or nutrition standards during subsequent administrative reviews.

Several commenters felt that the work required in the certification process was too burdensome for school food service directors. One common complaint was that SFAs that offer a wide variety of menu choices may be forced to limit their menus due to the difficulty with the certification process.

The certification process established in the interim final rule was intended to both meet the intent of the provision (that SFAs demonstrate compliance with the new meal pattern requirements) and impose a reasonable administrative burden on SFAs. FNS provided several training opportunities across the Nation to ensure that our State agency partners were well equipped to train local operators on the new certification process. Representatives from every State agency participated in at least one of these in-person trainings. In addition to in-person trainings, FNS conducted several webinars for both State agencies and SFAs on the certification process and on how to complete certification materials. Finally, FNS issued memoranda including a series of questions and answers related to the 6 cents certification process. Most recently, FNS issued SP 31–2012 (3rd Revision) on January 22, 2013, which included revised questions and answers on the certification process. The memorandum can be found at: *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2012/SP31-2012osr3.pdf.* FNS plans to continue to update the memorandum as more questions from States and SFAs are received.

Based on program data and other information from State agencies, 86 percent of SFAs nationwide have submitted certification materials as of the end of October 2013. By the end of September 2013, 80 percent of SFAs had been certified.

FNS is encouraged by these numbers and feels it demonstrates that a majority of SFAs have an understanding of the certification process. FNS continues to encourage State agencies to provide technical assistance and guidance to those SFAs not engaged in the certification process. Therefore, FNS will not be making changes to the requirements for the certification process in this final rule.

*Maximums for Grains and Meats and Frozen Fruit With Added Sugar*

As stated above, FNS established procedures for the certification process at 7 CFR 210.7. As part of the certification determination process, State agencies must evaluate whether documentation provided by SFAs (including menus, a menu worksheet measuring components and a nutrient analysis or assessment) is compliant with the updated meal pattern and nutrition requirements. This evaluation includes determining whether the SFA's menu meets the daily and weekly requirements for grains and meat/meat alternates.

Since implementation of the interim final rule, FNS has received feedback from both State agencies and SFAs about the certification process and the new meal pattern requirements in general. A frequent concern expressed by State and SFA partners was significant operational challenges in not exceeding the weekly maximum requirements for the grains and meats/meat alternate components, particularly for SFAs with schools with multiple menu offerings and multiple serving lines during meal service.

SFAs reported that for both grains and meat/meat alternates, some popular products are not yet readily available from suppliers in the wide ranges of serving sizes needed to meet the grain and meat/meat alternate weekly maximum requirements. Additionally, SFAs have reported that they are experiencing challenges with student acceptability of new items and smaller servings of items on their menus.

In response to concerns, FNS issued SP 11–2013 on December 20, 2012 (*http://www.fns.usda.gov/cnd/governance/Policy-Memos/2013/SP11-2013os.pdf*), providing local operators with flexibility in meeting the weekly maximums for grains and meat/meat alternates for compliance purposes in School Year (SY) 2012–2013. The memorandum stated that State agencies should consider any SFA compliant with the weekly ranges for these two components if the FNS-developed or FNS-approved Certification Tool and required supporting documentation indicate the menu is compliant with the daily and weekly *minimums.* SFAs are still expected to fall within the weekly *minimum and maximum* ranges for calories. These flexibilities were extended to School Year 2013–14 in SP 26–2013, which was issued on February 25, 2013 (*http://www.fns.usda.gov/cnd/governance/Policy-Memos/2013/SP11-2013os.pdf*).

Feedback on the memoranda concerning flexibility for weekly maximum grains and meat/meat alternates has been overwhelmingly positive, and there have been numerous requests to further extend this change. This new flexibility for measuring compliance has had a meaningful impact on the certification process by making it less complicated for SFAs to be certified as compliant with the new meal pattern. Allowing for more grain and meat/meat alternates has also increased student acceptability of the new meals they are being served.

Therefore, FNS is making this flexibility permanent by including it in this final rule at 7 CFR 210.7(d)(1). Because ongoing compliance with the meal patterns is assessed during administrative reviews, FNS is further extending this flexibility by including in the final rule at 7 CFR 210.18(g)(2)(vi). When conducting administrative reviews, State agencies should consider any SFA compliant with the weekly ranges for grains and meats if the weekly *minimums* are met. SFAs continue to be required to meet the weekly *minimum and maximum* range requirements for calories and the other dietary specifications.

In addition to concerns about the maximums for grains and meats, FNS received feedback from State and SFA partners concerning the requirement that frozen fruit served in the NSLP contain no added sugar.

Since 2009, USDA has reduced the amount of added sugars in frozen fruits offered to States; however most frozen strawberries, peaches and apricots offered by USDA currently contain added sugar. USDA has reached out to industry concerning reformulating these frozen fruits products to eliminate sugar completely, and industry has been working on this issue since publication of the meal pattern rule. Reformulating

some products has been challenging because sugar acts as an important ingredient in maintaining fruit flavor, appearance, texture and storability of certain frozen fruits. In addition, research on substitute sweeteners has not been successful in maintaining the color, flavor or texture of the fruit being tested.

In response to these concerns, FNS issued SP 20–2012 on February 24, 2012 and a revised version on September 11, 2012 (*http://www.fns.usda.gov/cnd/governance/Policy-Memos/2012/SP20-2012osr.pdf*), providing SFAs the flexibility to continue to use frozen fruit products containing added sugar through SY 2013–14. This was later expanded in SP 49–2013 issued on June 25, 2013, to include both lunch and breakfast through SY 2014–15 (*http://www.fns.usda.gov/sites/default/files/SP49-2013os.pdf*). In an effort to ease burden on program operators, this flexibility was applicable to all frozen fruit products.

Feedback on the memoranda has been positive with numerous requests to extend the flexibility for frozen fruit with added sugar. Thus far, research performed by several different processors for development of an acceptable no-sugar frozen fruit has resulted in an unacceptable product. Processors do not believe a short term solution is feasible as their research requires long term studies because many of the problems with frozen fruit do not develop until the products have been in storage for a reasonable time.

In addition to the challenges associated with processing frozen fruit without sugar, allowing SFAs to use frozen fruit with added sugar will make it less complicated for SFAs to meet meal pattern requirements, and also expand the types of frozen fruit allowable in school meals. It is also consistent with canned fruits since some added sugar is allowed in canned products. Additionally, the calorie limits for meals help preserve the integrity of the updated nutrition standards, as schools have to plan menus and select products carefully, including frozen fruit with added sugar, in order to be in compliance with the standards.

For those reasons, FNS is making this flexibility permanent by including it in this final rule at 7 CFR 210.7(d)(1)(iii)(B). Because ongoing compliance with the meal patterns is assessed during administrative reviews, FNS is further extending this flexibility by including it in the final rule at 7 CFR 210.18(g)(2)(vi). When conducting administrative reviews, State agencies should consider any SFA compliant with the meal pattern requirements even if the SFA serves frozen fruit containing added sugar. This flexibility is also applicable to fruit offered in the School Breakfast Program.

*Training*

Several comments from SFAs requested that FNS and State agencies provide training on the certification process, how to complete certification documentation, and allowable uses of administrative funds provided pursuant to amendments made by Section 201 of the HHFKA.

In recognition of the significance of changes necessitated by the new regulatory requirements, section 201 of the HHFKA amended section 4(b)(3)(F) of the NSLA authorizes the Secretary to provide up to $47 million to States for each of two years to assist in the implementation of the updated meal patterns, including training, technical assistance, and conducting performance-based certifications. States are using these funds to provide trainings and technical assistance to SFAs.

To address comments about the effective use of section 201 administrative funds, FNS issued two guidance memoranda to provide additional information on allowable uses of these administrative funds. Most recently, on December 6, 2012, FNS issued SP 13–2013 (*http://www.fns.usda.gov/cnd/governance/Policy-Memos/2013/SP13-2013os.pdf*) which provided several best practices State agencies may consider in using these administrative funds to help SFAs implement the new meal pattern.

To support State agency efforts to provide technical assistance and training, FNS offered States the option of postponing administrative reviews for School Year 2012–13. By providing this flexibility, FNS expected State agencies to use this time to certify SFAs and train SFAs that need assistance in becoming certified.

In addition, since the publication of the interim final rule, FNS has conducted several in-person trainings across the Nation. The webinars will help ensure both State agencies and SFAs understand the certification process and how to complete and evaluate certification materials.

FNS will continue to provide technical assistance and guidance, as needed, but no changes will be made in this final rule in regards to training.

*Non-Discretionary Items*

Several comments related to parts of the regulation over which FNS does not have discretion. Specifically, many comments indicated that 6 cents per lunch is insufficient to cover the costs associated with the new meal pattern requirements. The 6 cents per meal performance-based reimbursement was specifically established in the HHFKA; and therefore, FNS does not have discretion to increase the reimbursement rate. However, commenters should be aware that the HHFKA provided for annual adjustment to reflect changes in the cost of operating the meal programs, as indicted by the change in the series for food away from home of the Consumer Price Index for all Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

Several commenters felt that breakfast should not be included as part of 6 cents certification. However, as indicated in the preamble of the interim final rule, the statutory authority for the performance-based reimbursement requires that breakfast must be evaluated as part of the certification process. Further discussion of this issue is found in the **Federal Register** at 77 FR 25025.

## IV. Procedural Matters

*Executive Order 12866 and Executive Order 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been designated an ''economically significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

*Regulatory Flexibility Act*

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Pursuant to that review, it has been determined that this rule will not have a significant impact on a substantial number of small entities.

While there may be some SFA burden associated with initial certification for the performance-based reimbursement in this rule, the burden will not be significant and will be outweighed by

the benefits of increased Federal reimbursement for school lunches.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or to the private sector of $100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

*Executive Order 12372*

The National School Lunch Program and School Breakfast Program are listed in the Catalog of Federal Domestic Assistance under No. 10.555 and 10.553. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials. In developing this rule, FNS gathered input from State and local program operators, and other stakeholders, via listening sessions held at the School Nutrition Association Legislative Action Conference in March 2012, and at the School Nutrition Association Annual National Conference in July 2012. Additionally, FNS held a State agency meeting to discuss issues pertaining to the new meal pattern and certification in December 2012.

*Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation with State Officials:

Prior to drafting this final rule, FNS staff received informal input from various stakeholders while participating in various State, regional, national, and professional conferences. The School Nutrition Association, the Center for Science in the Public Interest, and the American Dietetic Association shared their views about performance-based reimbursement. Numerous stakeholders, including State agencies and local program operators, also provided input at public meetings held by the School Nutrition Association.

Nature of Concerns and the Need to Issue this Rule:

State agencies and SFAs want to provide the best possible school meals through the NSLP and SBP but are concerned about the costs and administrative burden associated with increased program oversight. While FNS is aware of these concerns, Section 4(b)(3)(D) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1753(b)(3)(D), requires that State agencies certify whether SFAs are in compliance with meal pattern and nutrition standards, and disburse performance-based reimbursement to eligible SFAs.

Extent to Which We Meet Those Concerns:

FNS has considered the impact of this final rule on State and local program operators and has attempted to develop a rule that would implement the performance-based reimbursement in the most effective and least burdensome manner. FNS recognizes that implementing the new performance-based reimbursement certification process will require a significant effort on the part of State and local program operators. This final rule simplifies the certification process by allowing State agencies to consider any SFA compliant with the component requirements for grains and meat/meat alternates if the menu is compliant with the daily and weekly minimums for these components. Additionally, FNS has provided several trainings and guidance to ensure State agencies understand performance-based funding requirements and provide SFAs with the training and technical assistance needed to implement the improved school meal patterns. Finally, per the requirements of the HHFKA, FNS provided $47 million to State agencies in fiscal years 2012 and 2013 to assist with meal pattern implementation, training, technical assistance, and performance-based certification activities. These funds are available for obligation by State agencies through September 2015.

*Executive Order 12988*

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless specified in the DATES section of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

*Civil Rights Impact Analysis*

FNS has reviewed this rule in accordance with Departmental Regulations 4300–4, ''Civil Rights Impact Analysis'', and 1512–1, ''Regulatory Decision Making Requirements.'' After a careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability nor is it intended to have a differential impact on minority owned or operated business establishments, and woman-owned or operated business establishments that participate in the Child Nutrition Programs.

*Paperwork Reduction Act*

FNS reduced the data required for the quarterly report associated with this final rule. In the interim rule, FNS required State agencies to submit a quarterly report detailing the disbursement of performance-based reimbursement, including the total number of SFAs in the State, the names and locations of certified SFAs, and the total number of lunches earning the performance-based reimbursement for each month. The burden estimate for this quarterly report was one hour. FNS received comments from State agencies that some of this information would be particularly difficult and/or burdensome to report by SFAs.

In an effort to reduce burden, this rule finalizes a reporting change at 7 CFR 210.5(d)(2)(ii) to require that State agencies only include in this quarterly report the total number of SFAs in the State and the names of certified SFAs.

This reduces the estimated burden for State agencies from one hour per quarterly report to 15 minutes per quarterly report.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0584–0567, Certification of Compliance with Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010.

*E-Government Act Compliance*

The Food and Nutrition Service is committed to complying with the E-Government Act, 2002 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.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or distribution of power and responsibilities between the Federal government and Indian tribes.

FNS provides regularly scheduled quarterly consultation sessions as a venue for collaborative conversations with Tribal officials or their designees. The most recent Quarterly Consultation Conference Calls were coordinated by FNS and held on the following dates: November 2, 2011; February 29, 2012; May 2, 2012; August 29, 2012; February 13, 2013.

There were no comments about this regulation received during any of the aforementioned Tribal Consultation sessions. Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule.

*Regulatory Impact Analysis Summary*

As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this final rule. The following is a summary of the RIA. The full RIA is included as an Appendix to this rule.

*Need for Action*

Section 201 of the Healthy Hunger-Free Kids Act of 2010 provides for a 6 cent per lunch performance-based reimbursement to SFAs that comply with the National School Lunch program (NSLP) and School breakfast Program (SBP) meal standards that took effect on July 1, 2012. This rule finalizes the interim rule's regulatory framework for establishing initial school food authority (SFA) compliance with the new meal standards and for monitoring ongoing compliance. In addition, the final rule makes minor changes to the interim rule that are intended to facilitate the certification of SFA compliance with the meal patterns.

*Benefits*

The impact analysis for the interim rule estimated that full compliance with the new meal patterns would increase SFA revenues by more than $300 million per year in the aggregate. The changes contained in the final rule are expected to facilitate compliance with the meal patterns, allowing SFAs to take full advantage of the additional revenue. Granting some flexibility on meat, grains, and frozen fruit is an effort by USDA to work with schools that are making serious efforts to comply with the rule's standards but are having some difficulty finding products that have been resized or reformulated specifically to meet the requirements of the rule. To the extent that a little flexibility at the margins encourages schools to plan menus that meet the new standards, students benefit from receiving meals that comply with the new standards rather than receiving meals that do not comply with the new standards.

Even with the added flexibility, schools have to meet all of the meal patterns' minimum food group requirements and stay within its calorie maximums. The benefits to children who consume school meals that follow DGA recommendations are detailed in the impact analysis prepared for the final meal patterns rule.[1] As discussed in that document, the 2010 Dietary Guidelines Advisory Committee emphasizes the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease.[2] The new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally. Those goals of the meal patterns rule are furthered to the extent that this rule contributes to full compliance with the meal patters by all SFAs.

Further, the changes adopted in the final rule are intended to facilitate SFA compliance with the meal pattern requirements and reduce State agency reporting and recordkeeping burden. By making permanent the flexibility on weekly maximum servings of grains and meat/meat alternates, and by allowing frozen fruit with added sugar to credit toward the meal pattern requirement for fruit, the final rule will make it easier for some SFAs to plan menus that comply with the meal pattern requirements. The effect of these provisions is to reduce the costs of compliance for the small minority of SFAs that would otherwise not have been certified eligible to receive the performance-based 6 cent reimbursement by the end of SY 2013–2014, though we do not estimate those potential cost savings in this analysis.[3] The savings generated by reducing State agency reporting and recordkeeping burden is minimal.[4]

*Costs*

These provisions will likely result in a small increase in cost to the Federal Government (as a result of a small number of schools receiving the performance-based reimbursement that might have otherwise not received it), though we expect this potential increase to fall within the cost range estimated for the interim final rule.[5]

**List of Subjects in 7 CFR Part 210**

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Penalties; Reporting and recordkeeping requirements; School breakfast and lunch programs; Surplus agricultural commodities.

Accordingly, the interim final rule published at 77 FR 25024 on April 27, 2012, is adopted as final with the following changes:

[1] **Federal Register,** Vol. 77, No. 17 pp. 4088–4167.

[2] Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010, p. B1–2. (*http://www.cnpp.usda.gov/DGAs2010-DGACReport.htm*).

[3] Since these provisions are options (not requirements) and because we have no data on how many schools might avail themselves of these options, we do not estimate those cost savings in this analysis.

[4] Although the relative burden decrease of 75% seems substantial, the absolute burden decrease (as measured in the dollar value of State agency staff time) is only about $4,000 per year across the entire United States.

[5] **Federal Register,** Vol. 77, No. 82 pp. 25024–25036.

## PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751–1760, 1779.

■ 2. Amend § 210.5 by revising paragraph (d)(2)(ii) to read as follows:

### § 210.5 Payment process to States.

* * * * *

(d) * * *

(2) * * *

(ii) Each State agency shall also submit a quarterly report, as specified by FNS, detailing the disbursement of performance-based cash assistance described in § 210.4(b)(1). Such report shall be submitted no later than 30 days after the end of each fiscal year quarter. State agencies will no longer be required to submit the quarterly report once all SFAs in the State have been certified. The report shall include the total number of school food authorities in the State and the names of certified school food authorities.

* * * * *

■ 3. Amend § 210.7 by redesignating paragraphs (d)(1)(iii) through (vii) as paragraphs (d)(1)(iv) through (viii) and adding a new paragraph (d)(1)(iii) to read as follows:

### § 210.7 Reimbursement for school food authorities.

* * * * *

(d) * * *

(1) * * *

(iii) State agencies must review certification documentation submitted by the school food authority to ensure compliance with meal pattern requirements set forth in § 210.10, § 220.8, or § 220.23, as applicable. For certification purposes, State agencies should consider any school food authority compliant:

(A) If when evaluating daily and weekly range requirements for grains and meat/meat alternates, the certification documentation shows compliance with the daily and weekly minimums for these two components, regardless of whether the school food authority has exceeded the maximums for the same components.

(B) If when evaluating the service of frozen fruit, the school food authority serves products that contain added sugar.

* * * * *

■ 4. Amend § 210.18 by adding paragraph (g)(2)(vi) to read as follows:

### § 210.18 Administrative reviews.

* * * * *

(g)* * *

(2)* * *

(vi) For purposes of paragraphs (g)(2)(i) through (v) of this section, State agencies should consider any school food authority compliant:

(A) If when evaluating daily and weekly range requirements for grains and meat/meat alternates, the documentation shows compliance with the daily and weekly minimums for these two components, regardless of whether the school food authority have exceeded the maximums for the same components.

(B) If when evaluating the service of frozen fruit, the school food authority serves products that contain added sugar.

* * * * *

Dated: December 24, 2013.

**Kevin Concannon,**

*Under Secretary, Food, Nutrition and Consumer Services.*

**Note:** The following appendix will not appear in the Code of Federal Regulations

## Appendix A

### Regulatory Impact Analysis

*Agency:* Food and Nutrition Service.

*Title:* Certification of Compliance with Meal Requirements for the National School Lunch Program under the Healthy, Hunger-Free Kids Act of 2010.

*Nature of Action:* Final Rule.

*Need for Action:* Section 201 of the Healthy Hunger-Free Kids Act of 2010 provides for a 6 cent per lunch performance-based reimbursement to SFAs that comply with the National School Lunch program (NSLP) and School Breakfast Program (SBP) meal standards that took effect on July 1, 2012. This rule finalizes the interim rule's regulatory framework for establishing initial school food authority (SFA) compliance with the new meal standards and for monitoring ongoing compliance. In addition, the final rule makes minor changes to the interim rule that are intended to facilitate the certification of SFA compliance with the meal patterns.

*Affected Parties:* The programs affected by this rule are the NSLP and the SBP. The parties affected by this regulation are local school food authorities, State education agencies and the USDA.

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### I. Background

The National School Lunch Program (NSLP) is available to over 50 million children each school day; an average of 31.6 million children per day ate a reimbursable lunch in fiscal year (FY) 2012. Schools that participate in NSLP receive Federal reimbursement and USDA Foods (donated commodities) for meals that meet program requirements.

Sections 4 and 11 of the Richard B. Russell National School Lunch Act (NSLA) govern the Federal reimbursement of school lunches. Reimbursement for school breakfasts is governed by Section 4(b) of the Child Nutrition Act. Reimbursement rates for both NSLP and SBP meals are adjusted annually for inflation under terms specified in Section 11 of the NSLA.

Federal reimbursement for program meals and the value of USDA Foods totaled $14.9 billion in FY 2012. Table 1 summarizes FNS projections of reimbursable meals served and the value of Federal reimbursements and USDA Foods through FY 2017.

The baseline for this analysis is the cost estimate published with the interim final rule.[6]

TABLE 1—PROJECTED NUMBER OF MEALS SERVED AND TOTAL FEDERAL PROGRAM COSTS[7]

[in billions]

| | Fiscal year | | | | |
|---|---|---|---|---|---|
| | 2013 | 2014 | 2015 | 2016 | 2017 |
| NSLP | | | | | |
| Lunches Served | 5.3 | 5.4 | 5.4 | 5.4 | 5.5 |

[6] **Federal Register,** Vol. 77, No. 82 pp. 25024–25036.

TABLE 1—PROJECTED NUMBER OF MEALS SERVED AND TOTAL FEDERAL PROGRAM COSTS [7]—Continued

[in billions]

| | Fiscal year | | | | |
|---|---|---|---|---|---|
| | 2013 | 2014 | 2015 | 2016 | 2017 |
| Program Cost | $12.3 | $12.6 | $12.7 | $12.9 | $13.0 |
| SBP | | | | | |
| Breakfasts Served | 2.3 | 2.4 | 2.4 | 2.5 | 2.5 |
| Program Cost | $3.6 | $3.8 | $4.0 | $4.1 | $4.2 |

[7] USDA projections of reimbursable lunches and breakfasts served, and total NSLP and SBP program costs, prepared for the FY 2014 President's Budget. NSLP program cost includes entitlement commodity assistance, but is not adjusted for the projected additional amount necessary to bring total commodity assistance up to 12 percent of the combined value of the Section 4 and 11 reimbursements as required by NSLA section 6(e) (42 U.S.C. 1755(e)). Note that the estimate for the cost of NSLP as given in on p. 175 of the 2014 President's budget appendix does not include estimated entitlement commodity assistance, unlike Table 1. In addition, although the USDA projections in the FY 2014 President's Budget included the cost of the extra 6 cents per meal (and assumed that all meals served would be eligible for the extra 6 cents per meal), the projections presented here do not include the value of the 6 cents—instead, program costs are presented as if no meals receive the 6 cents reimbursement, to provide a basis for comparison for the rest of the estimates in this RIA. The projected number of meals has changed from the estimated projections in the interim rule on account of updated projections provided in the 2014 President's Budget.

Table 2 provides additional detail on the components of the school year (SY) 2012–2013 Federal reimbursement rates for lunches and breakfasts that meet program requirements. The figures in Table 2 exclude the 6 cents for meals that comply with the new meal patterns.

TABLE 2—FEDERAL PER-MEAL REIMBURSEMENT AND MINIMUM VALUE OF USDA FOODS, SY 2012–2013

| | Breakfast reimbursement | | Lunch reimbursement | | | | | Minimum value of donated foods |
|---|---|---|---|---|---|---|---|---|
| | Section 4(b) of Child Nutrition Act | | Section 4 NSLA | | Section 11 NSLA | Combined Reimbursement, NSLA Sections 4 & 11 | | |
| | Schools in "Severe Need" | Schools not in "Severe Need" | SFAs that serve fewer than 60% of lunches free or at reduced price | SFAs that serve at least 60% of lunches free or at reduced price | | SFAs that serve fewer than 60% of lunches free or at reduced price | SFAs that serve at least 60% of lunches free or at reduced price | Additional Federal assistance for each NSLP lunch served |
| **Contiguous States** | | | | | | | | |
| Free | $1.85 | $1.55 | $0.27 | $0.29 | $2.59 | $2.86 | $2.88 | $0.2275 |
| Reduced Price | 1.55 | 1.25 | 0.27 | 0.29 | 2.19 | 2.46 | 2.48 | 0.2275 |
| Paid | 0.27 | 0.27 | 0.27 | 0.29 | n.a. | 0.27 | 0.29 | 0.2275 |
| **Alaska** | | | | | | | | |
| Free | $2.97 | $2.48 | $0.44 | $0.46 | $4.19 | $4.63 | $4.65 | $0.2275 |
| Reduced Price | 2.67 | 2.18 | 0.44 | 0.46 | 3.79 | 4.23 | 4.25 | 0.2275 |
| Paid | 0.41 | 0.41 | 0.44 | 0.46 | n.a. | 0.44 | 0.46 | 0.2275 |
| **Hawaii** | | | | | | | | |
| Free | $2.16 | $1.81 | $0.32 | $0.34 | $3.03 | $3.35 | $3.37 | $0.2275 |
| Reduced Price | 1.86 | 1.51 | 0.32 | 0.34 | 2.63 | 2.95 | 2.97 | 0.2275 |
| Paid | 0.31 | 0.31 | 0.32 | 0.34 | n.a. | 0.32 | 0.34 | 0.2275 |

## II. Need for Action

Section 201 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) directs the USDA to issue regulations to update the NSLP and SBP meal patterns to align them with the *Dietary Guidelines for Americans* (DGA). The Department published a proposed rule in January 2011.[8] A final rule was published on January 26, 2012.[9] The new standards took effect on July 1, 2012, the start of SY 2012–2013.

HHFKA Section 201 also provides for a 6 cent increase to the USDA reimbursement for lunches served on or after October 1, 2012 that meet the new meal standards. The interim rule provided the regulatory structure necessary to establish initial school food authority (SFA) compliance with the new meal standards and to monitor ongoing compliance. This final rule responds to concerns raised by comments given in response to the interim rule.

## III. Key Provisions of the Interim Rule

The interim rule included provisions that govern initial certification of SFA compliance with the breakfast and lunch meal patterns that took effect on July 1, 2012, ongoing monitoring of compliance by State agencies, consequences for non-compliance, and administrative responsibilities of SFAs and State agencies. SFAs began receiving an additional 6 cents for each reimbursable lunch served on or after October 1, 2012 that was determined to comply with the new meal standards. Key provisions of the interim rule included:

- *Defining compliance:* SFAs must be compliant with breakfast and lunch meal pattern requirements to receive the performance-based 6 cent lunch reimbursement. All meal components must be present in appropriate quantities. The meals offered to students must also comply

[8] **Federal Register**, Vol. 76, No. 9, pp. 2494–2570.

[9] **Federal Register**, Vol. 77, No. 17, pp. 4088–4167.

with sodium, calorie, saturated fat, and trans fat standards.

• *Initial certification of SFA eligibility for performance-based lunch reimbursement:* SFAs may be certified eligible for the performance-based lunch reimbursement in one of several ways. Procedures for submitting certification documentation will be developed by State agencies. Final certification decisions will also be made by State agencies. However, standards for certification and the materials used in the certification process will be developed by FNS and specified in guidance. The interim rule provided for the following certification methods:

i. Nutrient analysis: SFAs may submit to their State agency one week of each menu used by the SFA, along with the results of a nutrient analysis on each menu, and a menu worksheet.

ii. Practices and indicators documentation: SFAs may submit to their State agency responses to a series of questions on program operations, a week of each menu used by the SFA, and a menu worksheet.

iii. State agency reviews: SFAs may be certified in the process of a normal State agency administrative review. An SFA determined by the State agency to be compliant with all meal pattern and nutrient standards during an administrative review will be certified eligible for the performance-based lunch reimbursement.

iv. HealthierUS School Challenge: Individual schools that receive HealthierUS School Challenge awards after July 1, 2012 will be certified eligible for the performance-based lunch reimbursement without further action by the school or SFA.

• *Ongoing compliance:* SFAs must be held compliant with meal pattern and nutrient standards at subsequent State administrative reviews to remain eligible for the performance-based lunch reimbursement.

• *Consequences of non-compliance:* SFAs that are determined non-compliant with meal pattern or nutrient standards, either through State review of the SFAs' initial certification materials, or in an initial or future State administrative review, will not be eligible (or will lose eligibility) for the performance-based lunch reimbursement. State agencies that find SFAs to be non-compliant with meal pattern or nutrient standards must provide technical assistance and encourage SFA corrective action and re-application for certification.

• *State agency validation reviews:* State agencies must perform on-site validation reviews of a 25 percent random sample of certified SFAs during SY 2012–2013. Each validation review can substitute for an administrative review that the State agency would otherwise have to perform during SY 2012–2013.

• *Federal assistance to State agencies:* HHFKA Section 201 provided $50 million in each of the fiscal years 2012 and 2013 to assist States with training, technical assistance, certification, and oversight. As provided by HHFKA, the preamble to the interim rule specified that $3 million would be retained for Federal administration and $47 million would be distributed to the States in each of these 2 years.

## IV. Key Provisions of the Final Rule

This rule finalizes the provisions of the interim rule, including the procedures for performance-based certifications, required documentation and timeframes, validation reviews, compliance and administrative reviews, reporting and recordkeeping, and technical assistance, with a few revisions:

• This final rule amends the reporting requirement at 7 CFR 210.5(d)(2)(ii) to require that State agencies only include in their quarterly SFA performance-based certification report the total number of SFAs in the State and the names of certified SFAs. This represents a simplification of the reporting requirement from the interim rule. The change formalizes the simplification previously adopted by USDA and communicated to State agencies through Policy Memo SP 31–2012.

• This final rule at 7 CFR 210.7(d)(1) makes permanent a flexibility in requirements for weekly maximum grains and meat/meat alternates as originally outlined in Policy Memo SP 26–2013 and the flexibility for serving frozen fruit with added sugar as originally outlined in Policy Memo SP 20–2012. These changes make it easier for SFAs to meet the requirements of the school meals rule, which is a prerequisite for certification for the performance-based reimbursement.

## V. Addressing Comments on the Interim Rule and RIA

The interim rule generated about 200 comments. As noted in the preamble to the final rule, most of the comments pertained to either the school meals rule (e.g., commented on the new meal patterns) or to statutory requirements as set forth in HHFKA (e.g., commented on whether 6 additional cents are sufficient to cover the costs of the new meal patterns). As this RIA does not address the school meals rule and as FNS has no discretion to change the statutory requirements of the rule, this RIA will not address those comments.

### *A. Concerns About State Administrative Costs*

A few comments raised concerns about the cost of the States' quarterly reporting requirement on SFA certification. These comments viewed the reporting requirements as overly burdensome.

In response to these concerns, FNS decreased the amount of information required from States in the quarterly report, as noted above. This change decreases the estimated time it takes one State to prepare and submit a quarterly certification report from one hour under the interim rule to 15 minutes under this final rule. These reports will no longer be required once all SFAs have been certified to receive the performance-based reimbursement.

### *B. Concerns About Certification Costs*

A few comments raised concerns about State or SFA administrative costs to comply with the certification process and with a lack of adequate guidance and training of State agency officials by FNS. Other comments indicated that small SFAs do not have the staff resources, computers, or computer skills necessary to develop compliant menus or to complete the certification process. Some comments questioned whether the additional administrative costs are worth the additional 6 cent reimbursement, and they raised concerns about SFAs' abilities to meet certification requirements in a timely manner.

As noted in the preamble, FNS is encouraged by the number of SFAs that have already completed the certification process successfully. In October 2013, State agencies reported that, as of the end of June 2013, approximately 80 percent of all SFAs participating in the NSLP had submitted certification documentation to their respective State agency for review and certification, with more expected by the end of the school year. In addition, 90 percent of all lunches served in May 2013 received the extra 6 cent reimbursement.

With regard to the training provided to State agencies by FNS, we note that FNS led in-person training sessions with every State agency to assist them with the task of helping SFAs navigate the certification process. FNS also developed webinars, spreadsheet tools, documentation, and other training resources to assist State agencies and SFAs. All of these resources remain available on the FNS Web site.[10] The spreadsheet tools, in particular, are intended to assist SFAs that may not have the time or resources to develop or purchase their own software.[11] FNS recognizes, however, that some SFAs may continue to have difficulty with the process despite these resources. FNS is committed to assisting those SFAs, and the State agency staff who are working with them, by answering additional questions on the certification process as we receive them. FNS also encourages the States to provide additional assistance to SFAs that have not yet submitted requests for certification.

The final rule does not, however, change the requirements in the certification process. Consequently, we also make no fundamental change in the RIA concerning the costs of certification, although we do provide updated estimates of the cost of the interim rule based on the most recent data available. Nevertheless, we note that the other major change between the interim and final rule (i.e., making permanent the flexibility for weekly maximum grains and meat/meat alternates as original outlined in Policy Memo SP 26–2013 and the flexibility for serving frozen fruit with added sugar as originally outlined in Policy Memo SP 20–2012) should make it easier for SFAs to comply with the school meals rule (a prerequisite to becoming certified), though this does not change the certification process

[10] See *http://www.fns.usda.gov/outreach/webinars/child_nutrition.htm* and *http://www.fns.usda.gov/cnd/Governance/Legislation/certificationofcompliance.htm.*

[11] Some comments indicated that the FNS-developed spreadsheet tools were difficult to work with. While FNS will not be changing the tool at this time, FNS has conducted several in-person trainings and webinars to assist State agencies and SFA having difficulties using the tools. Additionally, the FNS Web site lists other commercially available tools that SFAs may find more appropriate or helpful.

itself. As discussed in the preamble and below in Section VI.A.1., we do not find that making permanent these flexibilities negatively impacts the nutritional profile of NSLP meals.

**VI. Cost/Benefit Assessment**

*A. Final Rule*

1. Benefits

The impact analysis for the interim rule [12] (and updated below) estimated that full compliance with the new meal patterns would increase SFA revenues by more than $300 million per year in the aggregate. The changes contained in the final rule are expected to facilitate compliance with the meal patterns, allowing SFAs to take full advantage of the additional revenue. Granting some flexibility on meat, grains, and frozen fruit is an effort by USDA to work with schools that are making serious efforts to comply with the rule's standards but are having some difficulty finding products that have been resized or reformulated specifically to meet the requirements of the rule. To the extent that a little flexibility at the margins encourages schools to plan menus that meet the new standards, students benefit from receiving meals that comply with the new standards rather than receiving meals that do not comply with the new standards.

The benefits to children who consume school meals that follow DGA recommendations are detailed in the impact analysis prepared for the final meal patterns rule.[13] As discussed in that document, the 2010 Dietary Guidelines Advisory Committee emphasizes the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease.[14]

The link between poor diets and health problems such as childhood obesity are a matter of particular policy concern given their significant social and economic costs. Obesity has become a major public health concern in the U.S., second only to physical activity among the top 10 leading health indicators in the United States Healthy People 2020 goals. According to data from the National Health and Nutrition Examination Survey 2007–2008, 34 percent of the U.S. adult population is obese and an additional 34 percent are overweight.[15]

The trend towards obesity is also evident among children; 33 percent of U.S. children and adolescents are now considered overweight or obese,[16] with current childhood obesity rates four times higher in children ages 6 to 11 than they were in the early 1960s (19 vs. 4 percent), and three times higher (17 vs. 5 percent) for adolescents ages 12 to 19.[17] These increases are shared across all socio-economic classes, regions of the country, and have affected all major racial and ethnic groups.[18]

Excess body weight has long been demonstrated to have health, social, psychological, and economic consequences for affected adults.[19] Recent research has also demonstrated that excess body weight has negative impacts for obese and overweight children. Research focused specifically on the effects of obesity in children indicates that obese children feel they are less capable, both socially and athletically, less attractive, and less worthwhile than their non-obese counterparts.[20]

Further, there are direct economic costs due to childhood obesity; $237.6 million (in 2005 dollars) in inpatient costs [21] 70 and annual prescription drug, emergency room, and outpatient costs of $14.1 billion.[22]

Childhood obesity has also been linked to cardiovascular disease in children as well as in adults. Freeman, Dietz, Srinivasan, and Berenson found that ''compared with other children, overweight children were 9.7 times as likely to have 2 [cardiovascular] risk factors and 43.5 times as likely to have 3 risk factors'' (p. 1179) and concluded that ''[b]ecause overweight is associated with various risk factors even among young children, it is possible that the successful prevention and treatment of obesity in childhood could reduce the adult incidence of cardiovascular disease'' (p. 1175).[23] It is known that overweight children have a 70 percent chance of being obese or overweight as adults. However, the actual causes of obesity have proven elusive.[24] While the relationship between obesity and poor dietary choices cannot be explained by any one cause, there is general agreement that reducing total calorie intake is helpful in preventing or delaying the onset of excess weight gain.

There is some recent evidence that food standards can improve children's dietary quality:

- Taber, Chriqui, and Chaloupka compared calorie and nutrient intakes for California high school students—with food standards in place—to calorie and nutrient intakes for high school students in 14 States with no food standards.[25] They concluded that California high school students consumed fewer calories, less fat, and less sugar at school than students in other States. Their analysis ''suggested that California students did not compensate for consuming less within school by consuming more elsewhere'' (p. 455). The consumption of fewer calories in school suggests that competitive standards ''. . . may be a method of reducing adolescent weight gain'' (p. 456).
- A study of competitive food policies in Connecticut concluded that ''removing low nutrition items from schools decreased students' consumption with no compensatory increase at home.'' [26]
- Similarly, researchers for Healthy Eating Research and Bridging the Gap found that ''[t]he best evidence available indicates that policies on snack foods and beverages sold in school impact children's diets and their risk for obesity. Strong policies that prohibit or restrict the sale of unhealthy competitive foods and drinks in schools are associated with lower proportions of overweight or obese students, or lower rates of increase in student BMI.'' [27]

[12] **Federal Register,** Vol. 77, No. 82 pp. 25024–25036.

[13] **Federal Register,** Vol. 77, No.17 pp. 4088–4167.

[14] Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010, p. B1–2. (*http://www.cnpp.usda.gov/DGAs2010-DGACReport.htm*).

[15] C.L. Ogden and M.D. Carroll (2010), ''Prevalence of Overweight, Obesity, and Extreme Obesity among Adults: United States, Trends 1976–1980 through 2007–2008,'' National Center for Health Statistics, June 2010, as cited in *Food Labeling: Calorie Labeling of Articles of Food in Vending Machines,* NPRM (2011). Preliminary Regulatory Impact Analysis, Docket No. FDA–2011–F–0171.

[16] M.A. Beydoun and Y. Wang (2011), ''Socio-demographic disparities in distribution shifts over time in various adiposity measures among American children and adolescents: What changes in prevalence rates could not reveal,'' *International Journal of Pediatric Obesity,* 6:21–35, as cited in *Food Labeling: Calorie Labeling of Articles of Food in Vending Machines,* NPRM (2011). Preliminary Regulatory Impact Analysis, Docket No. FDA–2011–F–0171.

[17] Institute of Medicine (2007), *Progress in Preventing Childhood Obesity: How do we Measure Up? Committee on Progress in Preventing Childhood Obesity,* edited by J.P. Koplan, C.T. Liverman, V.I. Kraak, and S.L. Wisham, Washington, DC: The National Academies Press, p. 24.

[18] S.J. Olshansky, D.J. Passaro, R.C. Hershow, J. Layden, B.A. Carnes, J. Brody, L. Hayflick, R.N. Butler, D.B. Allison, and D.S. Ludwig (2005). ''A Potential Decline in Life Expectancy in the United States in the 21st Century,'' *The New England Journal of Medicine,* 352:1138–1145.

[19] J. Guthrie, C. Newman, and K. Ralston (2009), ''USDA School Meal Programs Face New Challenges,'' *Choices: The Magazine of Food, Farm, and Resource Issues,* 24 (available online at *http://www.choicesmagazine.org/magazine/print.php?article=83*); and Y. Wang, M.A. Beydoun, L. Liang, B. Cabellero and S.K. Kumanyika (2008), ''Will all Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic,'' *Obesity,* 16: 2323–2330.

[20] A. Riazi, S. Shakoor, I. Dundas, C. Eiser, and S.A. McKenzie (2010), ''Health-related quality of life in a clinical sample of obese children and adolescents,'' *Health and Quality of Life Outcomes,* 8:134–139.

[21] L. Trasande, Y. Liu, G. Fryer, and M. Weitzman (2009), ''Trends: Effects of Childhood Obesity on Hospital Care and Costs, 1999–2005,'' *Health Affairs,* 28:w751–w760.

[22] J. Cawley (2010), ''The Economics of Childhood Obesity,'' *Health Affairs,* 29:364–371, as cited in *Food Labeling: Calorie Labeling of Articles of Food in Vending Machines,* NPRM (2011). Preliminary Regulatory Impact Analysis, Docket No. FDA–2011–F–0171.

[23] D.S. Freeman, W.H. Dietz, S.R. Srinivasan, and G.S. Berenson (1999), ''The Relation of Overweight to Cardiovascular Risk Factors Among Children and Adolescents: The Bogalusa Heart Study,'' *Pediatrics,* 103:1175–1182.

[24] ASPE, Health & Human Services (No Date), ''Childhood Obesity,'' Assistant Secretary for Planning and valuation, U.S. Department of Health & Human Services. Available online at *http://aspe.hhs.gov/health/reports/child_obesity.*

[25] D.R. Taber, J.F. Chriqui, and F.J. Chaloupka (2012), ''Differences in Nutrient Intake Associated With State Laws Regarding Fat, Sugar, and Caloric Content of Competitive Foods,'' *Archives of Pediatric & Adolescent Medicine,* 166:452–458.

[26] M.B. Schwartz, S.A. Novak, and S.S. Fiore (2009), ''The Impact of Removing Snacks of Low Nutritional Value from Middle Schools,'' *Health Education & Behavior,* 36:999–1011, p. 999.

[27] Healthy Eating Research and Bridging the Gap (2012), ''Influence of Competitive Food and Beverage Policies on Children's Diets and

Continued

Pew Health Group and Robert Wood Johnson Foundation researchers noted that the prevalence of children who are overweight or obese has more than tripled in the past three decades,[28] which is of particular concern because of the health problems associated with obesity. In particular, researchers found an increasing number of children are being diagnosed with type 2 diabetes, high cholesterol, and high blood pressure. These researchers further observed that children with low socioeconomic status and black and Hispanic children are at a higher risk of experiencing one or more of these illnesses (pp. 39–40, 56). Their analysis also noted that: [T]here is a strong data link between diet and the risk for these chronic diseases. Given the relationship between childhood obesity, calorie consumption, and the development of chronic disease risk factors at a young age, this report proposes that a national policy could alter childhood and future chronic disease risk factors by reducing access to certain energy-dense foods in schools. To the extent that the national policy results in increases in students' total dietary intake of healthy foods and reductions in the intake of low-nutrient, energy-dense foods, it is likely to have a beneficial effect on the risk of these diseases. However, the magnitude of this effect would be proportional to the degree of change in students' total dietary intake, and this factor is uncertain (p. 68).

In summary, the most current, comprehensive, and systematic review of existing scientific research concluded that foods standards can have a positive impact on reducing the risk for obesity-related chronic diseases. Because the factors that contribute both to overall food consumption and to obesity are so complex, it is not possible to define a level of disease or cost reduction that is attributable to the changes in foods resulting from implementation of this rule. USDA is unaware of any comprehensive data allowing accurate predictions of the effect of increasing the flexibility in meeting certain dietary requirements by SFA's to certify compliance for the National program and subsequent changes in consumer choice and, especially among children. But to illustrate the magnitude of the potential benefits of a reduction in childhood obesity, based on $237.6 million in inpatient costs and $14.1 billion in outpatient costs, a one percent reduction in childhood obesity implies a $143 million reduction in health care costs.

Some researchers have suggested possible negative consequences of regulating nutrition content in school foods. They argue that not allowing access to low nutrient, high calorie snack foods in schools may result in overconsumption of those same foods outside the school setting (although as noted earlier, Taber, Chriqui, and Chaloupka concluded overcompensation was not evident among the California high school students in their sample).

The new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally. Those goals of the meal patterns rule are furthered to the extent that this rule contributes to full compliance with the meal patterns by all SFAs.

The changes adopted in the final rule (summarized in Section IV) are intended to facilitate SFA compliance with the meal pattern requirements and reduce State agency reporting and recordkeeping burden. By making permanent the flexibility on weekly maximum servings of grains and meat/meat alternates, and by allowing frozen fruit with added sugar to credit toward the meal pattern requirement for fruit, the final rule will make it easier for some SFAs to plan menus that comply with the meal pattern requirements.[29]

The added flexibility on weekly maximum servings of grains and meat/meat alternates will benefit SFAs who may continue to rely on prepared foods or recipes that ensure compliance with daily and weekly minimum quantities but may exceed weekly maximums in some weeks. However, because the meal patterns' weekly calorie requirements remain in place, the added flexibility on grains and meat/meat alternates is unlikely to have a significant effect on the overall quantity of food served, the cost of acquiring that food, or the nutritional profiles of the meals served.

Allowing frozen fruit with added sugar to credit toward the meal patterns' fruit requirement also provides SFAs greater flexibility in purchasing foods for use in the school meal programs. Permitting schools to make use of a wider range of currently available frozen fruit products may reduce the administrative costs of finding and acquiring compliant foods for use in the meal programs. But, like the grains and meat/meat alternate provision, because the calorie limits are still in place, allowing added sugar in frozen fruit products will not undermine the updated nutrition standards.[30]

It is important to emphasize that menus developed by SFAs that are certified eligible for the additional 6 cent reimbursement must meet all of the minimum food group requirements contained in the final school meals rule, whether or not those SFAs take advantage of the added flexibilities of this rule. In addition, all SFAs are held to the same maximum calorie standards contained in the final school meals rule. Those standards are not meal-based. Instead, SFA compliance with the food group standards is assessed by comparing the weighted average amounts served across all meals served per day or in an entire week. Children in SFAs that are certified compliant under the modified standards of this rule will be served meals that satisfy *the same minimum requirements* as meals served in SFAs that were certified compliant under the original terms of the final school meals rule. Even in the absence of the flexibility added by this rule, the amount of meat and grains served in individual meals will vary significantly from the weighted average minimum and maximum amounts required over the course of a day or week. The changes in this rule recognize that additional flexibility on the upper end of the required range for meat and grains allows SFAs to use products that were formulated prior to the final school meal rule standards and to satisfy student demand. This rule does not offer SFAs a way to reduce the minimum amounts served from any of the food groups emphasized by the final school meal rule. And because this rule does not modify the final school meal rule's maximum calorie requirements, the new flexibility is limited and does not weaken the school meal standards' focus on childhood obesity.[31]

The final school meal rule establishes a primarily food-based set of requirements; these are designed to comply with the recommendations of the DGAs regarding the consumption of a variety of foods from key food groups. The school meal rule sets just a handful of macronutrient standards (for calories, saturated fat, sodium, and trans fat). The changes contained in this rule require SFAs to serve meals that satisfy the same minimum requirements from each of the food groups identified in the final school meal rule without relaxing any of that rule's macronutrient standards. In short, this rule's additional flexibility, designed to make it marginally easier to meet compliance with the new meal standards.

Schools that adopt healthier food standards for their school lunch programs will improve the dietary intake for children at school and make it more likely that those students will have improved health outcomes. However, by allowing greater flexibility in meeting the school lunch dietary standards, it may be that some compliant SFAs relax their implementation of those guidelines somewhat.

USDA has not quantified what changes may result to the overall nutritional content of SFAs availing themselves of those

Childhood Obesity,'' p. 3. Available online at *http://www.healthyeatingresearch.org/images/stories/her_research_briefs/Competitive_Foods_Issue_Brief_HER_BTG_7-2012.pdf.*

[28] Pew Health Group and Robert Wood Johnson Foundation (2012), *Heath Impact Assessment: National Nutrition Standards for Snack and a la Carte Foods and Beverages Sold in Schools.* Available online at *http://www.pewhealth.org/uploadedFiles/PHG/Content_Level_Pages/Reports/KS%20HIA_FULL%20Report%20062212_WEB%20FINAL-v2.pdf.*

[29] As explained in this section and in the preamble to the rule, making permanent this flexibility does not compromise the nutritional profile of school meals. IOM's recommendations were to serve food in minimum amounts subject to maximum calorie limits; the additional flexibility allowed by these provisions is still subject to the maximum calorie limits for school meals.

[30] We note that, in SY 2009–2010, frozen fruit accounted for only 17% of the fruit used by US schools. See p. 83 of USDA/FNS, School Food Purchase Study III (2012). Available online at *http://www.fns.usda.gov/Ora/menu/Published/CNP/FILES/SFSPIII_Final.pdf.*

[31] The final rule's flexibility on sugar contained in frozen fruit is also constrained by the retention of the interim rule's calorie restrictions. Because the interim rule already allowed for added sugar in canned fruit, the final rule's modification of the frozen fruit standard is primarily a means to widen the selection of processed fruit available to SFAs under nutrient standards that are comparable to the standards already allowed under the interim rule for other processed fruit. In the absence of the final rule provision on frozen fruit with added sugar, SFAs remained free to serve canned fruit in light syrup rather fresh or processed fruit without added sugar.

flexibility provisions. There are relatively few SFAs (relative to the total number of SFAs complying with school lunch dietary guidelines) that would significantly change the dietary composition of their school lunch program one way or the other. Those two effects (described above) are offsetting and so the net effects of these changes on the benefits to school children are likely to be marginal relative to the overall benefits afforded by the dietary standards.

Because of the macronutrient requirement is not adjusted, any resulting changes to the nutritional quality of the NSLP and SBP meals served by SFAs are expected to marginal, and so there would likely be few changes to the benefits to children relative to the final school meal rule or to the interim rule on certification for the 6 cent reimbursement.

2. Costs and Transfers

The baseline for our estimate of the cost of the final rule is the estimate for the interim final rule, which we update below using the latest President's Budget projections and preliminary data on certifications for the performance-based reimbursement.

The provisions in the final rule will likely result in a small increase in cost to the Federal Government (as a result of a transfer of Federal funds in the form of additional performance-based reimbursements to a small number of schools receiving the performance-based reimbursement that might have otherwise not received it), though we expect this potential increase to fall within the cost range estimated for the interim final rule, as updated below.

The effect of the provisions in the final rule (i.e. increased flexibility on grains, meats, and frozen fruits with added sugar) is to reduce the costs of compliance for the small minority of SFAs that would otherwise not have been certified compliant with the new meal standards by the end of SY 2013–2014. The policy memos issued by FNS in September 2012 and February 2013 had already extended these provisions through the end of SY 2013–2014.

These provisions are essentially administrative efficiency measures that will reduce meal pattern compliance costs at the margin for some SFAs; the provisions are not expected to have a significant effect on food costs. Since these provisions are options (not requirements) and because we have no data on how many schools might avail themselves of either of these options, we do not estimate those cost savings in this analysis.

Given these assumptions about a phased certification process for some SFAs, the estimated cost of Federal performance-based reimbursements (and the value of additional SFA revenue) is $1.54 billion through FY 2017 (1 percent less than the $1.55 billion estimated with full implementation).

To the extent that the additional flexibilities afforded SFAs, this rule could result in marginally lower costs to SFAs relative to the interim final rule baseline. USDA has not quantified those changes as there are relatively few SFAs (relative to the total number of SFAs complying with school lunch dietary guidelines) that would significantly change the dietary composition of their school lunch program one way or the other.

The added flexibility on weekly maximum servings of grains and meat/meat alternates could benefit SFAs who may continue to rely on prepared foods or recipes that ensure compliance with daily and weekly minimum quantities but may exceed weekly maximums in some weeks. That provision may reduce the administrative costs of meal planning for some SFAs, and may reduce the costs associated with modifying recipes or finding new prepared foods in the market with slightly different formulations than products currently purchased.

Because the flexibility on grains, meat/meat alternates, and frozen fruit had previously been extended by FNS through SY 2013–2014, the effect of these provisions on the initial certification of SFAs for the performance-based reimbursement is expected to be very small. Administrative data on certifications approved or pending through May 2013 indicate that only a small minority of SFAs are likely to remain uncertified by the end of SY 2013–2014. For those SFAs, these provisions may help reduce the costs of certification after that time.[32] For all other SFAs, these provisions will make it marginally easier to maintain compliance with daily and weekly meal pattern requirements, a necessary condition for continued receipt of the performance-based reimbursement. We expect these provisions to generate a small but uncertain cost savings for SFAs through a small reduction in SFA compliance costs.

The rule also finalizes the change in State agency quarterly reporting requirement on SFA certification. That change, previously adopted through Policy Memo SP–31–2012, reduces quarterly State agency reporting burden to an estimated 15 minutes per quarter per State agency.[33] The last change, contained in the preamble to the final rule, will eliminate the requirement that State agencies submit quarterly reports on SFA certification for the performance-based rate increase once all SFAs have been certified. The administrative savings from this provision is minimal.[34]

*B. Updated Analysis of Interim Rule Effects*

The analysis provided below updates a similar analysis prepared for the interim rule impact analysis.[35] We update the figures here using data on actual SFA certifications that were not available when the interim rule was published in April 2012, as well as new financial and participation projections provided in the 2014 President's Budget. The data collected since April 2012 allows for a more precise estimate of SFA certifications and receipt of performance-based reimbursements in FY 2013 and projections for fiscal years 2014 through 2017. This analysis is presented for the information of those interested in the effects of the rule on SFAs, State agencies and USDA. It provides estimates of the economic impact of the rule overall, not just the incremental effects of the final rule.

Two estimates are provided in recognition of the uncertainty of how quickly SFAs will be determined compliant with the new meal standards and, therefore, how soon they will be eligible for the performance-based rate increase. Data available as of October 2013 shows that 73% of meals served in FY2013 have been certified for the performance-based reimbursement as of July 2013, with 90% of meals served in May 2013 certified as of July 2013. Given the rate of retroactive certification of SFAs and meals, our upper bound (primary) estimate assumes that all SFAs will be certified by the end of FY 2013 and that 80% of the lunches served in FY 2013 will eventually be certified to receive the additional 6 cent reimbursement.

As of October 2013, administrative data that indicate that 80 percent of SFAs had been certified or had submitted certification documentation to their respective State agency for review and certification by the end of June 2013. It assumes that the remaining 20 percent of SFAs will be certified (or certified retroactively) in the remaining months of the fiscal year. Administrative data also indicate that 90 percent of meals served in May 2013 qualified for the extra 6 cent reimbursement, and that many SFAs are being certified retroactively as the processing of applications and approval of certification requests catch up with SFAs' documented compliance with the new meal patterns.[36]

Our alternate scenario relies on administrative data on certifications through the first several months of SY 2012–2013 to estimate the revenues and costs of a phased implementation that assumes full compliance during FY 2014. For both estimates, we assume that 80% of the meals served in FY 2013 will qualify for the additional 6 cent reimbursement; in the alternate estimate, we assume 95% of meals will qualify in FY 2014, and 100% will qualify in FY 2015 and beyond. In addition, in this second scenario

[32] As we note above, approximately 80 percent of SFAs had submitted documentation to their respective State agencies for review and certification as of June 2013. Administrative data also show that many SFAs are being certified retroactively as the processing of applications and approval of certification requests catch up with SFAs' documented compliance with the new meal patterns. With or without the changes contained in the final rule, State agency technical assistance will likely concentrate on this subset of uncertified SFAs during SY 2013–2014. Those efforts are likely to substantially reduce the number of non-certified SFAs by the end of SY 2013–2014. It is that remaining subset of SFAs that may benefit most from the permanent extension of the grains, meat/meat alternate, and frozen fruit policy changes contained in the final rule.

[33] Estimate developed for Paperwork Reduction Act reporting and contained in the preamble to the rule. Because this change was already adopted by USDA through a policy memo, the reduction in burden for State agencies is part of our baseline, and the formalization of that policy by the final rule does not further reduce State agency reporting costs.

[34] Although the relative burden decrease of 75% seems substantial, the absolute burden decrease (as measured in the dollar value of State agency staff time) is only about $4,000 per year across the entire United States.

[35] **Federal Register,** Vol. 77, No. 82 pp. 25024–25036.

[36] I.e., the number of meals certified for the performance-based reimbursement in the early months of the school year increases with each additional month of administrative data reported by the States.

we assume that roughly 90 percent of SFAs will be found compliant by the end of FY 2013, or certified compliant retroactively to the start of FY 2014. We further assume that the remaining 10% of SFAs will be certified sometime during FY 2014, and that 95% of FY 2014 lunch reimbursements will include the performance-based 6 cents. We assume that 100 percent of SFAs (and, consequently, 100 percent of meals) will be certified to receive the performance-based reimbursement in FY 2015 and beyond.

TABLE 3—SUMMARY OF REVENUE AND COST IMPACT, UPDATED ESTIMATE FOR INTERIM RULE, FY 2013–2017 [37]

[millions]

| | Fiscal year | | | | | |
|---|---|---|---|---|---|---|
| | 2013 | 2014 | 2015 | 2016 | 2017 | Total (FY 2013–2017) |
| **Upper bound (primary) estimate** | | | | | | |
| **SFAs and State agencies** | | | | | | |
| SFA revenue (NSLP reimbursements) | $255.3 | $321.3 | $323.3 | $325.4 | $327.6 | $1,553.0 |
| Federal transfer to States for technical assistance | 47.0 | 0.0 | 0.0 | 0.0 | 0.0 | 47.0 |
| State agency and SFA reporting and recordkeeping | −2.9 | ** | ** | ** | ** | −2.9 |
| **Federal** | | | | | | |
| Technical assistance to States | −50.0 | $0.0 | $0.0 | $0.0 | $0.0 | −50.0 |
| NSLP reimbursements | −255.3 | −321.3 | −323.3 | −325.4 | −327.6 | −1,553.0 |
| **Alternate estimate** | | | | | | |
| **SFAs and State agencies** | | | | | | |
| SFA revenue (NSLP reimbursements) | 255.3 | 305.2 | 323.3 | 325.4 | 327.6 | 1,536.9 |
| Federal transfer to States for technical assistance | 47.0 | 0.0 | 0.0 | 0.0 | 0.0 | 47.0 |
| State agency and SFA reporting and recordkeeping | −2.5 | −0.4 | ** | ** | ** | −2.9 |
| **Federal** | | | | | | |
| Technical assistance to States | −50.0 | 0.0 | 0.0 | 0.0 | 0.0 | −50.0 |
| NSLP reimbursements | −255.3 | −305.2 | −323.3 | −325.4 | −327.6 | −1,536.9 |

** Estimated at less than $50,000.

NOTE: Positive values indicate increase in revenues; negative values indicate increase in costs.

1. Methodology

The estimated increase in the Federal cost of NSLP reimbursements is a straightforward calculation of the number of meals that are certified in compliance with the new meal standards times 6 cents (adjusted for inflation). This approach applies the additional 6 cents to USDA's baseline projection of lunches. The 6 cents is subject to the same inflation adjustment applied to the Section 4 and Section 11 components of the lunch reimbursement, rounded down to the nearest cent.[38] The interim rule inflates the 6 cents separately from the Section 4 or Section 11 rates. Given our projected increase in the CPI Food Away from Home, we estimate that the 6 cents will remain unchanged through FY 2017.[39]

Full Implementation by October 1, 2013

If all SFAs are certified eligible for the performance-based 6 cent lunch rate increase as of October 1, 2013 (as assumed in the primary estimate), then the Federal cost and SFA revenue increase from FY 2013 through FY 2017 would total about $1.55 billion. This upper bound estimate (our primary estimate) assumes full compliance with the new breakfast and lunch meal patterns' food group and nutrient requirements by the start of (or retroactive to the start of) SY 2013–2014.

The added revenue will be distributed across SFAs in proportion to the number of reimbursable lunches served. Because students eligible for free or reduced-price meals participate in the school meals programs at higher rates than other students, revenue per enrolled student will tend to be higher in SFAs with the greatest percentage of free and reduced-price certified students. However, eligibility for free or reduced price meals is not the only factor that impacts student participation in the NSLP. Other factors that vary by SFA include the distribution of students by grade level, prices charged for paid lunches, availability of offer vs. serve (in elementary and middle schools), the variety of entrees offered, and school geography.[40]

[37] We note that the estimates in this table are largely consistent with the estimates published with the interim rule; the main differences are caused by (1) the exclusion of FY 2012 and the inclusion of FY 2017 in the above table, and (2) a small downward revision in the estimated number of lunches served in future Fiscal Years, resulting in an decrease in estimated Federal transfers to SFAs for reimbursable lunches. We also note that the 2014 President's Budget likely overstates the final number of lunches that will be served in FY2013, but we use the 2014 President's Budget as our basis of analysis for consistency's sake, both for internal consistency and consistency with past estimates.

[38] The fractional cents are not lost; they are added back to the base rate before applying the next year's inflation adjustment.

[39] The CPI Food Away From Home Index is the factor specified by NSLA Section 11 to adjust the reimbursement rates for school lunch and breakfast. Our projected values for this index are those prepared by OMB for use in the 2014 President's Budget.

[40] *School Nutrition Dietary Assessment Study-III,* Vol. 2, Table IV.2. Mathematica Policy Research, Inc. for U.S. Department of Agriculture, Food and Nutrition Service, 2007. Available online at *http://www.fns.usda.gov/ora/MENU/Published/CNP/cnp.htm.*

The data available do not allow us to account for each of those variables here. Instead we estimate the distribution of revenue across SFAs under the assumption that revenue is proportional to enrollment. Table 4 provides estimated revenue distributions across SFAs by SFA size, geography, and incomes of enrolled students.[41]

TABLE 4—ESTIMATED DISTRIBUTION OF ADDITIONAL REVENUE FROM PERFORMANCE-BASED RATE INCREASE[42]

| | Percent of students | Share of new revenue: primary estimate, FY 2013–17 (if proportional to enrollment) |
|---|---|---|
| **LEA enrollment** | | |
| 1–500 | 3 | $42.8 |
| 501–1,000 | 4 | 62.3 |
| 1,001–2,500 | 11 | 172.4 |
| 2,501–5,000 | 14 | 223.4 |
| 5,001–10,000 | 15 | 229.8 |
| 10,001–25,000 | 19 | 290.0 |
| 25,001–50,000 | 15 | 226.2 |
| 50,001 + | 20 | 306.3 |
| All | 100 | 1,553.0 |
| **Census region** | | |
| Northeast | 16 | 251.8 |
| Midwest | 21 | 332.7 |
| South | 37 | 581.7 |
| West | 24 | 370.6 |
| Territories | 1 | 16.2 |
| All | 100 | 1,553.0 |
| **Urbanicity** | | |
| City | 31 | 479.5 |
| Suburb | 38 | 584.8 |
| Town | 12 | 183.3 |
| Rural | 20 | 305.4 |
| All | 100 | 1,553.0 |
| **Percent of enrollment certified for free or reduced price school meals** | | |
| 0.0–19.9% | 14 | 218.2 |
| 20.0–39.9% | 23 | 361.1 |
| 40.0–59.9% | 33 | 507.6 |
| 60.0–79.9% | 23 | 350.5 |
| 80.0–100.0% | 7 | 115.5 |
| All | 100 | 1,553.0 |

Phased Implementation Within 2 Years

As we note above, State agencies reported in October 2013 that more than 80 percent of all SFAs participating in the NSLP had submitted certification documentation to their respective State agency for review and certification by the end of June 2013, and that 90 percent of meals qualified for the higher reimbursement in May. Administrative data also show that many SFAs are being certified retroactively as the processing of applications and approval of certification requests catch up with SFAs' documented compliance with the new meal patterns. Consequently, we feel comfortable assuming for this alternate analysis that roughly 90 percent of SFAs will be found compliant by the end of FY 2013, or certified compliant retroactively to the start of FY 2014.

We further assume that the remaining 10% of SFAs will be certified sometime during FY 2014, and that 95% of FY 2014 lunch reimbursements will include the performance-based 6 cents. We assume that 100 percent of SFAs (and, consequently, 100 percent of meals) will be certified to receive the performance-based reimbursement in FY 2015 and beyond.

Given these assumptions about a phased certification process for some SFAs, the estimated cost of Federal performance-based reimbursements (and the value of additional SFA revenue) is $1.54 billion through FY 2017 (1 percent less than the $1.55 billion estimated with full implementation).

2. Administrative Costs

Our updated estimate of administrative costs differs only slightly from the estimate published with the interim final rule.[43] The only change is a slight shifting in when

[41] Table 4 is based on SY 2009–2010 data for public local educational agencies (LEAs) from the Common Core of Data, U.S. Department of Education, National Center for Education Statistics. *http://nces.ed.gov/ccd/*. LEA and SFA boundaries are generally the same, but do vary in some instances.

[42] The distribution of States by Census region was taken from *http://www.census.gov/geo/www/us_regdiv.pdf*. The territories included here are Puerto Rico, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

The urbanicity categories are U.S. Department of Education, National Center for Education Statistics ''urban-centric local codes.'' ''City'' is any territory, regardless of size, that is inside an urbanized area and inside a principal city. ''Suburb'' is any territory, regardless of size, inside an urbanized area but outside a principal city. ''Town'' is a territory of any size inside an urban cluster but outside an urbanized area. ''Rural'' is a Census-defined rural territory outside both an urbanized area and an urban cluster. These definitions are contained in documentation for the SY 2009–2010 Common Core of Data, *http://nces.ed.gov/ccd/*.

Percent of enrollment certified for free or reduced-price meals is also an NCES Common Core of Data variable.

[43] **Federal Register** Vol. 77, No. 82 pp. 25024–25036.

certification expenses were incurred (or are estimated to be incurred), based on administrative data on certifications received after publication of the interim rule, as well as accounting for additional wage inflation.

As most SFAs submitted documentary materials in FY 2012 or FY 2013, most of the cost of this administrative burden was realized in those years, and we note that FY 2012 is not subject to this formal cost analysis. States reported 23.4 percent of SFAs were certified to receive the performance-based reimbursement for October 2012 and therefore incurred certification costs in FY2012. For purposes of our primary analysis, we assume that the remaining 76.6 percent did so by the end of FY 2013 (as described above, we currently only have data through June 2013).

Based on this updated information on when certifications occurred, we estimate in our primary estimate that State agency and SFA administrative costs associated with the rule totaled $3.7 million across FY 2012 and FY 2013 if all SFAs were determined compliant with the new meal standards based on an initial submission of SFA documentation. $2.9 million of these costs were realized in FY 2013 and are therefore included in the tables above. The ongoing burden created by reporting and recordkeeping requirements are not expected to be appreciably higher than they were before the implementation of the interim rule.

Under our alternate scenario, we assume that an additional 66.6 percent of SFAs submitted documentation by the end of FY 2013 and that the remaining 10 percent of SFAs did not submit applications to their State agencies in FY 2013.[44] For this estimate, we assume that these SFAs will take the steps necessary to reach compliance in FY 2014, and will submit documentation to their State agencies in that fiscal year, so those certification costs for both the States and remaining SFAs are realized in FY 2014.

Administrative costs will be similar, but will be spread over two years under our alternate scenario of less than 100 percent SFA compliance with the new standards by the start of SY 2013–2014. The cost of preparing and processing initial certification claims in FY 2012 and FY 2013 by 90 percent of SFAs will equal $3.4 million, of which $2.5 million was realized in FY 2013. The cost of submitting and processing the remaining claims will equal $0.4 million in FY 2014.

Due to inflation, SFAs and State agencies that submit or process documentation in FY 2014 will face slightly higher labor costs than those that submitted documentation in prior fiscal years, though this cost increase is too small to appear in our tables at the level of detail presented.

3. Uncertainties

The most significant unknown in this analysis is the length of time it will take all SFAs to reach full compliance. Our primary revenue and cost estimate developed in the previous section assumes full compliance by October 2013.[45] Our alternate estimate assumes that 10 percent of SFAs are certified compliant with the rule sometime in FY 2014.

Because the economic effects are essentially proportionate to the level of SFA compliance, the effects of more or less optimistic scenarios can be estimated by scaling the effects of our alternate scenario upward or downward by the assumed rates of initial and future year compliance.

Another important unknown is the student response to the introduction of new meal patterns. Although the introduction of healthier meals may attract new participants to the school meals program, the replacement or reformulation of some favorite foods on current school menus may depress participation, at least initially. As we did in the impact analysis for the school meal patterns rule, we provide alternate estimates given a 2 percent increase and a 2 percent decrease in student participation. The estimates shown here are simply 2 percent higher (or lower) than our estimates in Table 3. That is, we estimate the effect of changes in student participation on the value of the performance-based rate increase alone.

Changes in participation would also affect the current Section 4 and Section 11 reimbursements and student payments for paid and reduced price lunches. Because those effects are not a consequence of the 6 cent rate increase, but rather a consequence to the change in the content of the meals served, we exclude them from Table 5.

Table 5 does not show the effects on administrative costs (reporting and recordkeeping by State agencies and SFAs, and the technical assistance funds transferred by the Federal government to the States). Those are unchanged from Table 3.

TABLE 5—ALTERNATE REVENUE AND COST IMPACTS

[in millions]

| | Fiscal year | | | | | |
|---|---|---|---|---|---|---|
| | 2013 | 2014 | 2015 | 2016 | 2017 | Total (FY 2013–2017) |
| **2 Percent Increase in Student Participation** | | | | | | |
| **Full Implementation** | | | | | | |
| SFA revenue (NSLP reimbursements) .... | $260.5 | $327.7 | $329.8 | $332.0 | $334.1 | $1,584.0 |
| **Phased Implementation** | | | | | | |
| SFA revenue (NSLP reimbursements) .... | 260.6 | 311.3 | 329.8 | 332.0 | 334.1 | 1,567.6 |
| **2 Percent Decrease in Student Participation** | | | | | | |
| **Full Implementation** | | | | | | |
| SFA revenue (NSLP reimbursements) .... | 250.2 | 314.8 | 316.9 | 318.9 | 321.0 | 1,521.9 |
| **Phased Implementation** | | | | | | |
| SFA revenue (NSLP reimbursements) .... | 250.2 | 299.1 | 316.9 | 318.9 | 321.0 | 1,506.2 |

[44] Our alternate estimate of Federal reimbursements in Section V.B. assumes that 90 percent of SFAs will be certified compliant by the start of FY 2014, *or retroactively back to the start of FY 2014.* That allows for the possibility that fewer than 90 percent of SFAs will submit applications for certification before the end of FY 2013. For the sake of simplicity, we assume in the alternative administrative cost section of this analysis that 90 percent of applications for certification *are submitted before the end of FY 2013.*

[45] Note that, even though this RIA was most recently revised in October 2013, data were only available through June 2013.

4. Benefits

The interim rule will result in a transfer from the Federal government to SFAs of as much as $1.55 billion through FY 2017 to implement the new breakfast and lunch meal patterns that took effect on July 1, 2012. The Federal cost is fully offset by an identical benefit to SFAs and State agencies.

The interim rule generates significant additional revenue for SFAs that partially offset the additional food and labor costs to implement the improved meal standards more fully aligned with the *Dietary Guidelines for Americans.* For example, USDA previously estimated that the improved meal standards would cost an additional $1,220.2 million in FY 2015 (the first year in which the new standards are fully implemented).[46] The rule will generate $323.3 million in additional SFA revenue in the same fiscal year, helping school districts cover about 26% of this additional cost. USDA has also estimated that the paid lunch pricing and non-program food revenue provisions of HHFKA sections 205 and 206 will generate $7.5 billion in revenue for SFAs through FY 2015.[47] In the aggregate, therefore, these provisions provide a net gain in SFA revenue that exceeds the estimated cost of serving school meals that follow the *Dietary Guidelines.*

The benefits to children who consume school meals that follow DGA recommendations is detailed in the impact analysis prepared for the final meal patterns rule.[48] As discussed in that document, the 2010 Dietary Guidelines Advisory Committee emphasizes the importance of a diet consistent with DGA recommendations as a contributing factor to overall health and a reduced risk of chronic disease.[49] The new meal patterns are intended not only to improve the quality of meals consumed at school, but to encourage healthy eating habits generally. Those goals of the meal patterns rule are furthered by the funding made available by this final rule.

**VII. Alternatives**

The substantive differences between the interim and final rules are:

1. Decreasing the amount of information required in the States' quarterly certification reports and clarifying that the reports need not be submitted once all SFAs are certified for the performance-based reimbursement; and

2. making permanent the increased flexibility for SFAs regarding weekly maximum grains and meat/meat alternates and the serving of frozen fruit with added sugar.

These changes all decrease the administrative and/or compliance burden on States and SFAs and/or increase the flexibility for SFAs in serving lunches and breakfasts that comply with the school meal patterns, thereby decreasing costs to States and SFAs. The primary alternative considered in the course of developing the final rule was not to make these changes.

We do not provide a separate cost estimate for this ''doing nothing'' alternative because the decrease in burden associated with the shorter quarterly reports for States is small[50] (less than $50,000 per year) and because the additional transfers possibly attributable to the increase in flexibility to SFAs are likely within the cost estimate range published with the interim rule[51] and updated above.

**VIII. Accounting Statement**

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf*), we have prepared an accounting statement showing the annualized estimates of benefits, costs and transfers associated with the provisions of this final rule.

The figures in the accounting statement are the estimated discounted, annualized costs and transfers of the rule. The figures are computed from the nominal 5-year estimates developed above and summarized in Table 3. The accounting statement contains figures computed with 7 percent and 3 percent discount rates for both our upper bound (primary) estimate and our alternate estimate.

Note that we only provide an accounting statement for the final rule, not for the interim rule (as the interim rule was the baseline for our cost analysis for the final rule). As noted in the above analysis, any possible changes in costs or transfers attributed to the final rule are small and are likely within the cost estimate range published with the interim rule and updated above.

Illustration of computation:

The annualized value of this discounted cost stream over FY 2013–2017 is computed with the following formula, where PV is the discounted present value of the cost stream, *i* is the discount rate (e.g., 7 percent), and *n* is the number of years (5)[52]:

$$PV \div \left[ \frac{1 - \frac{1}{(1+i)^{(n-1)}}}{i} + 1 \right]$$

| | Estimate | Year dollar | Discount rate (percent) | Period covered |
|---|---|---|---|---|
| **Benefits** | | | | |
| *Qualitative:* Compared with the interim rule, the final rule slightly decreases the reporting burden on States and makes permanent the increased flexibility for SFAs regarding weekly maximum grains and meat/meat alternates and the serving of frozen fruit with added sugar. | | | | |
| **Costs** | | | | |
| Annualized Monetized ($millions/year) | n.a. | 2013 | 7 | FY2013–2017 |
| | n.a. | 2013 | 3 | |
| As discussed in Section V.A., the reduction in administrative costs to State agencies as a result of the reduced quarterly reporting requirement on SFA compliance is already in our baseline. The reduction in burden for State agencies who will no longer have to submit quarterly reports on SFA compliance once all SFAs have been certified is minimal. The final rule may also slightly reduce the costs of complying with the meal patterns for some SFAs, and reduce the costs of maintaining compliance by others. This reduction in SFA cost is not estimated, and likely lies within our range of alternate estimates for the interim rule. | | | | |

[46] **Federal Register**, Vol. 77, No. 17 pp. 4088–4167.

[47] USDA estimate contained in the regulatory impact analysis for the interim rule, ''National School Lunch Program: School Food account Revenue Amendments Related to the Healthy, Hunger-Free Kids Act of 2010.'' **Federal Register** Vol. 76, No. 117, pp. 35301–35318.

[48] **Federal Register**, Vol. 77, No. 17 pp. 4088–4167.

[49] Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010, p. B1–2. (*http://www.cnpp.usda.gov/DGAs2010-DGACReport.htm*).

[50] Furthermore, we do not estimate any Federal administrative savings as a result of the shorter quarterly reports.

[51] **Federal Register**, Vol. 77, No. 82 pp. 25024–25036.

[52] The Excel formula for this is PMT (rate num; periods, PV, 0, 1)

| | Estimate | Year dollar | Discount rate (percent) | Period covered |
|---|---|---|---|---|
| **Transfers** | | | | |
| Annualized Monetized | n.a. | 2013 | 7 | FY2013–2017 |
| (millions/year) | n.a. | 2013 | 3 | |

The changes in the final rule that are designed to facilitate compliance with the new meal patterns are expected to increase slightly the number of SFAs that are certified by their State agencies to receive the additional 6 cents per reimbursable lunch. This increased transfer from the Federal government to SFAs will be realized after the end of SY 2013–2014 (primarily in FY 2014 and beyond) when the grains, meat/meat alternate, and frozen fruit provisions contained in FNS policy memos would have expired in the absence of the rule. This possible, small increase in Federal transfers to SFAs also likely lies within our range of alternate estimates for the interim rule.

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## FEDERAL RESERVE SYSTEM

## 12 CFR Part 237

**[Docket No. R–1458; RIN 7100 AD 96]**

## Prohibition Against Federal Assistance to Swaps Entities (Regulation KK)

**AGENCIES:** Board of Governors of the Federal Reserve System (''Board'').

**ACTION:** Final rule.

**SUMMARY:** The Board is adopting a final rule that treats an uninsured U.S. branch or agency of a foreign bank as an insured depository institution for purposes of section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') and establishes a process by which a state member bank or uninsured state branch or agency of a foreign bank may request a transition period to conform its swaps activities to the requirements of section 716 of the Dodd-Frank Act.

**DATES:** This rule is effective on January 31, 2014.

**FOR FURTHER INFORMATION CONTACT:** Laurie Schaffer, Associate General Counsel, (202) 452–2272, Victoria Szybillo, Counsel, (202) 475–6325, Christine Graham, Counsel, (202) 452–3005, or Michelle Kidd, Senior Attorney, (202) 736–5554, Legal Division; or Jordan Bleicher, Supervisory Financial Analyst, (202) 973–6123, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

**SUPPLEMENTARY INFORMATION:** On June 5, 2013, the Board sought comment on an interim final rule that addressed the application of section 716 of the Dodd-Frank Act (''section 716'') to swaps entities that are uninsured U.S. branches or agencies of foreign banks and established the process by which a state member bank and an uninsured state branch or agency of a foreign bank may request transition period relief in order to conform its swaps activities to the requirements of section 716 (''interim final rule'').

Section 716 generally prohibits the provision of ''Federal assistance'' to any ''swaps entity'' with regard to any swap, security-based swap, or other activity of the swaps entity.[1] ''Federal assistance'' is defined by section 716 to include ''advances from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act'' and Federal Deposit Insurance Corporation (''FDIC'') insurance or guarantees.[2] For purposes of section 716, the term ''swaps entity'' generally includes any swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant that is registered under the Commodity Exchange Act or the Securities Exchange Act of 1934, as applicable.[3]

Section 716 includes several provisions applicable to insured depository institutions. It provides a specific exclusion from the definition of ''swaps entity'' for any insured depository institution that is a major swap participant or major security-based swap participant,[4] and provides that the prohibition on Federal assistance does not apply to an insured depository institution that limits its swaps activities to certain specified activities.[5] Section 716 provides insured depository institutions with a transition period to facilitate compliance with the requirements of the section. By its terms, section 716 applies to insured depository institutions only with respect to swaps and security-based swaps entered into after the expiration of the transition period.

The provisions of section 716 became effective on July 16, 2013.[6]

### I. Description of Final Rule

#### *A. Treatment of Uninsured U.S. Branches and Agencies of Foreign Banks*

As discussed in the interim final rule, the structure, language, and purpose of section 716 create an ambiguity as to whether the term ''insured depository institution'' includes uninsured U.S. branches and agencies of foreign banks for purposes of the various provisions of section 716. The term ''insured depository institution'' is not defined for purposes of these provisions. Section 2 of the Dodd-Frank Act provides that ''except as the context otherwise requires. . .,''[7] the definition of ''insured depository institution'' has the same meaning as in the Federal Deposit Insurance Act. ''Insured depository institution'' is defined by section 3(c)(2) of the Federal Deposit Insurance Act to mean a bank or savings association the deposits of which are insured by the FDIC, and, for some purposes under section 3(c)(3), an uninsured U.S. branch or agency of a foreign bank.[8]

The interim final rule resolved this ambiguity by providing that the term ''insured depository institution'' included uninsured U.S. branches and agencies of foreign banks for purposes of

[1] *See* Section 716(a) of the Dodd-Frank Act; 15 U.S.C. 8305(a).

[2] Section 716(b) of the Dodd-Frank Act; 15 U.S.C. 8305(b).

[3] *Id.*

[4] *Id.* This exclusion is available to major swap participants and major security-based swap participants that are not otherwise swap dealers or security-based swap dealers.

[5] *See* section 716(d) of the Dodd-Frank Act; 15 U.S.C. 8305(d). Those identified activities are: (i) Hedging and other similar risk-mitigating activities directly related to the activities of the insured depository institution, and (ii) acting as a swaps entity for swaps or security-based swaps involving rates or reference assets permissible for investment by a national bank pursuant to 12 U.S.C. 24(Seventh), other than acting as a swaps entity for non-cleared credit default swaps. Section 716(b)(2) of the Dodd-Frank Act; 15 U.S.C. 8305(b)(2).

[6] *See* Guidance on the Effective Date of Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 77 FR 27465 (May 10, 2012).

[7] *See* section 2 (chapeau) and (18)(A) of the Dodd-Frank Act; 12 U.S.C. 5301 (chapeau) and (18)(A).

[8] *See* 12 U.S.C. 1813(c)(2), (c)(3).

section 716.[9] Accordingly, uninsured branches and agencies of foreign banks are provided the same exceptions and transition period relief as provided to insured depository institutions.

The Board received four comments in response to its invitation for public comment on the interim final rule. Two of these comment letters were from industry groups, one letter was from a public interest group, and one letter was from an individual. Three of the four commenters expressed strong support for the approach taken in the interim final rule. These commenters agreed that section 716 is predicated on the treatment of uninsured U.S. branches and agencies of foreign banks as insured depository institutions for purposes of qualifying for Federal assistance and that similar treatment for purposes of section 716 is consistent with Congressional intent. One of these commenters expressed the view that the treatment in the interim final rule was necessary to secure equal treatment between U.S. banks and uninsured U.S. branches and agencies of foreign banks under the provisions of section 716.

One commenter disagreed with the Board's analysis and argued that U.S. branches and agencies of foreign banks should not be treated as ''insured depository institutions'' for purposes of section 716. The commenter expressed the view that the purpose of section 716 is to reduce systemic risk. The commenter argued that treating U.S. branches and agencies of foreign banks as insured depository institutions does not achieve that purpose because U.S. branches and agencies are subject to a safety and soundness regime that the commenter asserted is less rigorous than the regime applicable to insured depository institutions. The commenter also argued that U.S. branches and agencies of foreign banks have volatile liability structures and relatively weak capital requirements. For these reasons, the commenter concluded that U.S. branches and agencies of foreign banks should not be treated in the same manner as insured depository institutions and should not be allowed to continue swaps activities pursuant to the same exceptions.

As discussed in the preamble to the interim final rule, the interim final rule's definition of ''insured depository institution'' is premised on the fact that, by statute, both uninsured and insured U.S. branches and agencies of foreign banks may receive Federal Reserve advances on the same terms and conditions that apply to domestic insured member banks.[10] Federal Reserve advances are the only type of Federal assistance that causes uninsured U.S. branches and agencies of foreign banks to be affected by section 716.

Congress generally requires the Board to regulate foreign banking organizations in accordance with the principle of national treatment, which means that foreign banking organizations operating in the United States are generally treated no less favorably than similarly-situated U.S. banking organizations, and are generally subject to the same restrictions and obligations in the United States that apply to the domestic operations of U.S. banking organizations.[11] Congress provided U.S. uninsured branches and agencies of foreign banks with access to Federal Reserve advances on the same terms as insured depository institutions, and has permitted uninsured U.S. branches and agencies to engage in the same activities as insured depository institutions, in furtherance of this principle.[12] Congress did not express an indication to deviate from this principle in the Dodd-Frank Act. Instead, the interim final rule is consistent with Congress's intent to treat U.S. branches and agencies of foreign banks like insured depository institutions for purposes of section 716.[13]

Regarding the commenter's views on the safety and soundness regime applicable to U.S. uninsured branches and agencies of foreign banks, all U.S. branches and agencies are subject to prudential supervision and regulation and must conduct swaps activities in a safe and sound manner. To the extent the safety and soundness regime applicable to uninsured branches and agencies of foreign banks differs from the regime applicable to insured depository institutions, these differences reflect the structural differences between an uninsured branch or agency and an insured depository institution.

Furthermore, the commenter's assertions referred to practices in existence before the Dodd-Frank Act. The Dodd-Frank Act directed the Board to establish enhanced prudential standards, including enhanced liquidity requirements, in order to prevent or mitigate risks to U.S. financial stability that could arise from the material financial distress or failure, or ongoing activities of foreign banking organizations with total consolidated assets of $50 billion or more. The Board has issued a proposal to implement those requirements, which included liquidity requirements meant to address risks associated with the funding vulnerabilities the commenter cited.[14] In addition, the Board notes that uninsured branches and agencies of foreign banks are not insured by, and therefore do not pose a threat to, the FDIC's deposit insurance fund.

As such, for purposes of section 716, the Board believes that treating uninsured branches and agencies of foreign banks as insured depository institutions is appropriate. The final rule adopts the interim final rule's definition of insured depository institution without change.

*B. Transition Period for Insured Depository Institutions and Uninsured U.S. Branches and Agencies of Foreign Banks*

Section 716 provides insured depository institutions with a transition period to conform their activities.[15] Under section 716(f), the appropriate Federal banking agency for an insured depository institution, in consultation with the SEC and CFTC, as appropriate, is required to establish the length of the transition period for conformance with the requirements of section 716. That transition period may be up to 24 months and may be extended for a period of up to one additional year.

In establishing the length of the transition period for an insured depository institution, the Board is required by statute to take into account and make written findings regarding the potential impact of divestiture or cessation of swap or security-based swaps activities on the insured depository institution's: (i) Mortgage lending; (ii) small business lending; (iii) job creation; (iv) capital formation versus the potential negative impact on insured depositors and the Deposit Insurance Fund of the FDIC; and (v) any other factor that the Board believes appropriate to consider.

[9] The interim final rule defined the terms branch, agency, and foreign bank by cross-reference to section 1 of the International Banking Act of 1978. 12 U.S.C. 3101. Insured branches of foreign banks are separately included in the definition of ''insured depository institution'' under section 3(c)(2) of the Federal Deposit Insurance Act.

[10] Section 13(14) of the Federal Reserve Act; 12 U.S.C. 347d.

[11] *See, e.g.,* International Banking Act of 1978, Public Law 95–369, 12 U.S.C. 3101 *et seq;* S. Rep. No. 95–1073 (Aug. 8, 1978) (legislative history of the International Banking Act of 1978); Gramm-Leach-Bliley Act of 1999, Public Law 106–102, section 141, 12 U.S.C. 3106(c); Dodd-Frank Act, Public Law 111–203, section 165(b)(2), 12 U.S.C. 5365(b)(2).

[12] 12 U.S.C. 347d; 12 U.S.C. 3106.

[13] *See* 156 Cong. Rec. S5904 (daily ed. July 15, 2010) (statement of Sen. Lincoln, the sponsor of section 716, indicating that uninsured U.S. branches and agencies should be treated in the same manner as insured depository institutions).

[14] 77 FR 76628 (December 28, 2012).

[15] *See* 15 U.S.C. 8305(f).

The interim final rule provided that a state member bank and an uninsured state branch and agency of foreign bank may seek a transition period of up to 24 months from July 16, 2013 (for an entity that is a swaps entity as of July 16, 2013), or from the date on which the entity becomes a swaps entity (if that date occurs after July 16, 2013), by submitting a written request to the Board. The request must include: (i) The length of the transition period requested; (ii) a description of the quantitative and qualitative impacts of immediate divestiture or cessation of swap or security-based swaps activities on the institution, including regarding the potential impact of divestiture or cessation of swap or security-based swaps activities on the institution's mortgage lending, small business lending, job creation, capital formation versus the potential negative impact on insured depositors and the Deposit Insurance Fund of the FDIC; and (iii) a description of the insured institution's plan for conforming its activities to the requirements of section 716.

The interim final rule indicated that the Board may also request additional information that it believes is necessary in order to act on a request for a transition period. The Board will seek to act on a request for a transition period expeditiously after the receipt of a complete request. The final rule allows the Board to impose conditions on any transition period granted if the Board determines such conditions are necessary and appropriate. Consistent with section 716(f), the final rule also permits the Board, in consultation with the SEC and CFTC, as appropriate, to extend the transition period for up to one additional year. To request an extension of the transition period, an insured depository institution must submit a written request no later than 60 days before the end of the transition period.

Two commenters expressed support regarding the Board's expeditious action on transition period requests submitted in advance of section 716's July 16, 2013, effective date. The commenter indicated that factors governing transition period request determinations prescribed in Regulation KK are appropriate and provide the Board sufficient flexibility to address the particular circumstances presented by individual requests.

The Board is finalizing these transition period procedures as proposed.

## II. Administrative Law Matters

### *A. Solicitation of Comments on Use of Plain Language*

Section 722 of the Gramm-Leach-Bliley Act required the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board sought to present the interim final rule in a simple and straightforward manner and did not receive any comments on the use of plain language.

### *B. Paperwork Reduction Act Analysis*

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number for this information collection will be assigned. The Board reviewed the final rule under the authority delegated to the Board by OMB. The Board received no comments on the PRA.

The final rule contains requirements subject to the PRA. The reporting requirements are found in sections 237.22(a)(1) and 237.22(e). This information collection requirement would implement section 716 of the Dodd-Frank Act.

Proposed Information Collection

*Title of Information Collection:* Reporting Requirements Associated with Regulation KK.

*Frequency of Response:* On occasion.

*Affected Public:* Businesses or other for-profit.

*Respondents:* Uninsured U.S. branches or agencies of a foreign bank and state member banks.

*Abstract:* The final rule would treat an uninsured U.S. branch or agency of a foreign bank as an insured depository institution and establish a process by which a state member bank and uninsured branch or agency of a foreign bank may request a transition period to conform its swaps activities to the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305).

Section 237.22(a)(1) provides that an insured depository institution for which the Board is the appropriate Federal banking agency may request a transition period of up to 24 months from the later of July 16, 2013, or the date on which it becomes a swaps entity, to conform its swaps activities to the requirements of section 716 of the Dodd-Frank Act by submitting a request in writing to the Board. Any request submitted must, at a minimum, include the following information: (1) The length of the transition period requested; (2) a description of the quantitative and qualitative impacts of divestiture or cessation of swap or security-based swaps activities on the insured depository institution, including information that addresses the factors in section 237.22(c); and (3) a detailed explanation of the insured depository institution's plan for conforming its activities to the requirements of section 716 of the Dodd-Frank Act.

Section 237.22(e) would allow the Board to extend a transition period for a period of up to one additional year. To request an extension of the transition period, an insured depository institution must submit a written request containing the information set forth in section 237.22(a) no later than 60 days before the end of the transition period.

Estimated Paperwork Burden

*Number of Respondents:* 2 (12 initial submissions for transition period relief).

*Estimated Average Hours per Response:* 7 hours.

*Total Estimated Annual Burden:* 14 hours (84 hours for initial submissions for transition period relief).

The Board has a continuing interest in the public's opinions of collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

### List of Subjects in 12 CFR Part 237

Administrative practice and procedure, Banks and banking, Capital, Foreign banking, Holding companies, Margin requirements, Reporting and recordkeeping requirements, Risk, Derivatives.

### Authority and Issuance

For the reasons stated in the Supplementary Information, the interim rule adding part 237 to 12 CFR Chapter II and published at 78 FR 34545 on June 10, 2013, is adopted as final with the following changes:

## PART 237—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAPS ENTITIES (REGULATION KK)

■ 1. The authority citation for part 237 continues to read as follows:

**Authority:** 15 U.S.C. 8305, 12 U.S.C. 343–350, 12 U.S.C. 818, 12 U.S.C. 3101 *et seq.*

■ 2. Subpart B is revised to read as follows:

**Subpart B—Prohibition Against Federal Assistance to Swaps Entities**

Sec.
237.20 Definitions.
237.21 Definition of insured depository institution for purposes of section 716 of the Dodd-Frank Act.
237.22 Transition period for insured depository institutions.

## Subpart B—Prohibition Against Federal Assistance to Swaps Entities

### § 237.20 Definitions.

Unless otherwise specified, for purposes of this subpart:

(a) *Board* means the Board of Governors of the Federal Reserve System.

(b) *Dodd-Frank Act* means the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(c) *Foreign bank* has the same meaning as in § 211.21(n) of the Board's Regulation K (12 CFR 211.21(n)).

(d) *Major security-based swap participant* has the same meaning as in section 3(a)(67) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(67)) and as implemented in rules and orders issued by the Securities and Exchange Commission.

(e) *Major swap participant* has the same meaning as in section 1a(33) of the Commodity Exchange Act (7 U.S.C. 1a(33)) and as implemented in rules and orders issued by the Commodity Futures Trading Commission.

(f) *Security-based swap* has the same meaning as in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)) and as implemented in rules and orders issued by the Securities and Exchange Commission.

(g) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(71)) and as implemented in rules and orders issued by the Securities and Exchange Commission.

(h) *Swap dealer* has the same meaning as in section 1a(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)) and as implemented in rules and orders issued by the Commodity Futures Trading Commission.

(i) *Swaps entity* means a person that is registered as a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant under the Commodity Exchange Act or Securities Exchange Act of 1934, other than an insured depository institution that is registered as a major swap participant or major security-based swap participant.

### § 237.21 Definition of insured depository institution for purposes of section 716 of the Dodd-Frank Act.

For purposes of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) and this rule, the term ''insured depository institution'' includes any insured depository institution as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) and any uninsured U.S. branch or agency of a foreign bank. The terms branch, agency, and foreign bank are defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101).

### § 237.22 Transition period for insured depository institutions.

(a) *Approval of transition period.* (1) To the extent an insured depository institution for which the Board is the appropriate Federal banking agency qualifies as a ''swaps entity'' and would be subject to the Federal assistance prohibition in section 716(a) of the Dodd-Frank Act (15 U.S.C. 8305(a)), the insured depository institution may request a transition period of up to 24 months from the later of July 16, 2013, or the date on which it becomes a swaps entity, during which to conform its swaps activities to the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) by submitting a request in writing to the Board.

(2) Any request submitted pursuant to this paragraph (a) of this section shall, at a minimum, include the following information:

(i) The length of the transition period requested;

(ii) A description of the quantitative and qualitative impacts of divestiture or cessation of swap or security-based swaps activities on the insured depository institution, including information that addresses the factors in paragraph (c) of this section; and

(iii) A detailed explanation of the insured depository institution's plan for conforming its activities to the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) and this part.

(3) The Board may, at any time, request additional information that it believes is necessary for its decision.

(b) *Transition period for insured depository institutions.* Following review of a written request submitted under paragraph (a) of this section, the Board shall permit an insured depository institution for which it is the appropriate Federal banking agency up to 24 months after the later of July 16, 2013, or the date on which the insured depository institution becomes a swaps entity, to comply with the requirements of section 716 of the Dodd-Frank Act (15 U.S.C. 8305) and this subpart based on its consideration of the factors in paragraph (c).

(c) *Factors governing Board determinations.* In establishing an appropriate transition period pursuant to any request under this section, the Board will take into account and make written findings regarding:

(1) The potential impact of divestiture or cessation of swap or security-based swaps activities on the insured depository institution's:

(i) Mortgage lending;

(ii) Small business lending;

(iii) Job creation; and

(iv) Capital formation versus the potential negative impact on insured depositors and the Deposit Insurance Fund of the Federal Deposit Insurance Corporation; and

(2) Any other factor that the Board believes appropriate.

(d) *Timing of Board review.* The Board will seek to act on a request under paragraph (a) of this section expeditiously after the receipt of a complete request.

(e) *Extension of transition period.* The Board may extend a transition period provided under this section for a period of up to one additional year. To request an extension of the transition period, an insured depository institution must submit a written request containing the information set forth in paragraph (a) of this section no later than 60 days before the end of the transition period.

(f) *Authority to impose restrictions during any transition period.* The Board may impose such conditions on any transition period granted under this section as the Board determines are necessary or appropriate.

(g) *Consultation.* The Board shall consult with the Commodity Futures Trading Commission or the Securities and Exchange Commission, as appropriate, prior to the approval of a request by an insured depository institution for a transition period under this section.

By order of the Board of Governors of the Federal Reserve System, December 24, 2013.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2013–31204 Filed 1–2–14; 8:45 am]

BILLING CODE 6210–01–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2009–0811; Directorate Identifier 2008–NE–41–AD; Amendment 39–17715; AD 2013–26–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Rolls-Royce Corporation Turbofan Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are superseding airworthiness directive (AD) 2010–19–01 for certain Rolls-Royce Corporation (RRC) AE 3007A series turbofan engines. AD 2010–19–01 required removing certain high-pressure turbine (HPT) stage 2 wheels, or performing inspections on them, and reduced their approved life limits. This new AD clarifies the AE 3007A turbofan engine model applicability, further reduces the approved life limits of affected HPT stage 2 wheels, and eliminates the inspections required by the existing AD. This AD was prompted by additional analysis that concluded that lower life limits for the affected HPT stage 2 wheels are necessary. We are issuing this AD to prevent uncontained failure of the HPT stage 2 wheel, damage to the engine, and damage to the airplane.

**DATES:** This AD is effective February 7, 2014.

**ADDRESSES:** For service information identified in this AD, contact Rolls-Royce Corporation, 450 South Meridian Street, Mail Code NB–01–06, Indianapolis, IN 46225, phone: 317–230–1667; email: *CMSEindyOSD@rolls-royce.com;* Internet: *www.rolls-royce.com.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2009–0811; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; phone: 847–294–7836; fax: 847–294–7834; email: *kyri.zaroyiannis@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010–19–01, Amendment 39–16429 (75 FR 57660, September 22, 2010), (''AD 2010–19–01''). AD 2010–19–01 applied to the specified products. The NPRM published in the **Federal Register** on August 8, 2013 (78 FR 48339). The NPRM proposed to clarify the AE 3007A turbofan engine model applicability, further reduce the approved life limits of affected HPT stage 2 wheels, and eliminate the inspections required by the existing AD.

### Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

### Request To Clarify Applicability

One commenter indicated that the compliance section may lead the operator to remove all engines with HPT stage 2 wheels, part number (P/N) 23074462, while only a few engines are affected. He noted that compliance paragraphs in previous ADs on HPT stage 2 wheels used tables to identify affected and non-affected wheels.

We do not agree. The applicability section of this AD states that the AD applies to RRC AE 3007A, A1, A1/1, A1/2, A1/3, A1P, A1E, and A3 turbofan engines with an installed HPT stage 2 wheel, P/N 23084520 or P/N 23069438, 23069592, 23074462, 23074644, or 23075345, except for the HPT stage 2 wheel serial numbers listed in Table 2 through Table 5 of RRC Alert Service Bulletin (ASB) No. AE 3007A–A–72–414, Revision 1, dated December 5, 2012. Therefore, as noted in the AD, operators do not need to remove engines with HPT stage 2 wheels, P/N 23074462 with the serial numbers listed in Table 2 through Table 5 of this ASB. We did not change this AD.

### Request Not To Reduce Life Limits

One commenter indicated that eddy current inspections (ECIs) or surface wave ultrasonic test (SWUT) inspections of the HPT stage 2 wheels have proven satisfactory to this point as there have been no failures of engines in service worldwide. The commenter noted that reducing the life limit for these HPT stage 2 wheels is not justified.

We do not agree. Per FAA risk guidelines as published in Advisory Circular (AC) No. 39–8 ''Continued Airworthiness Assessments Of Powerplant And Auxiliary Power Unit Installations Of Transport Category Airplanes,'' dated September 8, 2003 (online at *http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC39-8.pdf*), we do not rely on recurring inspections to serve as a final corrective action unless there is no practicable alternative. In this case, analysis and testing performed on the affected wheels by RRC has shown that the life limit for the affected wheels must be reduced. We did not change this AD.

### Request Not To Issue AD

The same commenter noted that reduced life limits are already required based on an ASB published by RRC and incorporation of these life limits in the new RRC Engine Maintenance Manual (EMM), dated January 20, 2013. Operators have to consider these updates in their own maintenance programs. Therefore, an AD is not necessary.

We do not agree. Companies cannot mandate that operators follow new life limits. AD compliance is mandatory. We did not change this AD.

### Request To Revise the Cost of Compliance Estimate

The same commenter requested that the FAA include the number of aircraft affected worldwide in its cost of compliance estimate. He also indicated that cost of compliance should include an estimated labor cost of $250 per engine for each HPT stage 2 wheel change.

We do not agree. First, our ADs apply only to U.S. registered or operated products, not to products registered elsewhere. Therefore, costs to operators registered elsewhere are speculative.

Second, our cost estimate in this AD is based on the pro-rated cost of the reduction in life to the wheel. The labor cost of replacing the wheel is the same as it would be if the life of the wheel had not been changed. We did not change this AD.

**Request To Continue Inspections and Related Compliance Issues**

The same commenter suggested revising the compliance section of this AD by continuing with ECIs and/or SWUT inspections at the interval required by AD 2010–19–01 (75 FR 57660, September 22, 2010) or if the inspections are not performed at the required interval, then (1) the new life limit published in the RRC EMM, dated January 20, 2013, shall be considered; (2) at the next engine shop visit or when the life limit is reached, the affected parts will be changed; and (3) no engine can be released from an engine shop with life limits that exceed those published in the RRC EMM, dated January 20, 2013.

The commenter asked that if this change cannot be accepted, then RRC should be required to lend an engine to the operator free of charge and change the HPT wheels free of charge.

The commenter also indicated that providing a grace period of 15 cycles in service before removal of the engine for an issue that has been known and managed for the last 5 years without incident is not justified.

We do not agree. Repetitive inspection of the affected HPT wheels is not a replacement for reduction in their life limit. As stated above, based on FAA risk guidelines as published in AC 39–8, we do not rely on recurring inspections to serve as a final corrective action unless there is no practicable alternative. In the case of these affected wheels, analysis has shown that the life of these wheels must be reduced. Second, requests for warranty support, i.e., that RRC provide a free lease engine and free replacement HPT stage 2 wheel are economic issues between the operator and the original equipment manufacturer. Third, successful performance of a part has no effect on the need to remove that part once it has reached its life limit. However, we are providing a 15-cycle allowance to minimize disruptions to operators. This grace period is supported by our risk assessment. We did not change this AD.

**Conclusion**

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD as proposed.

**Costs of Compliance**

We estimate that this AD affects 18 engines installed on airplanes of U.S. registry. We also estimate that a replacement HPT stage 2 wheel costs about $145,524, and that it will be replaced during an engine shop visit at no additional labor cost. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $2,619,432.

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

**List of Subjects in 14 CFR Part 39**

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

**Adoption of the Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2010–19–01, Amendment 39–16429 (75 FR 57660, September 22, 2010) and adding the following new AD:

**2013–26–06 Rolls-Royce Corporation (Formerly Allison Engine Company):** Amendment 39–17715; Docket No. FAA–2009–0811; Directorate Identifier 2008–NE–41–AD.

**(a) Effective Date**

This AD is effective February 7, 2014.

**(b) Affected ADs**

This AD supersedes AD 2010–19–01, Amendment 39–16429 (75 FR 57660, September 22, 2010).

**(c) Applicability**

This AD applies to the following Rolls-Royce Corporation (RRC) AE 3007A, A1, A1/1, A1/2, A1/3, A1P, A1E, and A3 turbofan engines:

(1) With an installed high-pressure turbine (HPT) stage 2 wheel, part number (P/N) 23084520, or

(2) With an installed HPT stage 2 wheel, P/N 23069438, 23069592, 23074462, 23074644, or 23075345, except for the HPT stage 2 wheel serial numbers listed in Table 2 through Table 5 of RRC Alert Service Bulletin (ASB) No. AE 3007A–A–72–414, Revision 1, dated December 5, 2012. Those HPT stage 2 wheels maintain their existing approved life limits.

**(d) Unsafe Condition**

This AD was prompted by additional analysis that concluded that lower life limits for the affected HPT stage 2 wheels are necessary. We are issuing this AD to prevent uncontained failure of the HPT stage 2 wheel, damage to the engine, and damage to the airplane.

**(e) Compliance**

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

(1) For HPT stage 2 wheels, P/N 23069438 and P/N 23069592, do the following:

(i) For HPT stage 2 wheels that have 9,500 cycles since new (CSN) or more on the effective date of this AD, remove the HPT stage 2 wheel from service within 15 cycles-in-service (CIS) after the effective date of this AD.

(ii) After the effective date of this AD, do not approve for return to service any engine with an HPT stage 2 wheel, P/N 23069438 or P/N 23069592, that exceeds the new life limit of 9,500 CSN.

(2) For HPT stage 2 wheels, P/N 23074462, do the following:

(i) For AE 3007A1E turbofan engines with HPT stage 2 wheels installed that have 7,500

CSN or more on the effective date of this AD, and for the AE 3007A, A1, A1/1, A1/2, A1/3, A1P, and A3 turbofan engines with HPT stage 2 wheels installed that have 9,500 CSN or more on the effective date of this AD, remove the wheel from service within 15 CIS after the effective date of this AD.

(ii) Thereafter:

(A) Do not approve for return to service any AE 3007A1E turbofan engine with an HPT stage 2 wheel, P/N 23074462, installed, that exceeds the new life limit of 7,500 CSN; and

(B) Do not approve for return to service any AE 3007A, A1, A1/1, A1/2, A1/3, A1P, and A3 turbofan engines with an HPT stage 2 wheel, P/N 23074462, installed, that exceeds the new life limit of 9,500 CSN.

(C) Throughout the life of the HPT stage 2 wheel, always use the lowest life limit applicable to any engine model in which the part was used in service. If life usage records are not sufficient to identify all engine models in which the part has been flown, the lowest life applicable to any engine model for which the part is eligible must be used.

(3) For HPT stage 2 wheels, P/N 23074644 and P/N 23075345, do the following:

(i) For HPT stage 2 wheels that have 9,500 CSN or more on the effective date of this AD, remove the HPT stage 2 wheel from service within 15 CIS after the effective date of this AD.

(ii) Thereafter, do not approve for return to service any engine with an HPT stage 2 wheel, P/N 23074644 or P/N 23075345, installed, that exceeds the new life limit of 9,500 CSN.

(4) For HPT stage 2 wheels, P/N 23084520, do the following:

(i) For HPT stage 2 wheels that have 23,000 CSN or more on the effective date of this AD, remove the HPT stage 2 wheel from service before the next flight after the effective date of this AD.

(ii) Thereafter, do not approve for return to service any engine with an HPT stage 2 wheel, P/N 23084520, installed, that exceeds the new life limit of 23,000 CSN.

**(f) Alternative Methods of Compliance**

The Manager, Chicago Aircraft Certification Office, may approve alternative methods of compliance for this AD. Use the procedures 14 CFR 39.19 to make your request.

**(g) Related Information**

(1) For more information about this AD, contact Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; phone: 847–294–7836; fax: 847–294–7834; email: *kyri.zaroyiannis@faa.gov.*

(2) RRC ASB No. AE 3007A–A–72–414, Revision 1, dated December 5, 2012, which is not incorporated by reference in this AD, can be obtained from RRC, using the contact information in paragraph (g)(3) of this AD.

(3) For service information identified in this AD, contact Rolls-Royce Corporation, 450 South Meridian Street, Mail Code NB–01–06, Indianapolis, IN 46225, phone: 317–230–1667; email: *CMSEindyOSD@rolls-royce.com;* Internet: *www.rolls-royce.com.*

(4) You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

**(h) Material Incorporated by Reference**

None.

Issued in Burlington, Massachusetts, on December 17, 2013.

**Colleen M. D'Alessandro,**

*Assistant Directorate Manager, Engine & Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 2013–30734 Filed 1–2–14; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2013–0033; Airspace Docket No. 13–AEA–1]**

## Establishment of Class E Airspace; Leesburg, VA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E Airspace at Leesburg, VA, creating controlled airspace to aid Potomac TRACON in the safe and orderly flow of air traffic at Leesburg Executive Airport. This action enhances the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also updates the geographic coordinates of the airport.

**DATES:** Effective 0901 UTC, February 6, 2014. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

**SUPPLEMENTARY INFORMATION:**

### History

On April 8, 2013, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace at Leesburg, VA (78 FR 20846) Docket No. FAA–2012–0033. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication the FAA found that the geographic coordinates of the airport were transposed. This action makes the correction. Class E airspace designations are published in paragraph 6002 of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

### The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes the Class E airspace extending upward from the surface within a 6-mile radius at Leesburg Executive Airport, providing the controlled airspace required to aid Potomac TRACON in the safe and orderly flow of air traffic at Leesburg, VA. Also, the geographic coordinates of the airport are adjusted to coincide with the FAA's aeronautical database.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Leesburg Executive Airport, Leesburg, VA.

**Environmental Review**

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

**Lists of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

■ 1. The authority citation for Part 71 continues to read as follows:

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

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, effective September 15, 2013, is amended as follows:

*Paragraph 6002 Class E Airspace Areas Extending Upward From the Surface of the Earth.*

* * * * *

**AEA VA E2 Leesburg, VA [New]**

Leesburg Executive Airport, VA
(Lat. 39°04′41″ N., long. 77°33′27″ W.)

That airspace extending upward from the surface within a 6-mile radius of Leesburg Executive Airport.

Issued in College Park, Georgia, on December 19, 2013.

**Paul Lore,**

*Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2013–31062 Filed 1–2–14; 8:45 am]

BILLING CODE 4910–13–P

## PENSION BENEFIT GUARANTY CORPORATION

## 29 CFR Part 4007

**RIN 1212–AB26**

## Payment of Premiums; Large-Plan Flat-Rate Premium

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** Based on its regulatory review under Executive Order 13563 (Improving Regulation and Regulatory Review), the Pension Benefit Guaranty Corporation (PBGC) is moving the flat-rate premium due date for large plans to later in the premium payment year—to the same date as the variable-rate premium due date for such plans—starting with the 2014 plan year. Thus, large calendar-year plans' 2014 flat-rate premiums will be due October 15, 2014. This action implements part of a PBGC project to make its premium rules more effective and less burdensome by simplifying due dates, coordinating the due date for terminating plans with the termination process, making conforming and clarifying changes to the variable-rate premium rules, providing for relief from penalties, and making other changes. The rest of the project will be implemented by a separate final rule.

**DATES:** Effective January 3, 2014. Applicable to plan years that begin on or after January 1, 2014.

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Assistant General Counsel for Regulatory Affairs (*klion.catherine@pbgc.gov*), or Deborah C. Murphy, Deputy Assistant General Counsel for Regulatory Affairs (*murphy.deborah@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005–4026; 202–326–4024. (TTY and TDD users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4024.)

**SUPPLEMENTARY INFORMATION:**

### Executive Summary—Purpose of the Regulatory Action

This rulemaking is needed as part of a larger project to make PBGC's premium rules more effective and less burdensome. The rule contributes to the simplification and streamlining of due dates by making the flat-rate premium due date for large plans the same as the variable-rate premium due date for such plans.

PBGC's legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4007 of ERISA, which gives PBGC authority to set premium due dates and to assess late payment penalties.

### Executive Summary—Major Provisions of the Regulatory Action

In recent years, premium due dates have depended on size of plan and type of premium. Large plans have paid the flat-rate premium early in the premium payment year and the variable-rate premium later in the year. Mid-size plans have paid both the flat- and variable-rate premiums by that same later due date. Small plans have paid the flat- and variable-rate premiums in the following year. On July 23, 2013, PBGC proposed to simplify the due-date rules by providing that all annual premiums for plans of all sizes will be due on the same day in the premium payment year—the historical variable-rate premium due date. As part of that simplification process, this rule eliminates the separate due date for the flat-rate premiums of large plans beginning with the 2014 plan year.

### Background

PBGC administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under ERISA sections 4006 and 4007, plans covered by the program must pay premiums to PBGC. PBGC's premium regulations—on Premium Rates (29 CFR part 4006) and on Payment of Premiums (29 CFR part 4007)—implement ERISA sections 4006 and 4007.

There are two kinds of annual premiums.[1] The flat-rate premium is based on the number of plan participants, determined as of the participant count date. The participant count date is generally the last day of the plan year preceding the premium payment year; in some cases, however (such as for plans that are new or are involved in certain mergers or spinoffs), the participant count date is the first day of the premium payment year. The variable-rate premium (which applies only to single-employer plans) is based on a plan's unfunded vested benefits (UVBs)—the excess of its premium funding target over its assets.

Section 4007 of ERISA authorizes PBGC to set premium due dates and assess penalties for failure to pay

[1] There is also a termination premium, which is unaffected by this final rule.

premiums timely. Beginning in 1999,[2] PBGC set the variable-rate premium due date for plans of all sizes as 9½ calendar months after the beginning of the premium payment year (October 15 for calendar-year plans). This was done so that the due date would correspond with the extended due date for the annual report for the prior year that is filed on Form 5500. Coordination of the premium and Form 5500 due dates promotes consistency and simplicity and avoids confusion and administrative burden. In 2008, however, to conform to changes made by the Pension Protection Act of 2006 (PPA 2006), small-plan due dates were extended to 16 months after the beginning of the premium payment year (April 30 of the following year for calendar-year plans).

Most plans' flat-rate premiums have been due at the same time as variable-rate premiums. However, flat-rate premiums for large plans (those with 500 or more participants) are due two calendar months after the beginning of the premium payment year (the end of February for calendar-year plans).[3] Because of the impracticality of counting participants so soon after the participant count date, the premium payment regulation provides an elaborate system of safe harbors from late-payment penalties for estimated large-plan flat-rate premiums, and the practice of most large plans has been to pay an estimate of the flat-rate premium at the early due date and ''true up'' when they pay the variable-rate premium later in the year.

**Proposed Rule**

On January 18, 2011, the President issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure that Federal regulations seek more affordable, less intrusive means to achieve policy goals, and that agencies give careful consideration to the benefits and costs of those regulations. In response to and in support of the Executive Order, PBGC on August 23, 2011, promulgated its Plan for Regulatory Review,[4] noting several regulatory areas—including premiums—for immediate review.

PBGC reviewed its premium regulations and identified a number of ways to simplify and clarify the regulations, reduce burden, provide penalty relief, and generally make the regulations work better. On July 23, 2013 (at 78 FR 44056), PBGC published a proposed rule to replace the system of three premium due dates (based on plan size and premium type) with a single due date corresponding to the Form 5500 extended due date, to coordinate the due date for terminating plans with the termination process, to make conforming and clarifying changes to the variable-rate premium rules, to provide for relief from penalties, and to make other changes. Under the proposal, large plans would no longer have to pay flat-rate premiums early and small plans would have the same due dates as other plans but get more time to value benefits.

PBGC received comments from six commenters—two employer associations, two associations of pension practitioners, an actuarial firm, and an individual actuary. All of the commenters approved of the proposal, and one specifically urged that it be made effective for 2014. The commenters also had suggestions for additional changes PBGC might make in its premium regulations or procedures. None of those suggestions dealt with the large-plan flat-rate premium due date.

The first large-plan flat-rate filing deadline for 2014 is February 28, 2014. Thus the provision of the proposed rule setting the flat-rate premium due date for large plans later in the year—on the same date as the variable-rate premium due date for such plans—is by far the most time-sensitive aspect of the proposal. For that reason, and in light of the fact that this provision generated only positive comments, PBGC is finalizing this one change separately and ahead of the other changes in the proposal.

PBGC expects to deal with all other aspects of the July 23 proposal in a separate final rule to be issued in time to provide all plans with adequate advance guidance for timely compliance with the new procedures in 2014. If the situation changes, PBGC will advise the public as appropriate.

**Regulatory Changes Made by This Final Rule**

This final rule makes the flat-rate premium due date for large plans the same as their variable-rate due date. For calendar-year plans, that due date will be October 15.[5]

For many large plans, making the flat-rate premium due when the variable-rate premium is due will cut the number of premium transactions with PBGC by two, rather than just one. That is because underestimating the flat-rate premium has typically given rise not only to penalties (which are often waived) but also to interest charges (which cannot be waived). Thus, after paying an estimate of the flat-rate premium, and then paying the balance due, a large plan has usually had to make yet another payment, of the interest on the amount by which its initial estimated payment fell short of the correct amount. Eliminating the need for flat-rate premium estimates will eliminate interest payments on shortfalls in those estimates.

The due date change will mean that plan consultants can do all of a plan's premium filing work at one time, once a year. PBGC will receive one premium filing for each plan each year and will be able to process a plan's entire annual premium in a single operation. Reducing the number of due dates will be simpler for all concerned. Less complexity means less chance for mistakes and the time and expense of correcting them. Moving to a single due date will also simplify PBGC's premium processing systems and save PBGC money on future periodic changes to those systems (because it is less expensive to modify simpler systems).

In short, PBGC believes that this change in the large-plan flat-rate premium due date will produce a significant reduction in administrative burden for both plans and PBGC.

**Executive Orders 12866 and 13563**

PBGC has determined, in consultation with the Office of Management and Budget, that this rulemaking is a ''significant regulatory action'' under Executive Order 12866. The Office of Management and Budget has therefore reviewed this rule under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of

[2] See PBGC final rule at 63 FR 68684 (Dec. 14, 1998).

[3] This requirement was adopted in response to a recommendation in the 1984 report of the Grace Commission (the President's Private Sector Survey on Cost Control). See PBGC final rule at 50 FR 12533 (Mar. 29, 1985). The requirement was effective for 1985 for very large plans (those with 10,000 or more participants) and for 1986 for all other large plans.

[4] See *http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf.*

[5] To conform to this change in the large-plan flat-rate premium due date, which makes unnecessary the penalty safe harbors for under-estimates of large plans' flat-rate premiums, this final rule eliminates those safe harbor provisions from the premium payment regulation.

reducing costs, of harmonizing rules, and of promoting flexibility. This final rule is associated with retrospective review and analysis in PBGC's Plan for Regulatory Review issued in accordance with Executive Order 13563.

Executive Orders 12866 and 13563 require that a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, which, under Section 3(f)(1) of Executive Order 12866, is one that ''is likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''

PBGC premium payments are included as receipts in the Federal budget, and the large-plan flat-rate premium deferral will cause a one-time shift of about $1.5 billion (attributable primarily to calendar year plans) from one fiscal year to the next. Although no premium revenue will be lost, there will be the appearance of a one-time loss for the year when the due dates change, and PBGC has therefore determined that this final rule is economically significant under the criteria in Executive Order 12866.

The estimate of the amount of flat-rate premium shifted from one fiscal year to the next, and the estimate (below) of the amount of interest shifted from PBGC to plans, are revised from the estimates in the proposed rule to reflect projected 2014 per-participant flat premium rates ($49 (instead of $35) for single-employer plans and $12 (instead of $9) for multiemployer plans) and the following participant-count data for large plans for plan years beginning in 2012 (instead of 2010):

| | Approximate number of participants in large plans (millions) | |
|---|---|---|
| | All large plans | Large plans whose flat-rate premium shifts to the next fiscal year |
| Single-employer | 30 | 28 |
| Multiemployer | 10 | 9 |

In accordance with OMB Circular A–4, PBGC has examined the economic and policy implications of this final rule and has concluded that the action's benefits justify its costs. That conclusion is based on the following analysis of the impact of the due date change.

The due date change will shift, from PBGC to plans, the earnings on premium payments by large plans for the 7½ months between the old and new due dates. PBGC estimates that the average gain per large plan will be about $11,300 per year. To put this figure in perspective, large plans pay over $1 billion in flat-rate premiums—about 95 percent of PBGC's flat-rate premium income.

Because earning rates differ between PBGC and plans, PBGC's loss will be about one-third as much as plans' gain. PBGC estimates its rate of return, from investment in U.S. Government securities, at about 2 percent. PBGC estimates plans' rate of return at 6 percent. The following table shows the estimated average interest earnings calculated with four rates: two percent (PBGC's best estimate for PBGC's rate of return), six percent (PBGC's best estimate for plans' rate of return), and three and seven percent (the discount rates recommended by OMB Circular A–4).

| Approximate average interest earnings per large plan at— | | | |
|---|---|---|---|
| 2 percent | 3 percent | 6 percent | 7 percent |
| $3,800 | $5,600 | $11,300 | $13,200 |

In addition, PBGC estimates that the reduction in large plans' administrative burden attributable to the change in their flat-rate premium due date will translate into average annual savings of 3 hours per plan. (PBGC arrived at this estimate on the basis of inquiries made to pension practitioners.) The dollar equivalent of this saving is about $1,050.[6]

Accordingly, PBGC foresees an average net benefit (in dollar terms) from adoption of the new uniform due date of about $12,350 for each large plan (about $11,300 in saved interest plus about $1,050 in saved administrative expenses).

[6] PBGC assumes for this purpose that enrolled actuaries charge about $350 per hour.

**Immediate Effective Date**

Pursuant to section 553(d)(3) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and section 808(2) of the Congressional Review Act (5 U.S.C. 801 *et seq.*), PBGC for good cause finds that notice and public procedure on this final rule are unnecessary and contrary to the public interest and that this final rule should be effective upon publication. The project as a whole, including the relief provided by this final rule, has received only positive comment from the public. This rule requires no affirmative action by the regulated community. On the contrary, it provides relief from the restrictive large-plan flat-rate early-filing requirement for PBGC premiums (see section 553(d)(1) of the Administrative Procedure Act). The first large-plan flat-rate filing deadline for 2014 is February 28, 2014. To ensure that all large plans will be able to rely on this final rule for the 2014 plan year, PBGC is making this rule effective upon publication.

**Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility

analysis at the time of the publication of the final rule describing the impact of the rule on small entities and steps taken to minimize the impact. Small entities include small businesses, organizations and governmental jurisdictions.

*Small Entities*

For purposes of the Regulatory Flexibility Act requirements with respect to this final rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This is consistent with certain requirements in title I of ERISA [7] and the Internal Revenue Code,[8] as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.[9] Using this proposed definition, about 64 percent (16,500 of 25,600) of plans covered by title IV of ERISA in 2011 were small plans.[10]

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. In its proposed rule, therefore, PBGC requested comments on the appropriateness of the size standard used in evaluating the impact of the proposed rule on small entities. No comments were received on this issue.

*Certification*

On the basis of its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply. This certification is based on the fact that the change in the large-plan flat-rate premium due date will have no impact on any small plans.

**Paperwork Reduction Act**

The information requirements under this final rule have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (OMB control number 1212–0009; expires October 31, 2015). 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 only changes PBGC is making in its premium information collection in connection with this final rule are that PBGC will give notice that estimated flat-rate filings are discontinued for plan years starting in 2014. (PBGC will also notify private-sector premium filing software developers of the change so that it can be reflected in their products.) [11]

PBGC needs the information in a premium filing to identify the plan for which the premium is paid to PBGC, to verify the amount of the premium, to help PBGC determine the magnitude of its exposure in the event of plan termination, to help PBGC track the creation of new plans and the transfer of plan assets and liabilities among plans, and to keep PBGC's inventory of insured plans up to date. PBGC receives premium filings from about 25,700 respondents each year and estimates that the total annual burden of the collection of information will be about 8,900 hours and $59,250,000.[12]

**List of Subjects in 29 CFR Part 4007**

Employee benefit plans, Penalties, Pension insurance, Reporting and recordkeeping requirements.

In consideration of the foregoing, PBGC amends 29 CFR part 4007 as follows:

## PART 4007—PAYMENT OF PREMIUMS

■ 1. The authority citation for part 4007 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1303(A), 1306, 1307.

**§ 4007.8 [Amended]**

■ 2. In § 4007.8, paragraphs (f), (g), (h), and (i) are removed and reserved.

**§ 4007.11 [Amended]**

■ 3. In § 4007.11:

■ a. Paragraph (a) introductory text is amended by removing the words ''due dates for large plans are prescribed'' and adding in their place the words ''due date for large plans is prescribed''.

■ b. Paragraphs (a)(3)(i) and (iii) are removed and reserved.

■ c. Paragraph (a)(3)(ii) is amended by removing the words ''for the variable-rate premium required by § 4006.3(b) of this chapter for single-employer plans''.

Issued in Washington, DC, this 20 day of December 2013.

**Joshua Gotbaum,**

*Director, Pension Benefit Guaranty Corporation.*

[FR Doc. 2013–31109 Filed 1–2–14; 8:45 am]

BILLING CODE 7709–02–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 9, 260 and 261

**[EPA–HQ–RCRA–2010–0695; FRL–9904–84–OSWER]**

**RIN 2050–AG60**

## Hazardous Waste Management System: Conditional Exclusion for Carbon Dioxide ($CO_2$) Streams in Geologic Sequestration Activities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA or the Agency) is revising the regulations for hazardous waste management under the Resource Conservation and Recovery Act (RCRA) to conditionally exclude carbon dioxide ($CO_2$) streams that are hazardous from the definition of hazardous waste, provided these hazardous $CO_2$ streams are captured from emission sources, are injected into Underground Injection Control (UIC) Class VI wells for purposes of geologic sequestration (GS), and meet certain other conditions. EPA is taking this action because the Agency believes that the management of these $CO_2$ streams, when meeting certain conditions, does not present a

[7] See, *e.g.,* ERISA section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

[8] See, *e.g.,* Code section 430(g)(2)(B), which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

[9] See, *e.g.,* DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

[10] See PBGC 2011 pension insurance data table S–31, *http://www.pbgc.gov/documents/pension-insurance-data-tables-2011.pdf.*

[11] The more comprehensive changes to PBGC's premium information collection arising from the separate final rule that PBGC anticipates issuing—dealing with aspects of the July 23 proposal other than the large-plan flat-rate premium due date—will be addressed in that separate final rule.

[12] This burden estimate reflects both a decrease in burden attributable to the change in the large-plan flat-rate premium due date under this final rule and an increase in burden attributable to a re-estimate of the existing premium filing burden. The increase in burden due to re-estimation is about 31,300 hours, and the decrease due to the due date change is about 17,000 hours, a net increase of about 14,300 hours from the currently approved burden (about 163,600). PBGC assumes that about 95 percent of the work is contracted out at $350 per hour, so the 17,000-hour decrease attributable to the final rule is equivalent to about 850 hours of in-house labor and about $5,650,000 of contractor costs.

substantial risk to human health or the environment, and therefore additional regulation pursuant to RCRA's hazardous waste regulations is unnecessary. EPA expects that this amendment will substantially reduce the uncertainty associated with identifying these $CO_2$ streams under RCRA subtitle C, and will also facilitate the deployment of GS by providing additional regulatory certainty.

**DATES:** This final rule is effective on March 4, 2014.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–RCRA–2010–0695. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, such as 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 at *www.regulations.gov* or in hard copy at the OSWER Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the OSWER Docket is (202) 566–0270.

**FOR FURTHER INFORMATION CONTACT:** Melissa Kaps, Office of Resource Conservation and Recovery (5304P), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: 703–308–6787; fax number: 703–308–0514; email address: *kaps.melissa@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Does this action apply to me?

This final rule applies to generators, transporters, and owners or operators of treatment, storage, and disposal facilities engaged in the management of carbon dioxide streams that would otherwise be regulated as hazardous wastes under the RCRA subtitle C hazardous waste regulations as part of geologic sequestration activities. This includes entities in the following industries: operators of carbon dioxide injection wells used for geologic sequestration; and certain industries identified by their North American Industry Classification System (NAICS) code: oil and gas extraction facilities (NAICS 211111); utilities (NAICS 22); transportation (NAICS 48–49); and manufacturing (NAICS 31–33). More detailed information on the potentially affected entities is presented in Section VI of this preamble. 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.

### Preamble Outline

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I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. Statutory Authority

These regulations are promulgated under the authority of sections 2002, 3001–3009 and 3013 of the Solid Waste Disposal Act (SWDA) of 1970, as amended by the Resource Conservation and Recovery Act (RCRA) of 1976, and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6912, 6921–6929, 6934.

## II. Abbreviations, Acronyms, and Definitions

### *A. Abbreviations and Acronyms*

AoR Area of Review
CAA Clean Air Act
CCS Carbon Capture and Storage
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act
$CO_2$ Carbon Dioxide
EOR/EGR Enhanced Oil or Gas Recovery
EPA Environmental Protection Agency
GHG Greenhouse Gas
GS Geologic Sequestration
HSWA Hazardous and Solid Waste Amendments
RCRA Resource Conservation and Recovery Act
SDWA Safe Drinking Water Act
TC Toxicity Characteristic
TCLP Toxicity Characteristic Leaching Procedure
UIC Underground Injection Control
USDW Underground Source of Drinking Water

### *B. Definitions Used in This Preamble*

*Authorized representative:* The person responsible for the overall operation of a facility or an operational unit (i.e., part of a facility), e.g., the plant manager, superintendent or person of equivalent responsibility.

*Carbon dioxide ($CO_2$) stream:* Carbon dioxide that has been captured from an emission source (e.g., power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.

*Enhanced Oil or Gas Recovery (EOR/EGR):* Typically, the process of injecting a fluid (e.g., water, brine, or $CO_2$) into an oil or gas bearing formation to recover residual oil or natural gas. The injected fluid thins (decreases the viscosity) or displaces small amounts of extractable oil and gas, which is then available for recovery. This is also known as secondary or tertiary recovery.

*Supercritical $CO_2$*: Carbon dioxide that is above its critical temperature (31.1 °C, or 88 °F) and pressure (73.8 bar, or 1070 psi). Supercritical substances have physical properties intermediate to those of gases and liquids.

## III. Proposed Rule

### *A. Summary of Proposed Rule*

On August 8, 2011, EPA published a proposed rule that would conditionally exclude from the definition of hazardous waste certain carbon dioxide ($CO_2$) streams that are to be injected into Underground Injection Control (UIC) Class VI wells for purposes of geologic sequestration (GS). 76 FR 48073. The proposed rule was based upon EPA's determination that the management of these $CO_2$ streams in accordance with the proposed conditions would provide no reduced protection to human health

and the environment, and, therefore, additional regulation pursuant to the Resource Conservation and Recovery Act's (RCRA) hazardous waste regulations would be unnecessary.

Specifically, EPA proposed to amend 40 CFR 261.4 by adding an exclusion from the definition of hazardous waste for $CO_2$ streams that would otherwise be regulated as hazardous waste under RCRA subtitle C that met all of the following conditions: (1) Transportation of the $CO_2$ stream must be in compliance with applicable Department of Transportation (DOT) requirements; (2) injection of the $CO_2$ stream must be in compliance with the applicable requirements for UIC Class VI wells; (3) no other hazardous wastes may be mixed with, or otherwise co-injected with, the $CO_2$ stream; and (4) generators and UIC Class VI well owners or operators claiming the exclusion must sign a certification statement that the conditions of the exclusion were met. The proposed rule also would have required retention of the signed certification on-site for no less than three years, and required the certification be made available within 72 hours of request by the Regional Administrator (or state Director, if located in an authorized state).

EPA proposed this rule because the Agency expected that this amendment to the RCRA hazardous waste rules would substantially reduce the uncertainty associated with defining and managing these $CO_2$ streams under RCRA subtitle C and also would facilitate the deployment of GS by providing additional regulatory certainty.

Several other Agency activities are related to carbon capture and storage (CCS), including an EPA final rule that created a new class of injection wells (Class VI) for GS of $CO_2$ under the Safe Drinking Water Act (SDWA) UIC Program. December 10, 2010 (75 FR 77230). During the development of that UIC Class VI final rule, EPA was made aware that the participants in the CCS industry were asking for clarification on how the RCRA hazardous waste requirements apply to $CO_2$ streams that are geologically sequestered.

In addition, in February 2010, President Obama created the Interagency Task Force on Carbon Capture and Storage to develop a comprehensive and coordinated federal strategy to speed the commercial development and deployment of clean coal technologies. The task force consisted of 14 executive departments and federal agencies, and it was co-chaired by EPA and the U.S. Department of Energy. On August 12, 2010, the task force delivered a series of recommendations to the President on overcoming the barriers to the widespread, cost-effective deployment of CCS within 10 years. One of those recommendations was that EPA address RCRA applicability to $CO_2$ that is captured from an emission source for purposes of sequestration.[1]

GS is the process of injecting $CO_2$ captured from an emission source (e.g., a power plant or industrial facility) into deep subsurface rock formations in order to isolate the $CO_2$ permanently. GS is a key component of CCS, which is a set of climate change mitigation technologies. CCS can be described as a three-step process, beginning with the capture and compression of the $CO_2$ stream from fossil-fuel power plants or other industrial sources, after which the $CO_2$ stream is transported (usually in pipelines as a supercritical fluid[2]) to an on-site or off-site location, where it is then injected underground for purposes of sequestration.[3] Additional background information on the GS of $CO_2$ streams can be found in the August 8, 2011 proposed rule, as well as in the UIC Class VI final rule and record for that rule published on December 10, 2010 (75 FR 77230).

In developing the August 8, 2011 proposed rule, EPA looked at how $CO_2$ is captured, transported, and injected in CCS activities. For $CO_2$ capture, transport, and injection, EPA reviewed and compared regulations and requirements from other statutes and programs (e.g., DOT, SDWA) which might apply to each of these activities if the $CO_2$ stream is also regulated as hazardous waste. The Agency considered how these existing regulations and requirements control releases of hazardous constituents that might be present in the $CO_2$ streams.

First, regarding the generator requirements, EPA reviewed the subtitle C regulatory requirements applicable to RCRA generators, including requirements for tanks and containers and recordkeeping and reporting, among others. EPA also reviewed the available information on $CO_2$ capture processes and estimates of $CO_2$ capture rates. EPA concluded that, because of the large volumes of $CO_2$ projected to be captured, on-site storage of $CO_2$ in pressure vessels was unlikely. Rather, EPA stated its expectation that the process of capturing and compressing $CO_2$ prior to delivery to a UIC Class VI facility, which would likely occur via a pipeline will not involve storage at the generator facility (i.e., at the $CO_2$ source), but rather will occur in a continuous fashion (capture process → compression/dehydration → pipeline insertion). Because there would not be any substantive[4] RCRA subtitle C generator requirements applicable to such a continuous delivery scenario, the regulation of the movement of captured $CO_2$ streams from the point of capture to either an on-site UIC Class VI well or to an off-site DOT-regulated pipeline, would not be significantly different under the presence or absence of the conditional exclusion. EPA also stated its view that other programs provided equivalent notice and reporting requirements to the RCRA requirements. Thus, EPA concluded that additional regulation pursuant to RCRA subtitle C would not provide additional protections over existing regulatory requirements for generators of $CO_2$ streams.

Second, with respect to transportation, EPA examined existing requirements for pipeline and non-pipeline transportation. In the preamble to the proposed rule, EPA specifically discussed the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) requirements in 49 CFR Part 195, which apply to pipeline facilities used for transporting hazardous liquids or supercritical $CO_2$. EPA's review indicated that DOT's regulations addressed risks posed by pipelines in a way that is consistent with RCRA's goal of preventing releases in order to protect human health and the environment. EPA concluded that applicable DOT requirements (which apply to supercritical $CO_2$ streams regardless of whether or not these materials meet the definition of hazardous waste) will ensure that $CO_2$ streams are managed in a manner that addresses the potential risks to human health and the environment that these materials may pose, prior to arrival at a Class VI injection well facility. Therefore, EPA concluded that RCRA offers no additional protection, and did not propose any specific conditions beyond that of compliance with applicable DOT regulations. EPA assessed the DOT hazardous materials regulations applicable to non-pipeline transportation and reached similar conclusions. EPA also addressed issues surrounding on-site pipelines that may not be regulated by DOT pipelines and

[1] Report of the Interagency Task Force on Carbon Capture and Storage, August 2010, p. 12.

[2] Ibid., p. 61.

[3] Carbon Dioxide Capture and Storage. Intergovenrmental Panel on Climate Change (IPCC), 2005, p. 3.

[4] "Substantive" was used to describe requirements directly related to storage, transportation, treatment, or disposal and not notification or biennial reporting.

the lack of a manifest under the proposed conditional exclusion. See 76 FR 48083, August 8, 2011.

Third, EPA discussed the UIC Class VI injection well requirements, which are specifically designed to ensure that the $CO_2$ (and any incidental associated substances derived from the source materials and the capture process) will be isolated within the injection zone. EPA concluded that the elimination of exposure routes through these requirements, which are implemented through a SDWA UIC permit, will ensure protection of human health and the environment such that RCRA subtitle C regulation would be duplicative and unnecessary.

In addition, to further ensure protection of human health and the environment, EPA proposed to limit the scope of the exclusion by including a condition that no other hazardous waste can be mixed with, or otherwise co-injected with, the $CO_2$ streams. Thus, if hazardous waste is mixed with the $CO_2$ stream, that stream would not be eligible for the conditional exclusion under the proposed rule. Rather, that stream would need to be managed as a RCRA hazardous waste, and, if well injection is selected as the means of disposal, injected into a UIC Class I hazardous well.

*B. Authority for Conditional Exclusion From RCRA Subtitle C Requirements*

As explained in the proposed rule, RCRA provides EPA with authority to issue conditional exclusions from the hazardous waste regulations. EPA has previously interpreted RCRA section 3001(a) to authorize the issuance of ''conditional exemptions'' from the requirements of subtitle C, where it determines that ''a waste might pose a hazard only under limited management scenarios, and other regulatory programs already address such scenarios.'' 62 FR at 6636 (February 12, 1997); 66 FR at 27222–27223 (May 16, 2001). The final rule takes a similar approach to those earlier rules.

Section 3001(a) provides the Agency with flexibility to consider the need for regulation in deciding whether to list or identify a waste as hazardous. Specifically, RCRA section 3001(a) requires that EPA, in determining whether to list a waste as a hazardous waste, or to otherwise identify a waste as a hazardous waste, decide whether a waste ''should be subject to'' the requirements of subtitle C. Hence, RCRA section 3001 authorizes EPA to determine when subtitle C regulation is appropriate. EPA has consistently interpreted section 3001 of RCRA to give it broad flexibility in fashioning criteria for hazardous wastes to enter or exit the subtitle C regulatory system. EPA's longstanding regulatory criteria for determining whether wastes pose hazards that require regulatory control incorporate the idea that a waste that is otherwise hazardous may not present a hazard if already subject to adequate regulation. (See, e.g., 40 CFR 261.11(a)(3)(x), which requires EPA to consider action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste.)

EPA's interpretation is further supported by the text of RCRA sections 1004(5), and 3002–3004, and RCRA's legislative history. This interpretation has also been upheld upon judicial review. See, e.g., *Military Toxics Project* v. *EPA,* 146 F.3d 948 (D.C. Cir. 1998) (upholding conditional exemption for storage of military munitions, based on EPA determination that such wastes are subject to binding standards that meet or exceed RCRA standards, in addition to an institutional oversight process).

The statutory definition of hazardous waste, section 1004(5)(B), informs EPA's interpretation that EPA may consider good management practices in determining the need to regulate waste as hazardous under RCRA. That section defines a ''hazardous waste'' as ''a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may * * * (B) pose a substantial present or potential hazard to human health or the environment *when improperly treated, stored, transported, or disposed of, or otherwise managed.*'' (Emphasis added.) EPA has interpreted the statutory definition as incorporating the idea that a waste that is otherwise hazardous does not require regulation under RCRA so long as it is properly managed. For example, EPA's standards for listing hazardous wastes require consideration of a waste's potential for mismanagement. See 40 CFR 261.11(a)(3)(vii) (incorporating the language of RCRA section 1004(5)(B) and requiring EPA to consider ''plausible types of improper management'').

The statute also directs EPA to regulate hazardous waste generators (RCRA § 3002(a)), transporters (RCRA § 3003(a)) and treatment, storage and disposal facilities (RCRA § 3004(a)) ''as may be necessary to protect human health and the environment.'' By extension, the decision of when a waste should be subject to the regulatory requirements of subtitle C is a question of whether such regulatory controls are necessary to protect human health and the environment.

Thus, where a waste might pose a hazard only under limited management scenarios, and other regulatory programs already address such scenarios, EPA is not required to classify a waste as hazardous waste subject to regulation under subtitle C. At least three decisions by the U.S. Court of Appeals for the D.C. Circuit provide support for this approach to regulating wastes as hazardous waste only where necessary to protect human health and the environment. In *Military Toxics Project* v. *EPA,* 146 F.3d 948 (D.C. Cir. 1998), the court upheld a conditional exemption whereby the storage and transportation of certain military munitions are not considered hazardous waste subject to regulation under RCRA subtitle C, provided the munitions are stored and transported in compliance with regulations issued by the Department of Defense and the Department of Transportation, respectively. See 40 CFR 266.203, 266.205. The court ruled that EPA's interpretation of RCRA as authorizing a conditional exemption is ''a permissible construction of the statute.'' 146 F.3d at 958. The court cited its own precedent as recognizing '' 'that Congress intended the agency to have substantial room to exercise its expertise in determining the appropriate grounds for listing,' '' id. (citing *NRDC* v. *EPA,* 25 F.3d 1063, 1070 (D.C. Cir. 1994)), and concluded that, although the military munitions rule ''does not involve the listing regulations at issue in *NRDC* v. *EPA,* we think the principle at work there also supports the conditional exemption at issue here.'' Id.

In *NRDC* v. *EPA,* the court held that EPA appropriately used its discretion in relying on several existing regulatory frameworks governing used oil in determining not to list certain used oils as a hazardous waste. NRDC, 25 F.3d at 1071. Similarly, in *Edison Electric Institute* v. *EPA,* 2 F.3d 438 (D.C. Cir. 1993), the court upheld a temporary exemption from subtitle C for petroleum-contaminated media based on the fact that the potential hazards of such materials are already controlled under the underground storage tank regulations under RCRA subtitle I. In reaching its decision, the court considered the fact that the subtitle I standards could prevent threats to human health and the environment to be an important factor supporting the exemption. Id. at 453.

The legislative history of RCRA subtitle C also supports this interpretation, stating that ''the basic thrust of this hazardous waste title is to

identify what wastes are hazardous in what quantities, qualities, and concentrations, *and the methods of disposal which may make such wastes hazardous.''* H. Rep. No. 94–1491, 94th Cong., 2d Sess. 6 (1976), reprinted in A Legislative History of the Solid Waste Disposal Act, as Amended, Congressional Research Service, Vol.1, 567 (1991) (emphasis added). Finally, as discussed above, in finalizing this conditional exemption from RCRA, EPA is in part relying on the regulatory controls for Class VI wells, under the UIC program of the SDWA, 42 U.S.C. 300f *et seq.* EPA notes that such reliance is also consistent with the direction provided in section 1006(b) of RCRA, which directs EPA to integrate the provisions of RCRA, for purposes of administration and enforcement and to avoid duplication, to the maximum extent practicable, with those of certain other statutes, including the SDWA, to the extent that it can be done in a manner that is consistent with the goals and policies of both RCRA and the other relevant statute(s).

## IV. Changes to the Proposed Rule

EPA is finalizing the conditional exclusion largely as proposed on August 8, 2011, with some revisions. The following is a summary of the changes to the proposed rule.

EPA slightly modified the regulatory language for the condition that the $CO_2$ stream be transported in compliance with applicable DOT requirements (see § 261.4(h)(1) in today's final rule), by adding reference to state pipeline regulations that may be applicable (in lieu of the DOT regulations) in certain situations. Several commenters had noted that in cases where $CO_2$ pipelines start and stop within the same state (i.e., intrastate pipelines), these pipelines would be regulated by the state rather than by DOT. EPA consulted with DOT and confirmed that with respect to the DOT regulations in 49 CFR part 195 (which apply to pipeline facilities used in the transportation of hazardous liquids or supercritical $CO_2$), while some states have adopted regulations that apply to the transportation of supercritical $CO_2$ and are certified by DOT to directly regulate these intrastate pipelines, many states do not have such a certification, and DOT remains the direct regulator of both interstate and intrastate pipelines in those states. EPA notes that state pipeline regulations are required to be at least as stringent as the federal DOT requirements; therefore, compliance with either the applicable DOT regulations or the applicable certified state regulations has the same effect under the proposed conditional exclusion. Because the proposed condition at § 261.4(h)(1) only referred to compliance with applicable DOT regulations, EPA decided to modify the wording of the condition to add language that also refers to compliance with ''pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. § 60105'' to reflect situations where a pipeline facility must comply with state, rather than federal, regulation. Again, EPA is making this change in order to more accurately describe how pipeline facilities are already regulated under applicable pipeline regulations (be they State or Federal). EPA also made a conforming change to the related certification language so as to mirror the revised condition in § 261.4(h)(1).

The proposed exclusion required generators and UIC Class VI well owners or operators who claim the conditional exclusion to sign a certification statement that the conditions of the exclusion were met. EPA had proposed specific language for the certification statement. In today's final rule, the certification statement has been revised so that there are now two separate certification statements—one for $CO_2$ stream generators and another for UIC Class VI well owners or operators. This change was in response to commenters who were concerned about persons certifying to circumstances outside of their control. Under the final rule, the certification statement that the generator would sign is specific to the activities within the generator's control; likewise, the certification statement that the UIC Class VI well owner or operator would sign is specific to the activities within the owner or operator's control.

These revisions do not change how the conditional exclusion is implemented under today's final rule. A $CO_2$ stream must meet all the conditions to qualify for and maintain the exclusion from the hazardous waste regulations, and a violation of a condition at any point in the management of a $CO_2$ stream (that is otherwise hazardous) would result in that $CO_2$ stream being subject to all applicable subtitle C regulatory requirements, from the point of generation.

Furthermore, the final rule now requires that the signed certification statement must be readily accessible on the facility's publicly-available Web site, if such Web site exists, to serve as a public notification, in addition to being kept on-site for no less than three years. For further discussion on the changes to the certification statement, see section V.D. of this preamble.

## V. Summary of Comments and Responses to Major Comments

In response to the proposed rule, EPA received 29 distinct comments. The commenters represented a variety of organizations, including electric utilities, energy companies, the oil and gas industry, environmental groups, two states, and the public.

Nearly all commenters supported EPA's decision to clarify the regulatory scheme applicable to $CO_2$ management for CCS. Many commenters generally supported EPA's proposed conditional exclusion. Other commenters stated that a conditional exclusion is not necessary because the $CO_2$ streams are not subject to RCRA regulation, but suggested certain changes be made should EPA proceed with a conditional exclusion. Below is a detailed discussion of the major comments received, as well as EPA's response to those comments. EPA also notes that a more comprehensive response to comment document was prepared and placed in the docket associated with today's final rule.

### *A. Definition of Solid Waste*

In the proposed rule, EPA stated that a supercritical $CO_2$ stream injected into a permitted UIC Class VI well for purposes of GS is a RCRA solid waste, because it is a ''discarded material'' within the plain meaning of the term in RCRA § 1004(27). That is, a supercritical $CO_2$ stream is a solid waste when it is to be discarded through abandonment by disposing of the material in a UIC Class VI well (see 40 CFR 261.2(a)(2)(i) and (b)(1)). While some commenters agreed that EPA correctly identified supercritical $CO_2$ injected into a Class VI well for GS as a solid waste, a number of commenters disagreed, stating that supercritical $CO_2$ streams that are to be injected into a UIC Class VI well are not a solid waste, and therefore cannot be a hazardous waste. These commenters generally supported excluding supercritical $CO_2$ streams from RCRA regulation, but stated that these streams were already excluded. Commenters presented several reasons for this.

Some commenters argued that $CO_2$ is not a contained gas and, therefore, does not meet the RCRA statutory definition of solid waste. Some commenters also noted that $CO_2$ is a commodity that has commercial/beneficial uses, including use in enhanced oil or gas recovery (EOR/EGR) and manufacturing operations and, therefore, argued that it should not be classified as a waste. In fact, one commenter noted that *storage* (as in Carbon Capture and *Storage*) implies possible future use. Still other

commenters cited dictionary definitions of the terms used in EPA regulations, concluding that $CO_2$ sent to Class VI facilities is not *discarded, abandoned,* or *recycled.*

EPA disagrees that $CO_2$ streams sent to UIC Class VI wells for purposes of GS are not solid waste. As was stated in the preamble to the proposed rule, GS is an option to reduce $CO_2$ emissions to the atmosphere by injecting the $CO_2$ streams into deep subsurface geologic formations, with the express purpose of isolating the $CO_2$ so that it does not return to the atmosphere. August 8, 2011 (76 FR at 48075). Therefore, EPA views these $CO_2$ streams as ''discarded material'' within the plain meaning of the term in RCRA § 1004(27). The fact that the sequestration of $CO_2$ streams into deep geologic formations is at times labeled as ''long-term containment'' or ''long-term storage'' does not change this view.

In addition, several commenters pointed out that with the exception of demonstration and related projects, most if not all of the $CO_2$ that is geologically injected today is used for EOR/EGR, and in that application, it is purchased and transacted as a valuable commodity. EPA acknowledges that the underground injection of $CO_2$ has largely been (and continues to be) for the purpose of EOR/EGR, and does not disagree that $CO_2$ can and does have a variety of commercial and manufacturing uses,[5] but this does not affect the regulatory status of $CO_2$ streams when they are *to be injected into UIC Class VI wells for the purpose of GS.* As EPA noted in the preamble to the proposed rule, this conditional exclusion is not intended to affect the regulatory status of $CO_2$ streams that are injected into wells other than UIC Class VI wells. EPA reiterates that these issues are beyond the scope of this final rule, and EPA did not develop information for inclusion in the proposal on well classes other than UIC Class VI wells. However, in the interest of public transparency and in light of the several public comments on this issue, EPA does note that (based on the limited information provided in the public comments) should $CO_2$ be used for its intended purpose as it is injected into UIC Class II wells for the purpose of EOR/EGR, it is EPA's expectation that such an injection process would not generally be a waste management activity. EPA would encourage persons to consult with the appropriate regulatory authority to address any fact-specific questions they may have regarding the status of $CO_2$ in situations that are beyond the scope of this final rule.

As stated above, some commenters said that these $CO_2$ streams are not ''contained gases'' and therefore are not solid wastes under the RCRA statutory definition of solid waste.[6] More specifically, these commenters argued that these carbon dioxide streams are ''uncontained gases'' and as such were statutorily excluded from RCRA by Congress, while others said that Congress ''never envisioned regulation'' of a gas such as $CO_2$ under RCRA. As EPA noted in the proposed rule, the $CO_2$ streams are delivered by pipeline and injected into UIC Class VI wells for GS in a supercritical state, which EPA stated at proposal was ''. . . rather unique in that it has properties intermediate between a liquid and a gas.'' 76 FR at 48078. The scientific term used to describe or define this supercritical state (i.e., when a substance is at or above its critical temperature and critical pressure) is as a ''supercritical fluid.''[7][8] The RCRA statutory definition of solid waste specifically refers to ''*other discarded material, including* solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . .'' While EPA has indeed interpreted the meaning of specific terms listed, including ''contained gaseous material,'' the RCRA definition of solid waste encompasses ''other discarded material'' and does not speak to materials such as supercritical fluids. Like the listed ''solid, liquid, semisolid, or contained gaseous material'' specifically referenced, $CO_2$ streams sequestered for purposes of GS are ''other discarded material'' from industrial and commercial operations and, therefore, are of a similar kind to the other types of wastes specifically referenced by the definition. They are, therefore, RCRA statutory solid wastes.

*B. Definition of Hazardous Waste*

Under EPA's existing RCRA subtitle C regulations, generators are required to determine whether a solid waste exhibits a RCRA characteristic by testing the waste or applying their knowledge of the hazard characteristic of a waste, in light of the materials or processes used. In the proposed rule, EPA discussed the applicability of the RCRA hazardous waste regulations to supercritical $CO_2$ streams. 76 FR at 48077–78. Specifically, EPA stated that because there are no hazardous waste listings that apply to the supercritical $CO_2$ streams being considered here, a $CO_2$ stream could only be defined as a hazardous waste if it exhibits one or more of the hazardous waste characteristics as defined in 40 CFR part 261, subpart C. EPA also discussed issues specifically related to applying the Toxicity Characteristic (TC) to supercritical $CO_2$ streams and requested comment on the RCRA characterization issue.

Some commenters responded and said that even if these supercritical $CO_2$ streams were RCRA solid wastes, it should not be assumed that they are a hazardous waste, and that the very consideration of a conditional exclusion unnecessarily suggests that these streams could be hazardous. Many commenters argued that EPA has not demonstrated that the supercritical $CO_2$ streams would exhibit any of the RCRA characteristics, and asserted that the supercritical $CO_2$ streams would not exhibit any of the RCRA hazardous waste characteristics, or that the RCRA characteristic regulations do not otherwise apply to supercritical $CO_2$ streams. With respect to the TC specifically, commenters said that there is no record evidence that sequestered $CO_2$ streams are managed in municipal solid waste landfills (the waste management scenario EPA originally considered when establishing the TC) and in fact the conditional exclusion is premised on the material being managed only in a UIC Class VI well. Therefore, these commenters argued there is no basis for applying the TC to sequestered $CO_2$ streams.

EPA appreciates these commenters' concerns regarding the application of the hazardous waste regulations to supercritical $CO_2$ streams being sequestered. EPA believes these concerns exist as a result of the unique circumstances associated with addressing the applicability of RCRA to CCS at such an early stage in the

[5] For example, urea yield boosting, enhanced oil recovery, food processing and packaging, beverage carbonation, wine making.

[6] ''The term ''solid waste'' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or *contained gaseous material* resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).'' [emphasis added]. RCRA § 1004(27).

[7] See, for example, the definition of supercritical fluid in *Kirk-Othmer Concise Encylopedia of Chemical Technology, 5th edition.*

[8] Carbon dioxide becomes a supercritical fluid at a temperature of approximately 31.3 degrees C, and a pressure of 1,070 pounds per square inch (psi).

development of CCS. However, it is important to note that EPA did not set out in this rulemaking to conclude that those supercritical $CO_2$ streams that are solid wastes would, as a class, exhibit a RCRA characteristic. Indeed, EPA indicated in the proposed rule that it could not unequivocally conclude that supercritical $CO_2$ streams will *never* exhibit *any* RCRA hazardous waste characteristic and commenters provided no information to the contrary. Alternatively, EPA acknowledges that some RCRA hazardous characteristics are unlikely to apply to a waste composed of >90% $CO_2$, such as ignitability (i.e., RCRA Waste Code D001). Thus, in light of the early state of data development in this area, EPA intends to bring additional clarity to the regulatory regime through this rule, by establishing a conditional exclusion from the definition of hazardous waste that would apply in the event a generator determines that its $CO_2$ streams exhibit a RCRA hazardous characteristic.

EPA notes that it is not required to affirmatively demonstrate, as part of this rulemaking, that a particular $CO_2$ stream, or a portion of all $CO_2$ streams, necessarily qualifies as RCRA hazardous waste. Rather, under the conditional exclusion concept, EPA considers whether RCRA subtitle C regulation is necessary to protect human health and the environment. As explained in today's rule, after consideration of public comment, EPA has reached the conclusion that management of $CO_2$ streams under existing standards, including the UIC requirements for Class VI wells, as well as DOT standards, will protect human health and the environment from potential risks associated with $CO_2$ streams (including associated constituents that might be present). This conclusion is based on EPA's analysis of those other regulatory programs directly. EPA's analysis and conclusions are independent of, and thus unaffected by, the question of whether a stream is classified as a hazardous waste under EPA's RCRA regulations.

Finally, EPA notes that the conditional exclusion has a limited effect on the regulated community directly and the exclusion imposes no affirmative obligations upon them. Generators of non-hazardous waste $CO_2$ streams are not subject to the RCRA subtitle C regulations, and they are not obligated to make use of this conditional exclusion (although they still may choose to do so in situations where, for example, the generator may be uncertain regarding the hazardous waste status of the $CO_2$ stream). Moreover, because use of the conditional exclusion is voluntary, even those generators who characterize their streams as RCRA hazardous waste may continue to manage their streams as RCRA hazardous wastes from the point of generation. The only effect is upon those persons who choose to comply with the terms of the conditional exclusion.

*C. Justification for Conditional Exclusion*

In the proposed rule, EPA discussed at length the protections provided by the UIC Class VI well program and EPA's conclusion that regulation under RCRA would not provide additional protections to human health and the environment for $CO_2$ streams injected for purposes of GS. See 76 FR 48083–86. Two commenters claimed that EPA's conclusions in this respect were not adequately supported. The commenters stated that, by including a condition prohibiting the mixing or co-injection of hazardous waste into the $CO_2$ stream, EPA was implying that UIC Class I hazardous waste wells are more appropriate for hazardous wastes and therefore offer greater safeguards than UIC Class VI wells for hazardous $CO_2$ streams. These commenters also stated that EPA should offer an analysis on a point-by-point basis showing that the requirements for UIC Class VI wells are at least as protective as UIC Class I hazardous waste wells. Finally, the commenters said that EPA should not conditionally exclude $CO_2$ streams from subtitle C regulation without a better understanding of their composition, their potentially hazardous characteristics in all plausible environments, and without identifying allowable contaminants and setting limits for their concentration in these streams.

EPA does not agree that the hazardous waste mixing prohibition implies that UIC Class VI wells offer lesser safeguards than UIC Class I hazardous waste wells, for $CO_2$ streams that are the subject of this conditional exclusion. This conditional exclusion is limited to a specific, unique waste—$CO_2$ streams that are hazardous waste themselves (i.e., that exhibit a characteristic of hazardous waste due to the presence of impurities)—therefore, EPA needed to make clear that any other type of hazardous waste injection must continue to occur in UIC Class I hazardous waste wells.

EPA also disagrees that it needs to compare the UIC Class I hazardous waste and Class VI requirements point-by-point in order to demonstrate that the requirements for UIC Class VI wells are at least as protective as UIC Class I hazardous waste wells for $CO_2$ streams. As discussed in Section III.B in this preamble, determining whether a conditional exclusion is appropriate includes consideration of whether a waste may not present a hazard because it is already subject to adequate regulation. In determining whether existing regulation is adequate, EPA does not necessarily need to show that each existing requirement has a corresponding analogue in the RCRA subtitle C regulations. The UIC Class VI requirements are designed to ensure that the $CO_2$ streams (which may include low concentrations of hazardous constituents) remain isolated in the injection zone and confined by confining zones in an appropriate, well-characterized geologic setting that is continuously monitored to ensure that the $CO_2$ streams remain in the injection zone. EPA views the elimination of exposure routes through these requirements as determinative in its evaluation of whether the RCRA subtitle C regulatory requirements for hazardous waste disposal provide any substantial, additional protection for $CO_2$ streams which exhibit a characteristic of hazardous waste and are disposed in UIC Class VI wells. Moreover, in some instances, a point-by-point comparison may not even be appropriate. For example, the UIC Class VI requirements are designed for the unique characteristics of $CO_2$, including its large volume and its buoyancy relative to other fluids in the subsurface, unlike the typical fluids injected into UIC Class I hazardous waste wells. Finally, EPA also notes that the commenters, despite their general criticism that EPA did not undertake a particular enough analysis of the respective regulatory regimes, did not actually reject EPA's ultimate conclusion that the UIC Class VI requirements are sufficiently protective, nor did they provide any evidence of gaps in protection or other deficiencies in the analysis that only a more particularized analysis would reveal.

Regarding the comment that EPA did not evaluate the ''potentially hazardous characteristics'' of $CO_2$ streams ''in all plausible environments,'' EPA notes that the commenters did not identify the plausible environments to which they were referring. EPA's response is that the scope of its evaluation of the adequacy of existing regulatory requirements (and therefore the scope of the conditional exclusion) is limited to the management of supercritical $CO_2$ streams from capture at a $CO_2$ source to injection into a UIC Class VI well.

EPA agrees with the commenter that obtaining more data on the composition

of $CO_2$ streams that will be injected into UIC Class VI wells is important, but disagrees that the conditional exclusion should not be promulgated unless EPA identifies specific contaminants that may be injected and at what concentrations. As explained above, EPA has concluded that the injection of $CO_2$ streams, including incidental associated substances derived from the source materials and the capture process,[9] can be performed in a protective manner at a permitted UIC Class VI well. This is the case regardless of the precise contaminants, and their concentrations, because the UIC Class VI permitting requirements will take into account the physical and chemical characteristics of the $CO_2$ streams before any injection may occur, as part of establishing the appropriate conditions for the successful confinement of $CO_2$ in a manner that is protective of USDWs. EPA therefore has not altered its conclusion that the conditional exclusion is appropriate, and sees no need to delay further action on the conditional exemption to gather additional data.

Nevertheless, EPA emphasizes that the UIC Class VI regulations themselves require that the chemical composition and physical characteristics of the $CO_2$ streams be known as part of the initial permitting process, as well as during operation of the well, in order to ensure that these $CO_2$ streams can be injected in a manner that is protective of human health and the environment. EPA expects that this will provide a full understanding of the properties of the $CO_2$ streams being injected, including specific contaminants and their concentrations. As discussed in more detail below in Section V.G. of this preamble EPA intends to monitor any data on the chemical composition and physical characteristics of the $CO_2$ streams being injected by the UIC Class VI permitting program, and to use that information to determine whether changes to the conditional exclusion may be appropriate.

*D. Certification Statement*

One of the conditions for the proposed exclusion was that generators and UIC Class VI well owners or operators who claim the exclusion must sign a certification statement that all of the conditions of the exclusion were met. EPA had proposed specific language for a certification statement, where the same language would be used for the generator and the UIC Class VI well owner or operator. EPA requested comment on the certification statement and, particularly, on whether it would appropriately ensure compliance with the conditional exclusion.

While the commenters did not generally have concerns with signing a certification statement, some commenters were concerned that the certification as proposed would require signatories to attest to certain activities that were outside of their control. For example, several commenters thought it inappropriate for the $CO_2$ generator to have to certify to the injection well's owner or operator's compliance with the UIC Class VI rules. EPA agrees, and, in today's final rule, the certification statement has been revised so that there are now two separate certification statements worded slightly differently—one for generators and another for UIC Class VI well owners or operators claiming this exclusion. As revised, the generator certification statement reads as set forth in 40 CFR 261.4(h)(4)(i), and the UIC Class VI well owner or operator certification reads as set forth in 40 CFR 261.4(h)(4)(ii).

EPA is making these revisions to better reflect actions over which each party has control. EPA emphasizes that these revisions do not change how the conditional exclusion is implemented—that a $CO_2$ stream that is hazardous must meet all the conditions in § 261.4(h)(1)–(4) to qualify for and maintain the exclusion from the hazardous waste regulations. Thus, as discussed in the proposed rule, a violation of a condition at any point in the management of a $CO_2$ stream (that is otherwise hazardous) would result in that $CO_2$ stream being subject to all applicable subtitle C regulatory requirements from the point of generation. See 76 FR at 48087.

One additional note regarding situations where both the capture and the injection of $CO_2$ streams is occurring at the same site, such that the $CO_2$ streams are not being sent off-site either in a pipeline or via transportation such as by truck. EPA clarifies that § 261.4(h)(1) requires compliance with DOT (and state analogue) requirements only as these requirements independently apply (i.e., ''as applicable''). Thus, EPA would not consider this condition to have been violated merely because no pipeline or other transportation were used. Similarly, EPA does not intend for a generator in this situation to be prevented from signing the certification statement as drafted, because of the references to applicable DOT and state regulations.

As proposed, the certification statements would only be required of generators and UIC Class VI well owners or operators. EPA had requested comment on whether or not transporters or pipeline owners and operators also should sign a certification statement. One commenter stated that this certification would help ensure that pipeline owners and operators or other transporters do not purposefully mix hazardous wastes into the $CO_2$ stream. Several other commenters, however, asserted that this certification was unnecessary because transport through pipelines or by other means must meet applicable transport requirements for all materials moved, and therefore, certification that they meet these requirements only for a specific material (i.e., $CO_2$ to be sequestered) provides no additional protection and is unnecessary.

EPA agrees with those commenters who said that a certification by the transporter is not necessary. If EPA were to require such a certification, consistent with the approach described above, it would be limited to the conditions within the control of pipeline owners and operators or other transporters, which is compliance with applicable DOT requirements and to not mix hazardous waste into the $CO_2$ streams. Regarding compliance with DOT requirements, EPA agrees that if persons transporting supercritical $CO_2$ must comply with the applicable transportation requirements for all supercritical $CO_2$ being moved, it seems unnecessary to require that they certify compliance with DOT for a specific material (i.e., supercritical $CO_2$ streams to be sequestered). In addition, EPA does not have information, nor did commenters provide any new information, indicating that $CO_2$ pipeline owners and operators or other transporters would mix hazardous waste into $CO_2$ streams being delivered to UIC Class VI facilities.

One commenter pointed out that it is unlikely that these $CO_2$ streams will be transported other than by pipelines (except where small quantities are involved in some experimental wells, which are likely to be food grade $CO_2$ according to this commenter). As EPA discussed at proposal, PHMSA requires that pipeline owners and operators ensure that supercritical $CO_2$ streams be chemically compatible with the pipeline and any commodities in the pipeline and will not corrode the pipeline and pipeline system. 76 FR at 48087. EPA expects that pipeline owners and operators engaged in delivering supercritical $CO_2$ have strong disincentives to mix any hazardous

[9] EPA reiterates that $CO_2$ streams by definition may contain ''incidental associated substances derived from the source materials and the capture process.''

waste into their pipeline system, both in order to honor their contractual arrangement with customers, and also to maintain their equipment. For these reasons, EPA does not see the need for a transporter certification, and is not changing its proposed approach and transporters and pipeline owners and operators will not be required to sign a certification statement as a condition of the exclusion. However, EPA will continue to monitor compliance issues going forward and may revisit this condition as appropriate as part of its adaptive approach (discussed in Section V.G. in this preamble).

Finally, EPA proposed that the signed certification statement must be kept on-site for no less than three years and be made available upon request within 72 hours of a written request from either EPA or the state. In the proposed rule, EPA discussed how the certification plays an important role in ensuring that the conditions in the exclusion are met and its desire to safeguard the efforts of facilities to comply with the rule by designing a regulatory scheme both enforceable and structured to ensure compliance. EPA specifically requested comment on whether any new monitoring, recordkeeping, or reporting requirements were necessary to ensure compliance with the proposed conditional exclusion.

EPA received a few diverse comments on this provision. One commenter stated that requiring the certification to be kept on-site is not sufficient, citing the fact that the RCRA Enhanced Public Participation Rule would not apply.[10] Instead, this commenter suggested that EPA require the certification to be submitted to the UIC Program Director and be made publicly available on the regulator's Web site. Another commenter stated that requiring production within 72 hours was too short and that the certification requirement should reflect ''modern electronic filing systems where a paper copy may not be held in a file drawer. Making an electronic document available and submitting it electronically should both be allowed.''

In the final rule, EPA has kept the original proposed on-site retention time of no less than three years for the signed certification statement, but has added a provision for the statement to be posted prominently on the signatory's corporate Web site, if such Web site exists. As EPA made clear in the proposed rule, one of its key concerns with the certification statement was to ensure compliance with the terms of the conditional exclusion. Posting the signed certification statements on-line will promote compliance and accountability by providing efficient access by regulatory authorities and interested members of the public (consistent with the intent of the RCRA Enhanced Public Participation Rule cited by one commenter) to the exclusion certifications and the identities of the responsible officials. Moreover, EPA expects that posting the certifications on-line will simplify the reporting obligation for the regulated community because accessible internet posting obviates the need for a regulatory agency to request a hard copy.

EPA notes that it is not requiring the creation of any new corporate or other Web site. Entities without a Web site thus would not be required to post their certifications on-line. EPA expects, however, that most, if not all, affected entities already operate external Web sites to communicate to the public and, therefore, the posting requirement will be useful to regulators, the public, and the regulated community. The public disclosure of information is an increasingly common and important regulatory tool.[11] In 2010, the Office of Management and Budget (OMB) issued guidance with principles to assist agencies in using information disclosure to achieve regulatory objectives,[12] and EPA believes that regulatory information disclosure can cost-effectively improve compliance and accountability.

Finally, in today's final rule EPA is not requiring that the signed certification statement be submitted to the UIC Program Director as suggested by one commenter. EPA does not believe that an additional submission requirement will be necessary because the signed certification statement will in most circumstances be directly accessible on the injection facility's Web site. EPA also notes that as part of the process of obtaining a UIC Class VI permit, owners and operators who plan to claim the conditional exclusion may choose to submit the certification to the UIC Program Director to provide the necessary clarity on the status of the $CO_2$ streams under RCRA.[13]

*E. On-Site Pipelines*

In the proposed rule, EPA stated that some pipelines used to transport $CO_2$ might not be subject to the DOT requirements and requested information on how these pipelines are currently regulated, including any design and operating standards that apply to such pipelines. EPA also assumed that, in the typical case, captured $CO_2$ will not be stored at the generator facility but would be transferred in a continuous manner either to an on-site or off-site UIC Class VI well. While EPA did not propose to apply RCRA subtitle C requirements to these pipelines as a condition of the proposed exclusion, it did request comment on the appropriateness of applying the RCRA subtitle C standards to these non-DOT regulated pipelines. Several commenters responded and said that EPA should not apply the subtitle C requirements to non-DOT regulated pipelines as a condition of this rule. These commenters referenced the Pressure Piping standards set by the American Society of Mechanical Engineers (ASME)[14] and noted that non-DOT regulated $CO_2$ pipelines on-site are designed, constructed and maintained in accordance with these standards.

According to ASME, such standards promote safety, reliability, productivity, and efficiency in industries that rely on engineering components or equipment. While EPA acknowledges that ASME standards are not by themselves regulatory requirements,[15] these standards (e.g., ASME B31) are designed to ensure that the piping and associated

[10] The commenter is referring to regulations promulgated on December 11, 1995, that improve the process for permitting RCRA hazardous waste treatment, storage, or disposal facilities by providing earlier opportunities for public involvement in the process and expanding public access to information throughout the permitting process and the operational lives of facilities. 60 FR 63417.

[11] Cass R. Sunstein, Informational Regulation and Informational Standing: Akins and Beyond, 147 U. Pa. L. Rev. 613, 613 (1999).

[12] Memorandum for the Heads of Executive Departments and Agencies—Disclosure and Simplification as Regulatory Tools (Cass R. Sunstein, OMB; June 18, 2010). *http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf*

[13] The UIC Program Director may also request certain information prior to the issuance of a permit for the construction of a new Class VI well (or the conversion of an existing Class I, Class II, or Class V well to a Class VI well). 40 CFR 146.82(a)(21). Additionally, an owner or operator may choose to submit a signed certification statement in conjunction with other Class VI permit application information on the chemical and physical characteristics of the $CO_2$ stream required under 40 CFR 146.82(a)(7), to inform Class VI permit decisions.

[14] The B31 Code for pressure piping, developed by American Society of Mechanical Engineers (ASME) covers Power Piping, Fuel Gas Piping, Process Piping, Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids, Refrigeration Piping and Heat Transfer Components and Building Services Piping.

[15] According to ASME, standards are considered voluntary and serve as guidelines. ASME publishes its standards, accredits users of standards to ensure that they are capable of manufacturing products that meet those standards, and provides stamps that accredited manufacturers place on their products, indicating that a product was manufactured according to a standard.

equipment meet certain quality and safety criteria. In addition, that these ASME B31 standards have been incorporated by reference in various federal and state regulatory programs illustrates the high degree of confidence and acceptance placed on these standards. Ultimately, EPA did not find a compelling reason to require RCRA subtitle C standards to on-site piping associated with supercritical $CO_2$ streams.

*F. Definition of Carbon Dioxide Stream*

EPA proposed adding a definition for the term *carbon dioxide stream* to the hazardous waste regulations in 40 CFR 260.10. EPA is finalizing that definition without change: *Carbon dioxide stream* is defined as ''carbon dioxide that has been captured from an emission source (e.g., a power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.'' EPA explained that the proposed definition was intended to work in concert with the definition of ''carbon dioxide stream'' in the UIC Class VI regulations at 40 CFR 146.81(d). EPA also requested comment on the types and characteristics of substances that are added to $CO_2$ streams to enable or improve the injection process.

Most commenters agreed with the proposed definition. One commenter stated the definition as written is critical to ensure that the conditional exclusion is practicable, as any captured $CO_2$ stream will contain some substances from the source materials and the capture process. One commenter asked EPA to confirm that ''incidental associated substances'' means other substances captured together with the $CO_2$ from a gas stream and that the numerical values provided in the proposed rule preamble (as estimates of possible hazardous constituent concentrations in $CO_2$ streams) were not intended to establish any numerical threshold of ''incidental associated substances.'' EPA confirms that ''incidental associated substances derived from the source materials and the capture process'' is intended to refer to those substances that are captured together with the $CO_2$. EPA also confirms that it did not intend that the numerical concentrations of hazardous constituents described in the proposal's discussion of RCRA characterization issues[16] define what constitutes ''incidental associated substances'' in the proposed rule or in today's final conditional exclusion.

One commenter requested that EPA revise the term ''emission source'' to make it plural (''sources'') in order to recognize that $CO_2$ streams can come from more than one source, otherwise the definition ''. . . could be interpreted as requiring the $CO_2$ stream to come from a single source to qualify for the exemption.'' EPA never intended to limit the conditional exclusion to $CO_2$ streams from a single source but rather believes the existing language also would include $CO_2$ streams generated from two or more independently-produced $CO_2$ streams, provided that the conditions of the exclusion are met for all streams for which it is being claimed. Thus, we are not making this change.

This same commenter also requested that EPA delete the term ''incidental'' from the proposed definition, arguing that if a substance qualifies as an ''associated substance derived from the source materials and the capture process,'' then it should be eligible for the exclusion regardless of the quantity in which it exists in the stream. The commenter stated that the word ''incidental'' connotes a volume limitation, and its use in the definition suggests that if such ''associated substances'' are present at sufficient volume, then they will no longer qualify as being ''incidental,'' resulting in elimination of the exclusion.

EPA disagrees with the suggestion that ''incidental'' be deleted. In order to provide the regulatory clarity sought through this rule, it is critical that there be a consistent definition of *carbon dioxide stream* in both today's final rule and the UIC Class VI final rule. This consistent definition is important because the applicability of the UIC Class VI requirements and the applicability of the conditional exclusion are linked in instances where the exclusion is being claimed. EPA is concerned that employing different definitions will result in confusion as to which streams are subject to both rules. In any event, EPA finds it unlikely that the applicability of the conditional exclusion will turn on how 'incidental' is interpreted; that is, in any instance where it has been determined that a ''*carbon dioxide stream*'' (as defined in either rule) can be safely and legally injected into a UIC Class VI well, the conditional exclusion is applicable, provided the other specified conditions are met.

EPA also requested comment on the types and characteristics of substances that are added to $CO_2$ streams to enable or improve the injection process. One commenter stated that, at their GS injection site, they do not add any substances to improve the injectivity of the $CO_2$ stream. Another commenter said that it may be necessary to add substances to the $CO_2$ streams to improve injectivity, including substances to reduce viscosity, inhibit reactions with brine or formation rocks, or otherwise improve permeability. While this commenter did not provide information on what these substances might include, EPA emphasizes that any addition of substances to $CO_2$ streams to enable or improve the injection process would be occurring as part of the UIC Class VI permitted activity (subject to that program's oversight) and thus ultimately implemented in a manner to prevent the endangerment of Underground Sources of Drinking Water.

*G. Adaptive Approach*

EPA did not receive any significant comments on the adaptive approach, and no commenters disagreed with this approach; however, we believe it is important to reiterate what was presented in the preamble to the proposed rule, which was that after the conditional exclusion is promulgated any new information would be reviewed and used to inform whether changes should be made to the conditional exclusion, which could require additional rulemaking. August 8, 2011 (76 FR at 48088). This approach is consistent with the approach EPA described for considering changes to the UIC Class VI final rule, in order to incorporate new research, data, and information about GS and associated technologies. See December 10, 2010 **Federal Register** (75 FR at 77240–41, 77243, and 77257).

One example of where EPA has acknowledged it plans to consider new information that may have relevance to the overall protectiveness and/or implementation of this conditional exclusion is related to the composition of $CO_2$ streams. As described in Section V.C. of this preamble, one commenter cited EPA's lack of information on the nature of $CO_2$ streams as a concern, and EPA has stated that it intends to look at data generated on the chemical and physical characteristics of the $CO_2$ streams that are to be injected into UIC Class VI wells, to inform its consideration of whether changes should be made to the conditional exclusion.

Another commenter expressed concern that the conditional exclusion may actually create uncertainty, rather than reduce it, and that any exclusion ''. . . needs to address carbon dioxide

[16] See 76 FR at 48079.

streams for the full range of scenarios under which the uses of captured anthropogenic carbon dioxide streams are likely to occur.'' This commenter stated that EPA should not assume that the producer of $CO_2$ streams will always send their $CO_2$ streams through a dedicated pipeline to a single UIC Class VI well for geologic sequestration, and requested that EPA explain how the conditional exclusion would be implemented under a variety of hypothetical situations, involving $CO_2$ streams from anthropogenic and natural sources that may be co-mingled in the same $CO_2$ pipeline, for delivery either to one or more UIC Class II wells (for EOR), UIC Class VI wells (for GS), or to both types of wells.

EPA appreciates the commenter's request, and notes that currently there is a lack of sufficient information to inform the agency on how to best address the ''full range of scenarios'' presented by the commenter because many of such scenarios are still under development. EPA notes that the purpose of developing this final rule was to provide for the option of a conditional hazardous waste exclusion that could be used, where necessary,[17] to provide clarity as to the applicability of RCRA subtitle C, and in particular with respect to removing barriers to initiating near-term CCS projects.[18]

These examples illustrate why EPA is committed to an adaptive approach on CCS generally, so that the Agency may identify and address additional information and respond, including via rulemaking, should that be necessary. EPA emphasizes that the adaptive approach is not limited to the examples cited above, and where additional information may increase protectiveness, streamline implementation, or otherwise inform the requirements for GS injection of $CO_2$, EPA may need to evaluate whether changes are necessary. Thus, the Agency commits to reviewing, in a manner similar to the adaptive approach planned for the UIC Class VI rule, new research, data, and information related to today's conditional exclusion.

[17] EPA also notes that this conditional exclusion is voluntary, and regulated parties are not obligated to make use of this conditional exclusion. For example, generators of non-hazardous waste $CO_2$ streams are not subject to the RCRA subtitle C regulations, and they are not obligated to make use of this conditional exclusion.

[18] See Executive Summary, Report of the Interagency Task Force on Carbon Capture and Storage, August 2010.

## VI. State Authorization

### *A. Applicability of the Rule in Authorized States*

Under Section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste programs in lieu of the federal program within the state. Following authorization, EPA retains enforcement authority under Sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for state authorization are found at 40 CFR Part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. The federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA Section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than existing federal requirements. RCRA Section 3009 allows states to impose standards more stringent than those in the federal program (see also 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations that are considered less stringent than previous federal regulations.

### *B. Effect on State Authorization*

The provisions in today's notice are promulgated pursuant to non-HSWA authority, and would eliminate the hazardous waste requirements for those $CO_2$ streams that would otherwise meet the RCRA definition of hazardous waste, when these streams are managed in accordance with certain conditions. Therefore, this exclusion is less stringent than the federal program, and states are not required to adopt this provision.[19] Nevertheless, while states do not have to adopt this provision, EPA strongly encourages them to do so, because this amendment will substantially reduce the uncertainty associated with defining and managing these $CO_2$ streams under RCRA subtitle C, which will remove the uncertainty regarding the type of permit needed for the GS of $CO_2$ streams.

EPA notes that in situations involving the interstate transportation of conditionally-excluded waste, the exclusion must be authorized in the state where the waste is generated, any states through which the waste passes, and the state where the UIC Class VI injection well is located, in order for that conditionally-excluded waste to be managed as excluded from subtitle C from point of generation to injection in a UIC Class VI well. A state that has not adopted the conditional exclusion may impose state requirements, including the uniform hazardous waste manifest requirement (where applicable)[20] if characteristically-hazardous $CO_2$ streams are being transported through that state. EPA recommends in situations where the conditional exclusion is being asserted, involving one or more states that have not yet adopted this rule, that persons engaged in the transaction consult with these states to ensure no additional requirements apply.

[19] Some states incorporate the federal regulations by reference, or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, the conditional exclusion would be adopted by these states, consistent with state laws and administrative procedures (unless explicit action is taken by such a state to decline the revisions, as specified under that state's laws).

[20] As discussed in the proposed rule (see 76 FR at 48083), the off-site movement of hazardous waste through pipelines does not require the use of a hazardous waste manifest under the federal subtitle C hazardous waste regulations.

## VII. Statutory and Executive Order (EO) Reviews

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared a revised analysis of the potential cost impacts associated with the final rule. This revised analysis is presented in the following support document: *Assessment of the Potential Costs, Benefits, and Other Impacts—Hazardous Waste Management System: Conditional Exclusion for Carbon Dioxide ($CO_2$) Streams in Geologic Sequestration Activities: Final Rule (Assessment document).* A copy of this document is available in the docket for today's action. The findings from this analysis are briefly summarized below.

Entities that may be directly affected by the final rule include $CO_2$ generators and sequestration facilities that have UIC Class VI wells. These entities are likely to experience net cost savings as a result of the rule. Entities transporting the $CO_2$ stream that would otherwise be hazardous under subtitle C of RCRA must continue to meet the baseline DOT requirements and are expected to experience no increased costs, or cost savings. Increased costs associated with the review of selected $CO_2$ exclusion certification statements are expected for EPA and state governments.

Our revised analysis for the final rule incorporates modified estimates regarding the high-end number of potentially affected facilities and the percent of $CO_2$ streams that may be RCRA hazardous.[21] Market dynamics affecting the capture, compression, and sequestration of $CO_2$ streams have changed since the Agency prepared the *Assessment* document for the proposed action. The total number of $CO_2$ capture facilities potentially affected by the final rule remains uncertain. However, based upon current market conditions and the existing regulatory framework (i.e., lack of Federal legislation), it appears unlikely that there would be any significant expansion in CCS management for $CO_2$ over the next several years. As a result, we have made a downward revision to our high-end estimate of the number of facilities potentially affected by the final rule. The preamble to the proposed rule discussed the Agency's high level of uncertainty regarding the percent of $CO_2$ streams that may be characterized as RCRA subtitle C hazardous waste. Available information at the time indicated that it was possible that some $CO_2$ streams might meet the definition of hazardous waste, but the Agency considered this information to be insufficient to make a justifiable point estimate or reasonable range. Reflecting this uncertainty, we applied a broad range of 10 percent to 90 percent for $CO_2$ streams that may be RCRA hazardous waste. The proposed rule requested that commenters provide characterization data relevant to whether $CO_2$ streams meet the definition of RCRA hazardous waste and indicated that the Agency would continue to research and assess this issue. In response to our request, EPA received no new information or data that would indicate what percentage of captured $CO_2$ streams would be defined as a RCRA hazardous waste. Therefore, there remains a degree of uncertainty as to what percentage of $CO_2$ streams might be defined as a RCRA hazardous waste. However, within this uncertainty, EPA has considered all available information and now believes that the high-end estimate of 90 percent is likely to be a significant overestimate. Therefore, in an effort to present a more realistic and conservative estimate of cost savings, we are dropping the high-end 90 percent hazardous waste scenario for our final rule *Assessment.*

Based on these considerations, the final rule is estimated to result in undiscounted total net cost savings ranging from $4.96 million/year to $7.23 million/year. Applying a 3 percent discount rate, total net savings were found to range from $4.68 million/year to $6.83 million/year. Application of a 7 percent discount rate resulted in total net savings ranging from $4.24 million/year to $6.19 million/year. These figures represent more than an eighty percent reduction from estimates presented for the proposal. Similar to the proposal, impacts to sequestration facilities that have UIC Class VI wells represented less than one half of one percent of the total annualized net cost savings, in all cases examined. The revised estimates for EPA and state government annualized costs associated with the review of selected $CO_2$ exclusion certification statements are negligible (i.e., < $1,000/year).

These cost savings are expected to occur without any discernible increase in negative impacts to human health and the environment, as discussed above.

### *B. Paperwork Reduction Act*

The Office of Management and Budget (OMB) has preapproved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0207. The EPA ICR number is 2421.04.

This final rule is an important part of the Agency's efforts to establish a regulatory framework for GS. The certifications included in the rule (as well as the requirement for posting such certification on the signatories corporate Web site, if such Web site exists) are required for entities wishing to take advantage of the flexibility provided by the conditional exclusion. The certification statements would be used to hold generators and UIC Class VI well owner/operators accountable for knowing the conditions applicable to them (e.g., during an on-site inspection). The certification statements also would be used by generators and owner/operators to demonstrate that they are aware of, and complying with, the conditions.

We believe that the certifications are a practical way to assure compliance because they hold a single person at each facility accountable for compliance (i.e., the authorized representative). Because of this, the representative has a personal incentive to make sure that the facility complies with the conditions. The final rule requires that the certification be renewed every year, and be posted on the signatories corporate Web site, if such Web site exists, that the generator or UIC Class VI well owner/operator claims the RCRA conditional exclusion, in order to ensure that the certification remains current. EPA estimates the total annual burden to respondents (i.e., the private sector and state governments) under the new paperwork requirements to be 38 hours and $3,765. There are no capital costs. The annual public reporting and recordkeeping burden for this collection of information is estimated to average 4.8 hours per respondent. EPA estimates there to be 7 private entity respondents and 1 state government respondent that will respond once per year. In addition, EPA estimates an annual burden savings

[21] For a complete discussion of these changes see: ''Assessment of the Potential Costs, Benefits, and Other Impacts—Hazardous Waste Management System: Conditional Exclusion for Carbon Dioxide ($CO_2$) Streams in Geologic Sequestration Activities: Final Rule.''

under the existing paperwork requirements of 103 hours and $8,497. This results in a net annual savings of 65 hours and $4,733. The bottom-line burden savings to respondents over three years is estimated to be 195 hours and $14,199. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

*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.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business, based on the size standards of the Small Business Administration (SBA), that is primarily engaged in the generation, capture, storage, transportation, and GS of excluded hazardous $CO_2$ streams, as defined by NAICS codes 211111, 221112, 322121, 324110, 324199, 325120, 325193, 325311, and 327310, with total corporate employment ranging from 500 to 1,500 persons [22]; (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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if it relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This rule is projected to reduce the burden on regulated entities by conditionally excluding, from the RCRA subtitle C hazardous waste management requirements, hazardous $CO_2$ streams that are captured, transported, and injected into UIC Class VI wells and meet certain other conditions. We, therefore, have concluded that today's rule will relieve regulatory burden for all affected small entities.

*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. As explained above, this exclusion is less stringent than the current RCRA federal program, and states are not required to adopt it. Thus, the action imposes no enforceable duties on State, local or tribal governments. Moreover, private sector regulated entities are not required to use the conditional exclusion, and may continue to manage their hazardous $CO_2$ streams in accordance with the full RCRA hazardous waste regulations. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

*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 rule will not impose any requirements on States, or any other level of government. As explained above, today's final rule conditionally excludes $CO_2$ streams that would otherwise be RCRA hazardous from the definition of hazardous waste, where such streams, in accordance with the rule, are captured from emission sources and injected into UIC Class VI wells for purposes of GS. However, States would not be required to adopt this rule. Thus, Executive Order 13132 does not apply to this action.

*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). No tribal governments are known to generate $CO_2$ streams, or own or operate UIC Class VI wells subject to the final rule. Furthermore, we have identified no existing $CO_2$ pipelines that cross tribal lands. Thus, Executive Order 13175 does not apply to this action.

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

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The only effect of this action will be to conditionally exclude $CO_2$ streams that otherwise would be RCRA hazardous from the definition of hazardous waste, where such streams are captured from emission sources and injected into UIC Class VI wells for purposes of GS. This conditional exclusion would allow for the GS of $CO_2$, while maintaining protection of human health and the environment, and would not significantly disrupt the supply, distribution, or use of energy.[23]

[22] 211111 (500 persons), 221112 (500 persons), 322121 (750 persons), 324110 (1,500 persons), 324199 (500 persons), 325120 (1,000 persons), 325193 (1,000 persons), 325311 (1,000 persons), and 327310 (750 persons).

[23] As noted earlier in the preamble, where $CO_2$ streams are beneficially used for EOR/EGR in other than UIC Class VI wells—even where some sequestration may occur in the process of recovering oil or gas—these activities are beyond the scope of this final rule.

*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.

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, February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule 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. The only effect of this action will be to conditionally exclude $CO_2$ streams that would otherwise be RCRA hazardous from the definition of hazardous waste, where such streams are captured from emission sources and injected into UIC Class VI wells and meet other specified conditions. Existing regulations governing the generation, transportation, and injection of $CO_2$ streams in UIC Class VI wells are expected to protect human health and the environment, making additional regulation under RCRA subtitle C unnecessary. (See Section V.C. in this preamble for further discussion.)

*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 not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective March 4, 2014.

**List of Subjects**

*40 CFR Part 9*

Environmental protection, Reporting and recordkeeping requirements.

*40 CFR Part 260*

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

*40 CFR Part 261*

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Reporting and recordkeeping requirements.

Dated: December 17, 2013.

**Gina McCarthy,**

*Administrator.*

For the reasons set out in the preamble, Parts 9, 260 and 261 of title 40, Chapter I of the Code of Federal Regulations are amended as follows:

## PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

**Authority:** 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, add the following section in numerical order under the undesignated center heading ''Identification and Listing of Hazardous Waste'' to read as follows:

**§ 9.1 OMB approvals under the Paperwork Reduction Act.**

* * * * *

| 40 CFR citation | OMB control No. |
|---|---|
| * * * * * * * | |
| **Identification and Listing of Hazardous Waste** | |
| * * * * * * * | |
| 261.4(h)(4) | 2050–0207 |
| * * * * * * * | |

* * * * *

## PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

■ 3. The authority citation for Part 260 continues to read as follows:

**Authority:** 42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6934, 6935, 6937, 6938, 6939, and 6974.

### Subpart B—Definitions

■ 4. Section 260.10 is amended by adding in alphabetical order the definition of ''Carbon dioxide stream'' to read as follows:

**§ 260.10 Definitions.**

* * * * *

*Carbon dioxide stream* means carbon dioxide that has been captured from an emission source (e.g., power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.

* * * * *

## PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 5. The authority citation for Part 261 continues to read as follows:

**Authority:** 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938

■ 6. Section 261.4 is amended by adding paragraph (h) to read as follows:

**§ 261.4 Exclusions.**

* * * * *

(h) *Carbon dioxide stream injected for geologic sequestration.* Carbon dioxide streams that are captured and transported for purposes of injection into an underground injection well subject to the requirements for Class VI Underground Injection Control wells, including the requirements in 40 CFR Parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, are not a hazardous waste, provided the following conditions are met:

(1) Transportation of the carbon dioxide stream must be in compliance with U.S. Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable.

(2) Injection of the carbon dioxide stream must be in compliance with the applicable requirements for Class VI Underground Injection Control wells, including the applicable requirements in 40 CFR Parts 144 and 146;

(3) No hazardous wastes shall be mixed with, or otherwise co-injected with, the carbon dioxide stream; and

(4)(i) Any generator of a carbon dioxide stream, who claims that a carbon dioxide stream is excluded under this paragraph (h), must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with hazardous wastes, and I have transported the carbon dioxide stream in compliance with (or have contracted with a pipeline operator or transporter to transport the carbon dioxide stream in compliance with) Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190–199) of the U.S. Department of Transportation, and the pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable, for injection into a well subject to the requirements for the Class VI Underground Injection Control Program of the Safe Drinking Water Act.

(ii) Any Class VI Underground Injection Control well owner or operator, who claims that a carbon dioxide stream is excluded under paragraph (h) of this section, must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with, or otherwise co-injected with, hazardous waste at the Underground Injection Control (UIC) Class VI permitted facility, and that injection of the carbon dioxide stream is in compliance with the applicable requirements for UIC Class VI wells, including the applicable requirements in 40 CFR Parts 144 and 146.

(iii) The signed certification statement must be kept on-site for no less than three years, and must be made available within 72 hours of a written request from the Administrator, Regional Administrator, or state Director (if located in an authorized state), or their designee. The signed certification statement must be renewed every year that the exclusion is claimed, by having an authorized representative (as defined in 40 CFR 260.10) annually prepare and sign a new copy of the certification statement within one year of the date of the previous statement. The signed certification statement must also be readily accessible on the facility's publicly-available Web site (if such Web site exists) as a public notification with the title of ''Carbon Dioxide Stream Certification'' at the time the exclusion is claimed.

[FR Doc. 2013–31246 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2013–0668; FRL–9902–71–Region 9]**

## Revisions to the California State Implementation Plan, Antelope Valley Air Quality Management District, Mojave Desert Air Quality Management District, Monterey Bay Unified Air Pollution Control District, and South Coast Air Quality Management District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Antelope Valley Air Quality Management District (AVAQMD), Mojave Desert Air Quality Management District (MDAQMD), Monterey Bay Unified Air Pollution Control District (MBUAPCD), and South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from architectural coatings, liquefied petroleum gas transfer, and ignition of barbecue charcoal. We are approving three local rules and rescinding one local rule that regulate these emission sources under the Clean Air Act (CAA or the Act).

**DATES:** This rule is effective on March 4, 2014 without further notice, unless EPA receives adverse comments by February 3, 2014. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2013–0668, by one of the following methods:

1. Federal eRulemaking Portal: *www.regulations.gov.* Follow the on-line instructions.
2. Email: *steckel.andrew@epa.gov.*
3. Mail or deliver: Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that

you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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:* Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105–3901. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Nicole Law, EPA Region IX, (415) 947–4126, *law.nicole@epa.gov.*

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

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A. What rules did the State submit?
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D. Public Comment and Final Action
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## I. The State's Submittal

### *A. What rules did the State submit?*

Table 1 lists the rules we are approving and rescinding with the dates that they were adopted or rescinded by the local air agencies and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULES

| Local agency | Rule No. | Rule title | Adopted/ amended | Rescinded | Submitted |
|---|---|---|---|---|---|
| MDAQMD | 1113 | Architectural Coatings | 04/23/12 | | 02/06/13 |
| MBUAPCD | 426 | Architectural Coatings | 08/15/12 | | 04/22/13 |
| AVAQMD | 1174 | Control of Volatile Organic Compound Emissions from the Ignition of Barbecue Charcoal. | 10/05/90 | 11/20/12 | 04/22/13 |
| SCAQMD | 1177 | Liquefied Petroleum Gas Transfer and Dispensing. | 06/01/12 | | 02/06/13 |

On April 9, 2013, EPA determined that the submittal for MDAQMD Rule 1113 and SCAQMD Rule 1177 met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review. On June 26, 2013, EPA determined that the submittal for MBUAPCD Rule 426 and AVAQMD Rule 1174 met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review.

### *B. Are there other versions of these rules?*

There are no previous versions of SCAQMD Rule 1177 in the SIP. We approved an earlier version of AVAQMD Rule 1174 into the SIP on October 4, 1994 (59 FR 50498). Limited approvals of MDAQMD Rule 1113 and MBUAPCD Rule 426 were published on January 1, 2004 (69 FR 34) for inclusion in the SIP. The MDAQMD and MBUAPCD adopted revisions to the SIP-approved versions on April 23, 2012 and August 15, 2012 and CARB submitted them to us on February 6, 2013, and April 22, 2013.

### *C. What is the purpose of the submitted rule revisions?*

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions. MDAQMD Rule 1113 and MBUAPCD Rule 426 lower VOC content limits of various architectural coatings and SCAQMD Rule 117 limits VOC emissions from liquefied petroleum gas transfer. AVAQMD Rule 1174 controlled VOC emissions from ignition of barbecue charcoal, but is being rescinded because EPA and CARB have adopted redundant regulations. EPA's technical support documents (TSD) have more information about these rules.

## II. EPA's Evaluation and Action

### *A. How is EPA evaluating the rules?*

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each $NO_X$ or VOC major source in ozone nonattainment areas classified as moderate or above (see sections 182(b)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). SCAQMD regulates an ozone nonattainment area classified as extreme for the 8-hour ozone NAAQS (see 40 CFR Part 81.305), so Rule 1177 must fulfill RACT. The MBUAPCD and MDAQMD rules regulate an area source and are not required to fulfill RACT, though we have evaluated them for enforceability, stringency, and backsliding. The rescission of the AVAQMD rule must not relax existing requirements (see sections 110(l) and 193 of the CAA).

Guidance and policy documents that we use to evaluate enforceability and RACT requirements consistently include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).

3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

4. ''Suggested Control Measure for Architectural Coatings,'' CARB, October 2007.

*B. Do the rules meet the evaluation criteria?*

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The AVAQMD is requesting rescission of rule 1174 because EPA and CARB have adopted similar regulations and we believe the rule rescission is consistent with policy and guidance. The TSDs have more information on our evaluation.

*C. EPA Recommendations To Further Improve the Rules*

The TSDs describe additional rule revisions that we recommend for the next time the local agencies modify the rules.

*D. Public Comment and Final Action*

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules and rule rescission because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules and rule rescission. If we receive adverse comments by February 3, 2014, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on March 4, 2014. This will incorporate the three rules into and remove the one rule from the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

**III. Statutory and Executive Order Reviews**

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 4, 2014. 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 may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 25, 2013.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

## PART 52 APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS.

■ 1. The authority citation for Part 52 continues to read as follows:

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

## Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(184)(i)(B)(*12*), (c)(428)(i)(C) and (D), and (c)(429)(i)(C) to read as follows:

### § 52.220 Identification of plan.

* * * * *

(c) * * *

(184) * * *

(i) * * *

(B) * * *

(*12*) Previously approved on October 4, 1994 in paragraph (c)(184)(i)(B)(*4*) of this section and now deleted without replacement, for the Antelope Valley area only, Antelope Valley Rule 1174, previously South Coast Rule 1174. South Coast Rule 1174 remains in effect for the South Coast area.

* * * * *

(428) * * *

(i) * * *

(C) Mojave Desert Air Quality Management District.

(*1*) Rule 1113, ''Architectural Coatings,'' amended on April 23, 2012.

(D) South Coast Air Quality Management District.

(*1*) Rule 1177, ''Liquefied Petroleum Gas Transfer and Dispensing,'' adopted on June 1, 2012.

(429) * * *

(i) * * *

(C) Monterey Bay Unified Air Pollution Control District.

(*1*) Rule 426, ''Architectural Coatings,'' amended on August 15, 2012.

* * * * *

[FR Doc. 2013–30861 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2011–0344; FRL–9904–38–OAR]**

**RIN 2060–AR66**

## National Emissions Standards for Hazardous Air Pollutants from Secondary Lead Smelting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to promulgate amendments to a final rule that revised national emission standards for hazardous air pollutants for existing and new secondary lead smelters. The final rule was published on January 5, 2012. This direct final action amends certain regulatory text to clarify compliance dates. Additionally, we are making amendments to clarify certain provisions in the 2012 final rule related to monitoring of negative pressure in total enclosures. This action also corrects typographical errors in a table listing congeners of dioxins and furans and the testing requirements for total hydrocarbons.

**DATES:** This rule is effective on March 4, 2014 without further notice, unless the EPA receives adverse comment by February 3, 2014. If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule, or relevant provisions of this rule, will not take effect.

**ADDRESSES:** You may submit comments, identified by Docket ID Number EPA–HQ–OAR–2011–0344, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov,* Attention Docket ID Number EPA–HQ–OAR–2011–0344.
- *Fax:* (202) 566–9744, Attention Docket ID Number EPA–HQ–OAR–2011–0344.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA–HQ–OAR–2011–0344, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004, Attention Docket ID Number EPA–HQ–OAR–2011–0344. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions.* Direct your comments to Docket ID Number EPA–HQ–OAR–2011–0344. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the 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 the 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, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

*Docket.* The EPA has established a docket for this rulemaking under Docket ID Number EPA–HQ–OAR–2011–0344. 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, is not placed on the Internet, and 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 EPA Docket Center, 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 EPA Docket Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** For questions about this action, contact Mr. Nathan Topham, Metals and Inorganic Chemicals Group, Sector Policies and Programs Division (D243–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0483; fax number: (919) 541–3207; and email address: *topham.nathan@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Organization of this Document.* The following outline is provided to aid in locating information in the preamble.

I. What is the background for the amendments?
II. What are the changes to the final rule?
III. 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
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 Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

## I. What is the background for the amendments?

On January 5, 2012 (77 FR 556), EPA published final amendments to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) From Secondary Lead Smelting. The EPA has subsequently determined, following discussions with affected parties, that the final rule warrants clarification in four areas.

The EPA inadvertently removed from 40 CFR part 63, subpart X the requirement for facilities constructed or reconstructed on or before May 19, 2011, to comply with the previous version of the NESHAP between promulgation of the January 5, 2012, amendments and the subsequent compliance date for existing sources, which is January 6, 2014. Since existing sources remain subject to the pre-existing standards until the compliance date for the January 2012 standards, the EPA is amending the rule to restore the deleted language.

The EPA received petitions for reconsideration of the final rule from the secondary lead smelting industry. One issue raised in the petitions relates to the table of dioxin and furan congeners contained in the regulatory text (Table 3 to Subpart X of Part 63—Toxic Equivalency Factors). This table included incorrect values for some dioxin toxic equivalency factors (TEF) and omitted some congeners. The EPA intended to use the 2005 World Health Organization (WHO) TEF in Table 3 to subpart X of part 63. See 76 FR 29051, ''The TEQ emissions will be calculated using the toxic equivalency factors (TEF) outlined by the World Health Organization (WHO) in 2005 (available at Web site: *http://www.epa.gov/raf/hhtefguidance/*).''

Industry petitioners expressed concern that the agency changed one aspect of the emission standard for total hydrocarbons (THC) between proposing and finalizing the risk and technology review amendments for secondary lead smelters. In the 2011 proposed rule, the total hydrocarbon standard for furnace charging process fugitive emissions that are not combined with furnace process emissions did not require correction to 4-percent carbon dioxide ($CO_2$). See the **Federal Register** at 76 FR 29072, May 19, 2011. In the 2012 final rule, this standard inadvertently included correction to 4-percent $CO_2$. See the **Federal Register** at 77 FR 582, January 5, 2012.

Finally, petitioners asked the EPA to clarify several monitoring provisions for total enclosures. Industry requested flexibility in defining the term ''windward wall'' when a total enclosure is not impacted by ambient wind. The regulatory text was unclear where to place monitors when ambient wind does not affect the total enclosure. Petitioners requested clarification in how to monitor enclosures that are divided into multiple areas all under negative pressure. Petitioners also asked the EPA to clarify that data from differential pressure monitors should be used to calculate 15-minute averages. Petitioners also stated that the EPA should clarify the meaning of ''accuracy'' in 40 CFR 63.548(k)(3).

The EPA is issuing the amendments as a direct final rule, without a prior proposal, because we view the revisions as noncontroversial and anticipate no adverse comment. The EPA never intended to remove the pre-January 2012 NESHAP from the Code of Federal Regulations (CFR), and no commenters suggested such an action. Additionally, the errors in Table 3 to subpart X of part 63 and the THC correction for furnace charging process fugitive emissions are simply typographical errors. The differential pressure monitoring clarifications do not alter the impacts of the 2012 final rule and simply clarify requirements from that rulemaking. The monitoring clarifications include the following: Clarifying the definition of windward wall; clarifying how to monitor pressure in situations where smaller enclosures are located within larger full enclosures; clarifying the averaging time for the monitoring; and clarifying the calibration requirements for the monitoring equipment. However, in the Proposed Rules section of this **Federal Register** issue, the EPA is also publishing a separate document that will serve as the proposal to amend the Secondary Lead Smelting NESHAP with the same amendments contained in this direct final action if significant adverse comments are submitted. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. The EPA will address all public comments in any subsequent final rule based on the proposed rule. We will address other issues for which we have received requests for reconsideration in a separate proposal that will be published at a later date.

## II. What are the changes to the final rule?

We are clarifying compliance requirements for existing sources for the period beginning January 5, 2012, and ending on the compliance date for existing sources established in the final rule published in the **Federal Register** at 77 FR 584, January 5, 2012. See 40 CFR 63.546(a). When the final rule was published in the **Federal Register**, the subpart was reprinted in its entirety to aid the public in locating and understanding the requirements for secondary lead smelters. This inadvertently removed the earlier version of 40 CFR part 63, subpart X from the CFR. This direct final rule clarifies that secondary lead smelters that commenced construction or reconstruction before May 19, 2011 (i.e., all sources existing as of that time, which includes sources classified as both existing and new under the previous rule), are still subject to the requirements of subpart X for new and existing sources that were effective prior to the January 5, 2012, amendments, and remain subject to those provisions until the compliance date for the January 5, 2012, amendments. Specifically, sources that were classified as new under the previous rule, (i.e., those which commenced construction after June 9, 1994) are subject to the previous rule's new source standards (codified at former 40 CFR 63.543 through 63.545). Existing sources under the previous rule are subject to the previous rule's existing source standards (codified at former 40 CFR 63.543 through 63.545). We have added paragraph (c) to 40 CFR 63.546 to correct this inadvertent error.

The EPA is also correcting typographical errors in Table 3 to subpart X of part 63. The table did not include all of the 2005 WHO TEF and had incorrect TEF values for some of the congeners included in the table. The EPA is not changing the emission standards for dioxins and furans from the 2012 final rule or using different congeners than we intended to include in the 2011 proposed rule or 2012 final rule. See 76 FR 29051, ''The TEQ emissions will be calculated using the toxic equivalency factors (TEF) outlined by the World Health Organization (WHO) in 2005 (available at Web site: *http://www.epa.gov/raf/hhtefguidance/*)''.

We are removing the $CO_2$ correction requirement that we inadvertently added to 40 CFR 63.543(f) in the final rule. We did not intend to make this change between the proposed and final rules, did not receive comments on this issue, and did not discuss it in the preamble to the final rule or supporting documents. The hoods that capture furnace charging process fugitive emissions draw a large amount of excess ambient air with very low concentrations of $CO_2$. Measured concentrations of THC would be inappropriately multiplied by 10 if $CO_2$ corrections were required for these sources. This amendment will not change the impacts of the 2012 final rule since we did not intend to make this change between the proposed and final rules.

We are also clarifying five parts of the rule establishing differential pressure monitoring requirements for negative pressure enclosures. These corrections are intended to clarify existing requirements and do not change the impacts of the final rule.

*1. Placement of Pressure Monitors for Total Enclosures Inside Larger Structures*

Industry petitioners requested that the EPA clarify how differential pressure monitors should be arranged within total enclosures when those enclosures exist within or as part of a larger structure. The EPA granted reconsideration in order to provide needed clarifications. In the 2012 final rule, differential pressure monitors are required on walls within a total enclosure to ensure negative pressure is maintained within the enclosure. See 40 CFR 63.548(k). The EPA included definitions for ''windward'' and ''leeward'' walls to determine which walls within a total enclosure should have differential pressure monitors. Windward and leeward walls were defined using prevailing ambient wind directions. See 40 CFR 63.542. Industry petitioners stated that some total enclosures are within larger structures that shield the total enclosure from impacts of ambient wind. Furthermore, we have determined there are significant technical difficulties associated with monitoring negative pressure in areas that open into other areas that are also under negative pressure. Therefore, as explained in more detail under item number 5 below, in situations where smaller enclosures are contained within larger total enclosed structures, we are clarifying that facilities only need to monitor pressure differential for the larger total enclosure. Furthermore, in this action, we are clarifying that in such situations, owners or operators may choose which wall to define as the ''windward wall'' for placing differential pressure monitors. We are also adding regulatory text that allows a permit authority to approve an alternative location for the third monitor placed between the windward and leeward wall monitors. Industry commenters stated that irregularly shaped enclosures would make it difficult to determine where to place the monitor under the current requirements. This clarification will not adversely affect the quality or frequency of data collection from differential pressure monitors.

*2. Averaging Time for Differential Pressure Monitoring Data*

The 2012 final rule for secondary lead smelters requires differential pressure monitors in order to demonstrate continuous compliance with the requirements of 40 CFR 63.544(c)(1). Industry petitioners stated that the 2012 final rule creates uncertainty about how to handle data collected from differential pressure monitors. The 2012 final rule did not explicitly state how to use the data collected from the monitors, although the rule did incorporate 40 CFR 63.10(b)(2)(vii), which requires records of 15-minute averages of data collected from continuous monitoring systems. In this action, we are clarifying that the data collected from the continuous pressure monitors must be used to calculate 15-minute averages that are used to demonstrate compliance. This amendment does not alter the impacts of the 2012 final rule. Rather, it simply clarifies the existing requirements already included in the 2012 rule by explicitly stating the requirements previously referenced in the general provisions.

*3. Differential Pressure Monitoring Device Accuracy*

The 2012 final rule included a requirement for differential pressure monitors with ''minimum accuracy of plus or minus 0.001 millimeters of mercury (0.0005 inches of water).'' See 40 CFR 63.548(k)(3). Industry has expressed concerns that there are not monitors available with certified accuracy at the levels prescribed in the 2012 final rule. We included the accuracy requirement in the 2012 final rule to ensure that the differential pressure monitors display and record data with sufficient sensitivity to demonstrate compliance with the standard. Our goal was to require monitors that display and record data with sufficient significant figures, rather than a specific certified accuracy level. We are clarifying this requirement in the regulatory text. We are changing the sensitivity requirement from 0.0005 inches of water to 0.001 inches of water. Industry commenters noted difficulty finding monitors with sufficient sensitivity to meet the original requirement. Monitors capable of recording data in increments of 0.001 inches of water are sufficient to determine compliance with the standard. This clarification will not have any impact on the cost or environmental impacts of the 2012 final rule or impact the quality or frequency of differential pressure data collection.

*4. Calibration Schedule for Differential Pressure Monitors*

We are amending the regulatory text to simplify requirements for calibrating differential pressure monitors. See 40 CFR 63.548(k)(5). We have changed the regulatory text to require calibration per manufacturer's specifications rather than on a prescribed schedule. It has come to our attention that some manufacturers of differential pressure monitors do not require or recommend calibration as frequently as once per year. The amended requirements will ensure that monitors are calibrated properly without requiring adjustments more frequently than manufacturers recommend.

*5. Monitoring Enclosures That Only Open Into Other Enclosures*

We are adding regulatory text to address how negative pressure within total enclosures must be monitored when those enclosures only open into other totally enclosed process areas. If a source, or group of sources, is in a totally enclosed part of a building that only opens into other areas that are also totally enclosed under negative pressure, the source only needs to monitor differential pressure on the outermost walls of the enclosure that opens to areas that are not enclosed under negative pressure. This change ensures that facilities maintain negative pressure in structures housing process areas without unnecessary monitoring requirements. It is redundant to monitor negative pressure in process areas that open into other totally enclosed process areas under negative pressure. Additionally, it has come to our attention that there are technical difficulties associated with monitoring negative pressure in areas that open into other areas also under negative pressure. The modified regulatory text will ensure that monitors are able to function properly by specifying that monitors are not to be placed on walls with no

exposure to ambient pressure on either side of the wall.

We have not made any other changes to the final rule in this direct final action. We note that we are not re-proposing, reconsidering, or in any other way re-opening any other aspects of the final rule for comment through this direct final action.

## III. 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 (EO) 12866 (58 FR 51735, October 4, 1993), and is, therefore, not subject to review under Executive Order 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 adds clarifications and corrections to the final standards. However, OMB has previously approved the information collection requirements contained in the existing regulation (40 CFR part 63, subpart X) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.,* and has assigned OMB control number 2060–0296. 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 generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of this rule on small entities, small entity is defined as: (1) A small business as defined by Small Business Administration (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 impact of this direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities because it does not add any additional regulatory requirements and only clarifies the existing compliance requirements.

*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. The action imposes no enforceable duties on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments nor does it impose obligations upon them.

*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 direct final rule primarily affects private industry, and does not impose significant economic costs on state or local governments. Thus, Executive Order 13132 does not apply to this action.

*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). It will not have substantial direct effect on tribal governments, 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 as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

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

*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 the EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. The VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

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

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule 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. This action merely corrects and clarifies existing requirements, it does not change any regulatory requirements.

*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. The EPA will submit a report containing this final rule and other required information to the United States Senate, the United States House of Representatives and the Comptroller General of the United States prior to publication of the direct final 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). The final rule will be effective on March 4, 2014.

**List of Subjects for 40 CFR Part 63**

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 20, 2013.

**Gina McCarthy,**

*Administrator.*

For the reasons stated in the preamble, part 63 of title 40, chapter I, of the Code of Federal Regulations is amended as follows:

## PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

■ 2. Amend § 63.542 by revising the definition of ''Windward wall'' to read as follows:

### § 63.542 Definitions.

* * * * *

*Windward wall* means the exterior wall of a total enclosure that is most impacted by the wind in its most prevailing direction determined by a wind rose using available data from the closest representative meteorological station. When openings into enclosures are not impacted by ambient wind due to the enclosure being part of a larger structure, the owner or operator may designate which wall of the enclosure to define as the windward wall.

■ 3. Amend § 63.543 by revising paragraph (f) to read as follows:

### § 63.543 What are my standards for process vents?

* * * * *

(f) If you do not combine the furnace charging process fugitive emissions with the furnace process emissions, and discharge such emissions to the atmosphere through separate emissions points, you must maintain the total hydrocarbons concentration in the exhaust gas at or below 20 parts per million by volume, expressed as propane.

* * * * *

■ 4. Amend § 63.544 by revising the first sentence of paragraph (c) introductory text and adding paragraph (c)(3) to read as follows:

### § 63.544 What are my total enclosure standards?

* * * * *

(c) You must construct and operate total enclosures for the sources listed in paragraph (a) of this section as specified in paragraphs (c)(1) through (3) of this section.* * *

* * * * *

(3) If areas that contain one or more sources listed in paragraphs (a)(1) through (9) of this section are enclosed within a larger building that also meets the definition of a total enclosure under § 63.542, the requirements of paragraphs (c)(1) and (2) shall be monitored pursuant to § 63.548(k) at only one leeward, one windward and one additional wall of the outermost portion of the larger totally enclosed building rather than each individual area within the building.

* * * * *

■ 5. Amend § 63.546 by adding paragraph (c) to read as follows:

### § 63.546 Compliance dates.

* * * * *

(c) Until the date specified in 63.546(a), secondary lead smelters that commenced construction or reconstruction on or before May 19, 2011, must continue to demonstrate compliance with the requirements of this subpart, codified in 40 CFR 63.541 through 40 CFR 63.550, that were in effect prior to the January 5, 2012, amendments. This means that secondary lead smelters that commenced construction or reconstruction on or before June 9, 1994, must continue to demonstrate compliance with existing source requirements of this subpart that were in effect prior to the January 5, 2012, amendments until the date specified in § 63.546(a). Secondary lead smelters that commenced construction or reconstruction after June 9, 1994, and on or before May 19, 2011, must continue to demonstrate compliance with new source requirements of this subpart that were in effect prior to the January 5, 2012, amendments until the date specified in § 63.546(a).

■ 6. Amend § 63.548 by revising paragraphs(k)(1)(iii), (k)(3), (k)(4) and (k)(5) to read as follows:

### § 63.548 Monitoring requirements.

* * * * *

(k) * * *

(1) * * *

(iii) An exterior wall that connects the leeward and windward wall at a location defined by the intersection of a perpendicular line between a point on the connecting wall and a point on its furthest opposite exterior wall, and intersecting within plus or minus 10 meters of the midpoint of a straight line between the two other monitors specified. The midpoint monitor must not be located on the same wall as either of the other two monitors. If approved by the permitting authority, this third monitor may be placed in an alternative location on the midpoint wall or an exterior wall that is not the windward wall, leeward wall or midpoint wall.

* * * * *

(3) The digital differential pressure monitoring systems must be certified by the manufacturer to be capable of measuring and displaying negative pressure containing values in the range of 0.01 to 0.2 millimeters mercury (0.005 to 0.11 inches of water) and capable of recording data in increments of 0.002 millimeters of mercury (0.001 inches of water).

(4) You must equip each digital differential pressure monitoring system with a continuous recorder. To demonstrate compliance with the standard for differential pressure, you must maintain the pressure in total enclosures such that the average pressure in any 15-minute period does not fall below the level specified in § 63.544(c)(1). The 15-minute averages must include at least one reading per minute.

(5) You must calibrate each digital differential pressure monitoring system

in accordance with manufacturer's specifications.

* * * * *

■ 7. Section 63.550 is amended by revising paragraph (e)(10) to read as follows:

**§ 63.550 Recordkeeping and reporting requirements.**

* * * * *

(e) * * *

(10) Records of 15-minute periods when the pressure was not maintained as required in § 63.544(c) or power was lost to the continuous pressure monitoring system as required in § 63.548(k). Records of which wall is chosen as the windward wall must be included in the records required by § 63.10(c) if a total enclosure located within a larger structure is not impacted by ambient wind.

* * * * *

■ 8. Amend Table 3 to Subpart X of Part 63—Toxic Equivalency Factors by revising to read as follows:

TABLE 3 TO SUBPART X OF PART 63—TOXIC EQUIVALENCY FACTORS

| Dioxin/furan congener | Toxic equivalency factor |
|---|---|
| 2,3,7,8-tetrachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,7,8-pentachlorinated dibenzo-p-dioxin | 1 |
| 1,2,3,4,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzo-p-dioxin | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzo-p-dioxin | 0.01 |
| octachlorinated dibenzo-p-dioxin | 0.0003 |
| 2,3,7,8-tetrachlorinated dibenzofuran | 0.1 |
| 2,3,4,7,8-pentachlorinated dibenzofuran | 0.3 |
| 1,2,3,7,8-pentachlorinated dibenzofuran | 0.03 |
| 1,2,3,4,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,7,8,9-hexachlorinated dibenzofuran | 0.1 |
| 2,3,4,6,7,8-hexachlorinated dibenzofuran | 0.1 |
| 1,2,3,4,6,7,8-heptachlorinated dibenzofuran | 0.01 |
| 1,2,3,4,7,8,9-heptachlorinated dibenzofuran | 0.01 |
| octachlorinated dibenzofuran | 0.0003 |

[FR Doc. 2013–31267 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 228

**[EPA–R06–OW–2013–0221; FRL–9904–86]**

# Ocean Dumping Regulations: Atchafalaya-West Ocean Dredged Material Disposal Site Designation; Calcasieu, Sabine Neches, and Atchafalaya-East Site Corrections

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule and technical amendment.

**SUMMARY:** Pursuant to section 102(c) of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), the EPA today designates the Atchafalaya-West Ocean Disposal Site (ODMDS-West), located adjacent to and west of the Atchafalaya River Bar Channel (ARBC) of Louisiana as a permanent ocean dredged material disposal site (ODMDS). This designation will allow continued use of the site, which was previously designated a temporary site pursuant to MPRSA section 103(b).

In addition to the designation, the EPA now issues a technical amendment to correct seven typographical errors.

The designation of the Atchafalaya ODMDS-West disposal site does not by itself authorize the disposal of dredged material, but makes the site available for use for dredged material from the ARBC if no environmentally preferable, practicable alternative for managing that dredged material exists, and if analysis of the dredged material indicates that it is suitable for open-water disposal. This action is to designate adequate, environmentally-acceptable ocean disposal site capacity for suitable dredged material from the ARBC.

**DATES:** This final rule is effective on February 3, 2014.

**ADDRESSES:** The EPA established a docket for this action under Docket ID No. EPA–R06–OW–2013–0221. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Marine & Coastal Section (6WQ–EC), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

**FOR FURTHER INFORMATION CONTACT:** Jessica Franks, Ph.D., Marine and Coastal Section (6WQ–EC), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–8335, fax number (214) 665–6689; email address *franks.jessica@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

## Table of Contents

I. Background
II. Final Action
III. Regulatory Requirements
IV. Statutory and Executive Order Reviews

## I. Background

The background for today's action is discussed in detail in our May 21, 2013 proposal [78 FR 29687, Tuesday, May 21, 2013]. We received no comments on the proposed rule itself, and two comments on the draft Environmental Impact Statement (EIS) for the proposed designation. Those comments were addressed in the Final EIS (Section 4.3.6.2 and Section 5.3), which is available at *http://www.epa.gov/region6/water/ecopro/feis-odmds-west-final.pdf.*

For the Calcasieu, LA, Dredged Material Site 3, the EPA found a typographical error in 40 CFR 228.15(j)(7)(i), 4th longitudinal coordinate, which was incorrectly published as 93°16′5″ W. The correct longitude for coordinate number 4 is 93°16′25″ W. For the Sabine-Neches, TX, Dredged Material Site D, the EPA found a typographical error in 40 CFR 228.15(j)(25)(i), 3rd longitudinal coordinate, which was incorrectly published as 93°44′10″ W. The correct longitude for coordinate number 3 is 93°41′10″ W. For the Sabine-Neches, TX, Dredged Material Sites A–D and Atchafalaya East, LA, the EPA did not clarify which North American Datum was used for the location coordinates. According to 228.15(a)(3) the default datum is NAD27. The correct North American Datum for these sites is NAD83.

This final rule is also a record of decision in accordance with 40 CFR 1505.2.

## II. Final Action

The EPA hereby designates the Atchafalaya-West Ocean Disposal Site (ODMDS-West) as a permanent ocean dredged material disposal site (ODMDS) pursuant to MPRSA Section 102(c). This ODMDS is located adjacent to and west of the Atchafalaya River Bar Channel of Louisiana.

This action also corrects the typographical errors as noted in the Background section of this preamble.

## III. Regulatory Requirements

Details of the regulatory requirements of this rule are in our May 21, 2013 proposed rule, 78 FR 29694, Tuesday, May 21, 2013. To summarize, this final rule complies as follows:

—It complies with the National Environmental Policy Act of 1969 (NEPA) under the doctrine of functional equivalency; the EPA has relied on information from the final Environmental Impact Statement in its consideration and application of ocean dumping criteria to the ODMDS-West;

—It complies with the Endangered Species Act (ESA), regarding consultation with the U.S. Fish and Wildlife Service in that designation of the ocean disposal site is not expected to adversely affect any threatened or endangered species or their critical habitat;

—It complies with the Magnuson-Stevens Fishery Conservation and Management Act of 1996 (MSFCMA) regarding consultation with the National Marine Fisheries Service (NMFS) in that designation of the ocean disposal site is not expected to have significant impacts to marine fishery resources;

—It complies with the Coastal Zone Management Act, regarding federal activities that affect a state's coastal zone in that the designation of the ODMDS-West is not inconsistent with the approved Louisiana Coastal Resources Program;

—It complies with the Coastal Barrier Improvement Act of 1990 in that project activities related to disposal are exempt from the prohibitions set forth in the act.

## IV. Statutory and Executive Order Reviews

Details of the applicability of executive orders and statutory provisions to this rule are in our May 21, 2013 proposed rule, 78 FR 29695, Tuesday, May 21, 2013. To summarize, this final rule complies with applicable executive orders and statutory provisions as follows:

—It is not a 'significant regulatory action'' subject to office of Management and Budget (OMB) review under Executive Order 12866 (58 FR 51735, October 4, 1993);

—It does not impose an information collection burden under the provisions of the Paperwork Reduction Act 44 U.S.C. 3501 *et seq;*

—It 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);

—It does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);

—It does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

—It is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

—It has no Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000);

—It is not an economically significant regulatory action subject to Executive Order 12866 (62 FR 19885, April 23, 1997), and does not present a disproportionate risk to children;

—It is not a significant regulatory action under Executive Order 12866 and so is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001) ;

—It is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113, 12(d) (15 U.S.C. 272 note) as it does not involve technical standards; and

—It will not have a disproportionately high and adverse human health or environmental effects on minority or low-income populations subject to Executive Order 12898 (59 FR 7629).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as amended 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. The 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2) and its effective date thus need not be delayed for 60 days.

### List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: December 18, 2013.

**Ron Curry,**

*Regional Administrator, Region 6.*

In consideration of the foregoing, part 228, Chapter I of Title 40 of the Code of Federal Regulation is amended as follows:

## PART 228—CRITERIA FOR THE MANAGEMENT OF DISPOSAL SITES FOR OCEAN DUMPING

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 33 U.S.C. 1412 and 1418.

■ 2. Section 228.15 is amended by

■ a. Revising paragraph (j)(7)(i);
■ b. Revising paragraph (j)(21)(i);
■ c. Revising paragraph (j)(22)(i);
■ d. Revising paragraph (j)(23)(i)
■ e. Revising paragraph (j)(24)(i);
■ f. Revising paragraph (j)(25)(i); and
■ g. Adding paragraph (j)(26).

The additions and revisions read as follows:

**§ 228.15 Dumping sites designated on a final basis.**

* * * * *

(j) * * *

(7) * * *

(i) *Location:* 29°37′50″ N., 93°19′37″ W.; 29°37′25″ N., 93°19′33″ W.; 29°33′55″ N., 93°16′23″ W.; 29°33′49″ N., 93°16′25″ W.; 29°30′59″ N., 93°13′51″ W.; 29°29′10″ N., 93°13′49″ W.; 29°29′05″ N., 93°14′23″ W.; 29°30′49″ N., 93°14′25″ W.; 29°37′26″ N., 93°20′24″ W.; 29°37′44″ N., 93°20′27″ W.

* * * * *

(21) * * *

(i) *Location (NAD83):* 9E20′59.92″ N, 91E23′33.23″ W, 29E20′43.94″ N, 91E23′09.73″ W, 29E08′15.46″ N, 91E34′51.02″ W, and 29E07′59.43″ N, 91E34′27.51″ W; thence to point of beginning.

* * * * *

(22) * * *

(i) *Location (NAD83):* 29°24′47″ N., 93°43′29″ W.; 29°24′47″ N., 93°41′08″ W.; 29°22′48″ N., 93°41′09″ W.; 29°22′49″ N., 93°43′29″ W.; thence to point of beginning.

* * * * *

(23) * * *

(i) *Location (NAD83):* 29°21′59″ N., 93°43′29″ W.; 29°21′59″ N., 93°41′08″ W.; 29°20′00″ N., 93°41′09″ W.; 29°20′00″ N., 93°43′29″ W.; thence to point of beginning.

* * * * *

(24) * * *

(i) *Location (NAD83):* 29°19′11″ N., 93°43′29″ W.; 29°19′11″ N, 93°41′09″ W.; 29°17′12″ N., 93°41′09″ W.; 29°17′12″ N., 93°43′29″ W.; thence to point of beginning.

* * * * *

(25) * * *

(i) *Location (NAD83):* 29°16′22″ N., 93°43′29″ W.; 29°16′22″ N., 93°41′10″ W.; 29°14′24″ N., 93°41′10″ W.; 29°14′24″ N., 93°43′29″ W.; thence to point of beginning.

* * * * *

(26) Atchafalaya River and Bayous Chene, Boeuf, and Black, LA (ODMDS-West)

(i) *Location (NAD83):* 29°22′06″ N, 91°27′38″ W; 29°20′30″ N, 91°25′13″ W; 29°09′16″ N, 91°35′12″ W; 29°10′52″ N, 91°37′33″ W; thence to point of beginning.

(ii) *Size:* 48 square miles.

(iii) *Depth:* Ranges from 4 to 23 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from the Atchafalaya River Bar channel that complies with EPA's Ocean Dumping Regulations. Dredged material that does not meet the criteria set forth in 40 CFR part 227 shall not be placed at the site. Disposal operations shall be conducted in accordance with requirements specified in a Site Management and Monitoring Plan developed by EPA and USACE, to be reviewed periodically, at least every 10 years.

* * * * *

[FR Doc. 2013–31263 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register
Vol. 79, No. 2
Friday, January 3, 2014

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.

## POSTAL SERVICE

### 39 CFR Part 111

### Revised Postage and Fee Refund Criteria

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service™ proposes to revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) section 604.9 to update the hourly charges and related postage threshold used in assessing certain types of postage refunds and to provide the allowable time periods for requesting refunds for extra service fees.

**DATES:** Submit comments on or before February 3, 2014.

**ADDRESSES:** Mail or deliver written comments to the manager, Product Classification, U.S. Postal Service®, 475 L'Enfant Plaza SW., Room 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington, DC by appointment only between the hours of 9 a.m. and 4 p.m., Monday through Friday, by calling 202–268–2906 in advance. Email comments, containing the name and address of the commenter, may be sent to: *ProductClassification@usps.gov,* with a subject line of *''Revised Postage and Fee Refund Criteria''.* Faxed comments are not accepted.

**FOR FURTHER INFORMATION CONTACT:** Douglas Germer, Revenue/Field Accounting, *douglas.g.germer@usps.gov,* 202–268–8522; Karen Key, Manager Shipping Products, *karen.f.key@usps.gov,* 202–268–7492; or Suzanne Newman, Product Classification, *suzanne.j.newman@usps.gov,* 202–268–5581.

**SUPPLEMENTARY INFORMATION:** On March 14, 2013, the Postal Service published a notice of proposed rulemaking (78 FR 16213–16220) to eliminate hourly charges for processing refunds and replace it with a charge of 10% of the face value of the postage refund amount being requested. This proposal affected postage refunds for dated or undated, unused postage meter indicia and for stamps affixed to Business Reply Mail® (BRM) pieces.

The proposed rule also included adding general language to the DMM on refund periods for extra service fees of not less than 10 days, or more than 18 months, for services not rendered. The proposed rule included a 30-day comment period. After review of the comments and further analysis, the Postal Service is publishing this revision of its proposed rule.

The Postal Service proposes to align the current assessments for processing postage refunds, in effect since 2003, with current costs. Therefore, if this revised rule is adopted, the Postal Service will update the hourly factor used in various refund assessments from $35.00 an hour to $50.00 an hour. Additionally, the threshold for assessing certain postage refunds at the hourly factor will be updated from postage amounts exceeding $350.00 to postage amounts exceeding $500.00. The refund assessment amounts in this proposed rule would not revise the current standards for providing service failure refunds or when USPS® is at fault.

The Postal Service also proposes to add language to the DMM to provide customers with information on refund time periods for extra service fees that align with the revised claims filing periods (being made effective January 26, 2014) to promote timely adjudication. Therefore, if this proposed rule is adopted, the Postal Service will include the following information in the DMM: Refund requests for Registered Mail™, Certified Mail®, Signature Confirmation™, USPS Tracking™, Adult Signature services, and insurance fees must be made by the mailer no sooner than 10 days, or more than 60 days, from the date the service was purchased.

Additionally, if these proposed changes are adopted, PS Form 3533, *Application for Refund of Fees, Products and Withdrawal of Customer Accounts,* will be revised to reflect the changes.

### List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Although we are exempted from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), we invite public comments on the following proposed revisions to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. *See* 39 CFR 111.1. Accordingly, 39 CFR part 111 is proposed to be amended as follows:

## PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

### *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM)

* * * * *

### 600 Basic Standards for All Mailing Services

* * * * *

### 604 Postage Payment Methods

* * * * *

### 9.0 Exchanges and Refunds

* * * * *

### 9.2 Postage and Fee Refunds

* * * * *

### 9.2.4 Postage Refunds Not Available

Refunds are not made for the following:

* * * * *

*[Add new item 9.2.4h to read as follows:]*

h. For extra service fees paid for Registered Mail, Certified Mail, Signature Confirmation, USPS Tracking, Adult Signature services and insurance when a refund request is made by the mailer less than 10 days, or more than 60 days, from the date the service was purchased.

* * * * *

**9.2.6 Postage Affixed to Business Reply Mail**

*[Revise the seventh sentence of 9.2.6 to read as follows:]*

* * * A charge of $50.00 per hour, or fraction thereof, is assessed for the workhours used to process the credit or refund. * * *

* * * * *

**9.3.2 General Standards for Metered Indicia Refunds**

* * * For both types of unused metered indicia, submit refund requests as follows:

* * * * *

b. * * * Charges for processing a refund request for unused, dated meter indicia are as follows, depending on the total face value of the indicia:

*[Revise 9.3.2b1 and 9.3.2b2 to read as follows:]*

1. When the total face value of the indicia is $500.00 or less, the amount refunded is 90% of the face value. USPS may process the refund payment via a no-fee postal money order; or

2. When the total face value of the indicia is more than $500.00, the amount refunded is the total face value reduced by $50.00 per hour for the USPS time to process the refund, with a minimum charge of $50.00. The charge is $50.00 for each hour spent, with the last fraction of an hour treated as a full hour. Payment processing for refunds of $500.01 or more is through the Accounting Service Center.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if our proposal is adopted.

* * * * *

**Stanley F. Mires,**

*Attorney, Legal Policy & Legislative Advice.*

[FR Doc. 2013–31443 Filed 1–2–14; 8:45 am]

BILLING CODE 7710–12–P

## POSTAL SERVICE

## 39 CFR Part 121

## Service Standards for Destination Sectional Center Facility Rate Standard Mail

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule

**SUMMARY:** The Postal Service seeks public comment on proposed revisions to the service standards for Standard Mail that is eligible for Destination Sectional Center Facility (DSCF) rates. The revisions would change the service standard (a) from three days to four days for Standard Mail pieces that are eligible for a DSCF rate and that are properly accepted before the day zero Critical Entry Time on a Friday or Saturday, and (b) from four days to five days for DSCF Standard Mail properly accepted at the SCF in San Juan, Puerto Rico and destined to the United States Virgin Islands, and properly accepted DSCF Standard Mail destined to American Samoa.

**DATES:** Comments must be received on or before February 3, 2014.

**ADDRESSES:** Written comments should be mailed to the Manager, Industry Engagement and Outreach, United States Postal Service, 475 L'Enfant Plaza SW., Room 4107, Washington, DC 20260–4107, or transmitted by email to *industryfeedback@usps.com.* Copies of all comments will be available for inspection and photocopying at the Postal Service Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor North, Washington, DC 20260, between 9 a.m. and 4 p.m., Monday through Friday, by appointment (please call 202–268–5585 to schedule an appointment).

**FOR FURTHER INFORMATION CONTACT:** Anthony Frost, Industry Engagement and Outreach, at 202–268–8093; or Prathmesh Shah, Processing and Distribution Center Operations, at 404–792–3195.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

Standard Mail may include any mailable matter weighing less than 16 ounces that is not otherwise required to be mailed as First-Class Mail or Periodicals mail. Of the Standard Mail products, High Density and Saturation Letters, High Density and Saturation Flats/Parcels, Carrier Route, Letters, Flats, and Parcels are eligible for the DSCF rate, provided that the mail meets the standards for such a rate.[1] Among other requirements, to qualify for a DSCF rate, a mailing must contain at least 200 addressed pieces or 50 pounds of addressed pieces;[2] mailers must make an appointment to deposit DSCF Standard Mail;[3] and mail must be prepared and delivered in a specific manner.[4] DSCF Standard Mail primarily consists of direct mail letters, catalogs, flyers, and other advertising mail.

Currently, DSCF Standard Mail has a 3-day service standard.[5] Monday is the expected delivery date for the DSCF Standard Mail entered on Thursday and Friday, which are two of the three heaviest days for acceptance of such mail. Moreover, in Fiscal Year 2013, DSCF Standard Mail comprised 62 percent of Standard Mail volume and 32 percent of overall mail volume. Accordingly, DSCF Standard Mail has a significant impact on processing and delivery operations through which it passes.

The Postal Service faces an uneven workload for postal delivery operations and extraordinary allocations of resources to meet Monday delivery expectations, based on current service standards. Specifically, the high volume of Standard Mail with a service standard that creates a Monday delivery expectation contributes to the significant challenge faced by the Postal Service in seeking to achieve efficient and timely completion of delivery operations on Monday, and to make dispatch of collection mail picked up by carriers to mail processing plants for timely cancellation. This general imbalance in the proportion of volume with a Monday delivery expectation contributes significantly to increased overtime workhours in delivery operations at a time when the Postal Service is faced with increased costs while revenues decline as a result of the overall reduction in mail volumes.

The Postal Service seeks to address these issues by proposing an adjustment to the service standard applicable to DSCF Standard Mail entered on designated days of the week. Realization of a more balanced distribution of DSCF Standard Mail across delivery days requires a modification to the current service standards for that mail. Accordingly, the Postal Service is exploring a proposal (the Proposal) to revise service standards applicable to DSCF Standard Mail that is entered on a Friday or Saturday. The Proposal would change the delivery day for DSCF Standard Mail accepted on Friday and Saturday. DSCF Standard Mail that is accepted before the Critical Entry Time (CET) on Friday will have a Tuesday delivery expectation, rather than Monday. DSCF Standard Mail that is accepted before the CET on Saturday will have a Wednesday delivery expectation, rather than Tuesday. The proposed changes will apply to DSCF Standard Mail that is dropped at the SCF in Puerto Rico and destined to the

[1] (Draft) Mail Classification Schedule secs. 1200.1(a) and 1200.2, revised December 5, 2013.

[2] Domestic Mail Manual (DMM) 246.2.2(a).

[3] DMM 246.2.6.3.

[4] DMM 246.4.0.

[5] 39 CFR 121.3(b)(2). DSCF Standard Mail that is dropped at the SCF in Puerto Rico and destined to the U.S. Virgin Islands, or mail destined to American Samoa has a 4-day service standard. 39 CFR 121.3(b)(3). The proposed changes will also apply to the service standard for mail that is dropped at the SCF in Puerto Rico and destined to the U.S. Virgin Islands, and mail that is destined to American Samoa.

U.S. Virgin Islands, or mail destined to American Samoa, which currently has a 4-day service standard and would have a 5-day service standard under the Proposal. By adjusting the processing and delivery of DSCF Standard Mail accepted on Friday and Saturday, the Postal Service seeks to achieve a more even distribution of mail volume delivered throughout the week.[6] Pursuant to 39 U.S.C. 3661(b), the Postal Service has also requested an advisory opinion from the Postal Regulatory Commission regarding these changes in the nature of DSCF Standard Mail service.[7]

## II. Proposed Revisions to Service Standards

Before describing how service standards will be revised, it is important to explain how service standards are structured. Service standards are comprised of two components: (1) A delivery day range within which all mail in a given product is expected to be delivered; and (2) business rules that determine, within a product's applicable day range, the specific number of delivery days after acceptance of a mail piece by which a customer can expect that piece to be delivered, based on the 3-digit ZIP Code prefixes associated with the piece's point of entry into the mail stream and its delivery address.

Business rules are based on the CET. The CET is the latest time on a particular day that a mail piece can be entered into the postal network and still have its service standard calculated based on that day (this day is termed ''day-zero''). In other words, if a mail piece is entered before the CET, the mail piece's service standard is calculated from the day of entry, whereas if the mail piece is entered after the CET, its service standard is calculated from the following day. For example, if the applicable CET is 4:00 p.m., and a letter is entered at 3:00 p.m. on a Tuesday, its service standard will be calculated from Tuesday, whereas if the letter is entered at 5:00 p.m. on a Tuesday, its service standard will be calculated from Wednesday.

The Postal Service is proposing to revise the Standard Mail service standards for pieces that qualify for a DSCF rate and are accepted before the day zero CET at the proper DSCF on Friday or Saturday, to enable a more balanced distribution of Standard Mail volume across delivery days. For these Standard Mail pieces entered on Friday or Saturday at the DSCF rate, the Postal Service is proposing to change the current three-day delivery expectation to a four-day delivery expectation. And for pieces entered at the SCF in San Juan, PR and destined for the U.S. Virgin Islands, as well as all DSCF entry pieces destined for American Samoa, the delivery expectation for pieces entered on Friday or Saturday would change from four days to five days.

The Postal Service is not proposing any other revisions to its service standards in this notice.

## III. Request for Comments

Although exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the proposed revisions to 39 CFR part 121 and on the Proposal generally. A more extensive discussion of the Proposal and its associated operational and service implications is available in the materials filed by the Postal Service with the Postal Regulatory Commission in Docket No. N2014–1, available at *http://www.prc.gov.* If the Postal Service determines to implement the Proposal, it will publish a final rule in the **Federal Register**.

Accordingly, for the reasons stated, the Postal Service proposes the following amendment to 39 CFR part 121:

## PART 121—SERVICE STANDARDS FOR MARKET DOMINANT MAIL PRODUCTS

■ 1. The authority citation for 39 CFR part 121 continues to read as follows:

**Authority:** 39 U.S.C. 101, 401, 403, 404, 1001, 3691.

■ 2. In part 121, revise § 121.3 paragraph (b)(2) and (b)(3) to read as follows:

## PART 121—SERVICE STANDARDS FOR MARKET-DOMINANT MAIL PRODUCTS

* * * * *

### § 121.3 Standard Mail.

* * * * *

(b) * * *

(2) Standard Mail pieces that qualify for a DSCF rate and that are accepted before the day-zero Critical Entry Time at the proper DSCF have a 3-day service standard when accepted on Sunday through Thursday and a 4-day service standard when accepted on Friday or Saturday, except for mail dropped at the SCF in the territory of Puerto Rico and destined to the territory of the U.S. Virgin Islands, or mail destined to American Samoa.

(3) Standard Mail pieces that qualify for a Destination Sectional Center Facility (DSCF) rate and that are accepted before the day zero Critical Entry Time at the SCF in the territory of Puerto Rico and destined for the territory of the U.S. Virgin Islands, or are destined to American Samoa, have a 4-day service standard when accepted on Sunday through Thursday and a 5-day service standard when accepted on Friday or Saturday.

* * * * *

■ 3. In Appendix A to part 121, revise Tables 5 and 6 to read as follows:

## Appendix A to Part 121—Tables Depicting Service Standard Day Ranges

The following tables reflect the service standard day ranges resulting from the application of the business rules applicable to the market-dominant mail products referenced in §§ 121.1 through 121.4:

* * * * *

[6] Under the proposed schedule, Wednesday becomes the expected delivery date for DSCF Standard Mail entered on both Saturday and Sunday. Due to the relatively small volume of mail accepted on Saturdays and Sundays, the Postal Service does not believe that the Proposal will present a challenge regarding the ability to more evenly distribute mail volume throughout the week.

[7] Request of the United States Postal Service for an Advisory Opinion on Changes in the Nature of Postal Services, Docket No. N2014–1 (Dec. 27, 2013). Documents pertaining to the Request are available at the Postal Regulatory Commission (PRC) Web site, *http://www.prc.gov,* under Docket No. N2014–1.

TABLE 5—DESTINATION ENTRY SERVICE STANDARD DAY RANGES FOR MAIL TO THE CONTIGUOUS 48 STATES AND THE DISTRICT OF COLUMBIA

| Mail class | Contiguous United States | | | |
|---|---|---|---|---|
| | Destination entry (at appropriate facility) | | | |
| | DDU (days) | SCF (days) | ADC (days) | NDC (days) |
| Periodicals | 1 | 1 | 1–2 | 1–2 |
| Standard Mail | 2 | 3–4 | ..... | 5 |
| Package Services | 1 | 2 | ..... | 3 |

TABLE 6—DESTINATION ENTRY SERVICE STANDARD DAY RANGES FOR MAIL TO NON-CONTIGUOUS STATES AND TERRITORIES

| Mail class | Destination entry (at appropriate facility) | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | DDU (days) | SCF (days) | | | ADC (days) | | | NDC (days) | | |
| | | Alaska | Hawaii, Guam, & American Samoa | Puerto Rico & USVI | Alaska | Hawaii, Guam, & American Samoa | Puerto Rico & USVI | Alaska | Hawaii, Guam, & American Samoa | Puerto Rico & USVI |
| Periodicals | 1 | 1–2 | 1 | 1–2 | 1–3 (AK)<br>11 (JNU)<br>11 (KTN) | 1 (HI)<br>2 (GU) | 1–2 | 10–11 | 10 | 8–10 |
| Standard Mail | 2 | 3–4 | 3–5 | 3–5 | ..... | ..... | ..... | 14 | 13 | 12 |
| Package Services | 1 | 2 | 2 | 2–3 | ..... | ..... | ..... | 12 | 11 | 11 |

AK = Alaska 3-digit ZIP Codes 995–997; JNU = Juneau AK 3-digit ZIP Code 998; KTN = Ketchikan AK 3-digit. ZIP Code 999; HI = Hawaii 3-digit ZIP Codes 967 and 968; GU = Guam 3-digit ZIP Code 969.

* * * * *

**Stanley F. Mires,**

*Attorney, Legal Policy & Legislative Advice.*

[FR Doc. 2013–31442 Filed 1–2–14; 8:45 am]

BILLING CODE 7710–12–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R09–OAR–2013–0668; FRL–9902–73–Region 9]**

### Revisions to the California State Implementation Plan, Antelope Valley Air Quality Management District, Mojave Desert Air Quality Management District, Monterey Bay Unified Air Pollution Control District, and South Coast Air Quality Management District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection EPA is proposing to approve revisions to the Antelope Valley Air Quality Management District, Mojave Desert AQMD, Monterey Bay Unified Air Pollution Control District, and South Coast AQMD portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from architectural coatings, liquefied petroleum gas transfer, and ignition of barbecue charcoal. We are approving three local rules and rescinding one local rule that regulate these emission sources under the Clean Air Act (CAA or the Act).

**DATES:** Any comments on this proposal must arrive by February 3, 2014.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2013–0668, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.
2. *Email: steckel.andrew@epa.gov.*
3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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:* Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105–3901. While all documents in the docket are listed at *www.regulations.gov*, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Nicole Law, EPA Region IX, (415) 947–4126, *law.nicole@epa.gov.*

**SUPPLEMENTARY INFORMATION:** This proposal addresses the following local

rules: Mojave Desert AQMD Rule 1113 Architectural Coatings, Monterey Bay Unified APCD Rule 426 Architectural Coatings, Antelope Valley AQMD Rule 1174 Control of Volatile Organic Compound Emissions from the Ignition of Barbecue Charcoal, and South Coast AQMD Rule 1177 Liquefied Petroleum Gas Transfer and Dispensing. In the Rules and Regulations section of this **Federal Register**, we are approving three of these local rules and rescinding one local rule in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: September 25, 2013.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

[FR Doc. 2013–30872 Filed 1–2–14; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2011–0344; FRL–9904–39–OAR]**

**RIN 2060–AR66**

## National Emissions Standards for Hazardous Air Pollutants From Secondary Lead Smelting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule amendments.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing amendments to a final rule that revised national emission standards for hazardous air pollutants for existing and new secondary lead smelters. The final rule was published on January 5, 2012. This action proposes amendments to clarify certain regulatory text related to compliance dates. Additionally, we are proposing amendments to clarify certain provisions in the 2012 final rule relating to monitoring of negative pressure in total enclosures. This action also proposes corrections of typographical errors in a table listing congeners of dioxins and furans and testing requirements for total hydrocarbons.

**DATES:** *Comments.* Comments must be received on or before February 3, 2014, or 30 days after date of public hearing, if one is requested. If anyone contacts the EPA requesting a public hearing by January 10, 2014, the EPA will announce the details as to when the hearing will be held in a separate **Federal Register** notice.

*Public Hearing.* The EPA will hold a public hearing on this proposed rule if requested. Requests for a hearing must be made by January 10, 2014. Contact Nathan Topham at *topham.nathan@epa.gov* or (919) 541–0483 by January 10, 2014 to request a public hearing. If a hearing is requested, the EPA will announce the details, including specific dates, times, addresses and contact information for the hearing, in a separate **Federal Register** notice.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2011–0344, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov,* Attention Docket ID Number EPA–HQ–OAR–2011–0344.
- *Fax:* (202) 566–9744, Attention Docket ID Number EPA–HQ–OAR–2011–0344.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA–HQ–OAR–2011–0344, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004, Attention Docket ID Number EPA–HQ–OAR–2011–0344. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions.* Direct your comments to Docket ID Number EPA–HQ–OAR–2011–0344. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the 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 the 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, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

*Docket.* The EPA has established a docket for this proposed action under Docket ID Number EPA–HQ–OAR–2011–0344. 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, is not placed on the Internet, and 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 EPA Docket Center, 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 EPA Docket Center is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Mr. Nathan Topham, Metals and Inorganic Chemicals Group, Sector Policies and Programs Division (D243–

02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0483; fax number: (919) 541–3207; and email address: *topham.nathan@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

*Organization of this Document.* The following outline is provided to aid in locating information in the preamble.

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for the EPA?
C. What is the background for the proposed amendments?
II. Direct Final Rule
III. Statutory and Executive Order Reviews

## I. General Information

### *A. Does this action apply to me?*

The regulated industrial source category that is the subject of this proposal is listed in Table 1 of this preamble. Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. These standards, once finalized, will be directly applicable to affected sources. Federal, state, local and tribal government entities are not affected by this proposed action. As defined in the source category listing report published by the EPA in 1992, the Secondary Lead Smelting source category is defined as any facility at which lead-bearing scrap materials (including, but not limited to lead acid batteries) are recycled by smelting into elemental lead or lead alloys.[1]

TABLE 1—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

| Source category | NESHAP | NAICS [1] code | MACT [2] code |
|---|---|---|---|
| Secondary Lead Smelting | Secondary Lead Smelting | 331492 | 0205 |

[1] North American Industry Classification System.
[2] Maximum Achievable Control Technology.

### *B. What should I consider as I prepare my comments for the EPA?*

*Submitting Confidential Business Information.* Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to the 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. If you submit a CD ROM or disk that does not contain CBI, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA–HQ–OAR–2011–0344.

*Docket.* The docket number for this action is Docket ID Number EPA–HQ–OAR–2011–0344.

*World Wide Web (WWW).* In addition to being available in the docket, an electronic copy of this action will be posted on the WWW through the Technology Transfer Network Web site (TTN Web). Following signature, the EPA will post a copy of this action on the TTN's policy and guidance page at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

### *C. What is the background for the proposed amendments?*

On January 5, 2012 (77 FR 556), the EPA issued final amendments to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) from Secondary Lead Smelting. The EPA has subsequently determined, following discussions with affected parties, that the final rule warrants clarification in four areas.

The EPA inadvertently removed from 40 CFR part 63, subpart X the requirement for facilities constructed or reconstructed on or before May 19, 2011, to comply with the previous version of the NESHAP between promulgation of the January 5, 2012, amendments and the subsequent compliance date for existing sources, which is January 6, 2014. Since existing sources remain subject to the pre-existing standards until the compliance date for the January 2012 standards, the EPA is amending the rule to restore the deleted language.

The EPA received petitions for reconsideration of the final rule from the secondary lead smelting industry. One issue raised in the petitions relates to the table of dioxin and furan congeners contained in the regulatory text (Table 3 to Subpart X of Part 63—Toxic Equivalency Factors). This table included incorrect values for some dioxin toxic equivalency factors (TEF) and omitted some congeners. The EPA intended to use the 2005 World Health Organization (WHO) TEF in Table 3 to subpart X of part 63. See 76 FR 29051, ''The TEQ emissions will be calculated using the toxic equivalency factors (TEF) outlined by the World Health Organization (WHO) in 2005 (available at Web site: *http://www.epa.gov/raf/hhtefguidance/*).''

Industry petitioners expressed concern that the agency changed one aspect of the emission standard for total hydrocarbons (THC) between proposing and finalizing the RTR amendments for secondary lead smelters. In the 2011 proposed rule, the total hydrocarbon standard for furnace charging process fugitive emissions that are not combined with furnace process emissions did not require correction to 4-percent carbon dioxide ($CO_2$). See 76 FR 29072, May 19, 2011. In the 2012 final rule, this standard inadvertently included correction to 4-percent $CO_2$. See 77 FR 582, January 5, 2012.

Finally, petitioners asked the EPA to clarify several monitoring provisions for total enclosures. Industry requested

[1] USEPA. Documentation for Developing the Initial Source Category List—Final Report, USEPA/OAQPS, EPA–450/3–91–030, July 1992.

flexibility in defining the term ''windward wall'' when a total enclosure is not impacted by ambient wind. The regulatory text was unclear where to place monitors when ambient wind does not affect the total enclosure. Petitioners requested clarification in how to monitor irregularly shaped enclosures or enclosures that are divided into multiple areas all under negative pressure. Petitioners also asked the EPA to clarify that data from differential pressure monitors should be used to calculate 15-minute averages. Petitioners also stated that the EPA should clarify the meaning of ''accuracy'' in 40 CFR 63.548(k)(3).

**II. Direct Final Rule**

A direct final rule that would make the same changes as those proposed in this document appears in the Rules and Regulations section of this **Federal Register**. The EPA is taking direct final action on these amendments because we view the amendments as noncontroversial and anticipate no significant adverse comments. The EPA has explained our reasons for the amendments in the direct final rule. If no significant adverse comments are received, no further action will be taken on the proposal, and the direct final rule will become effective as provided in that action.

If the EPA receives significant adverse comments, we will withdraw only those provisions on which we received those comments. The EPA will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective, and which provisions are being withdrawn. If part or the entire direct final rule in the Rules and Regulations section of this **Federal Register** is withdrawn, all comments pertaining to those provisions will be addressed in a subsequent final rule based on these proposed amendments. The EPA will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time.

The changes to the regulatory text proposed in this notice are identical to those for the direct final rule published in the Rules and Regulations section of this **Federal Register**. For further information, including the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in a separate part of this **Federal Register**.

**III. Statutory and Executive Order Reviews**

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the ''rules and Regulations'' section of this **Federal Register**.

**List of Subjects for 40 CFR Part 63**

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 20, 2013.

**Gina McCarthy,**

*Administrator.*

[FR Doc. 2013–31266 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 67

**[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–B–1241]**

### Proposed Flood Hazard Determinations for Bullitt County, Kentucky and Incorporated Areas

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed notice; withdrawal.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is withdrawing its proposed notice concerning proposed flood hazard determinations, which may include the addition or modification of any Base Flood Elevation, base flood depth, Special Flood Hazard Area boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps, and where applicable, in the supporting Flood Insurance Study reports for Bullitt County, Kentucky and Incorporated Areas.

**DATES:** This withdrawal is effective January 3, 2014.

**ADDRESSES:** You may submit comments, identified by Docket No. FEMA–B–1241, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

**SUPPLEMENTARY INFORMATION:** On March 28, 2012, FEMA published a proposed notice at 77 FR 18837, proposing flood hazard determinations in Bullitt County, Kentucky. FEMA is withdrawing the proposed notice.

**Authority:** 42 U.S.C. 4104; 44 CFR 67.4.

Date: November 22, 2013.

**Roy E. Wright,**

*Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. 2013–30946 Filed 1–2–14; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 130903776–3776–01]**

**RIN 0648–BD66**

### Fisheries of the Exclusive Economic Zone Off Alaska; Modifications to Identification Markings on Fishing Gear Marker Buoys

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to revise the identification marking requirements for fishing gear marker buoys (buoys) used in Federal waters off Alaska. This proposed rule would eliminate the requirement that hook-and-line, longline pot, and pot-and-line buoys be marked with the vessel's name. The requirement to mark buoys with either the vessel's Federal fisheries permit number or Alaska Department of Fish and Game (ADF&G) number remains in effect. This action is needed to remove a regulatory requirement that is unnecessary. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI Groundfish FMP), the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA Groundfish FMP), and other applicable laws.

**DATES:** Comments must be received no later than February 3, 2014.

**ADDRESSES:** You may submit comments, identified by FDMS Docket Number NOAA–NMFS–2013–0137, by any of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0137,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

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

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

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

Electronic copies of the Categorical Exclusion and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) prepared for this action are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to NMFS at the above address and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:** Michael Camacho, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS Alaska Region manages the U.S. groundfish fisheries in the Exclusive Economic Zone off Alaska under the BSAI and GOA Groundfish FMPs. These FMPS were prepared by the North Pacific Fishery Management Council, under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.,* and other applicable laws, and approved by the Secretary of Commerce. Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

## Background

Federal regulations pertaining to gear markings for groundfish are set forth at § 679.24. These regulations apply to operators of vessels required to carry a Federal fisheries permit (FFP) while fishing in the groundfish and halibut fisheries in Federal waters off Alaska. The proposed rule implementing these requirements was published on August 16, 1989 (54 FR 33737), and the final rule on January 2, 1990 (55 FR 31). Buoys are used to indicate the positions of hook-and-line, pot, and pot-and-line gear in these fisheries. Section 679.24 requires buoys to be marked to make it possible to identify the vessel from which the gear was deployed. The NMFS Office of Law Enforcement and the United States Coast Guard use the identification markings from buoys when issuing violations, prosecutions, and other enforcement actions. Cooperating fishermen use the identification markings to report the placement or occurrence of gear in unauthorized areas. Identification markings are also necessary to facilitate the return of lost or stolen gear. Fishermen that correctly mark their gear ultimately benefit because this deters unauthorized and illegal fishing and reduces the need for more burdensome regulations.

Federal regulations at § 679.24(a) require that buoys carried onboard or used by any vessel subject to 50 CFR part 679 that is using hook-and-line, longline pot, or pot-and-line gear must be marked with the vessel's name and either the vessel's FFP number or the vessel's Alaska Department of Fish and Game (ADF&G) vessel registration number. In addition, the markings ''shall be in characters at least 4 inches (10.16 cm) in height and 0.5 inch (1.27 cm) in width in a contrasting color visible above the water line and shall be maintained so the markings are clearly visible.''

These regulations apply to ''vessels regulated under this part'' which refers to those vessels required to carry FFPs under § 679.4(b). FFPs are required for vessels fishing for groundfish (a legal category that does not include halibut) in the GOA or BSAI, or fishing for any non-groundfish species when incidentally caught groundfish must be retained. Regulations at § 679.7(f)(8) prohibit vessels with individual fishing quota (IFQ) halibut or sablefish on board from discarding rockfish or Pacific cod under various conditions. Thus, vessels used to fish for halibut IFQ are required to have FFPs and comply with all regulations in 50 CFR part 679 that apply to vessels required to have FFPs, including requirements for marking buoys. Other non-groundfish fisheries have no comparable discard prohibitions.

Identification markings on buoys in the Federal waters off Alaska also are regulated by the State of Alaska (State) and the International Pacific Halibut Commission (IPHC). The State shares management responsibilities with NMFS for king crab and Tanner crab in the Federal waters off Alaska, and regulates the buoy identification markings in these fisheries. The State requires at least one buoy on each commercial king or Tanner crab pot or ring net to be legibly marked with the permanent ADF&G license number of the vessel using the gear (5 AAC 34.051; 5 AAC 35.051). Identification marking requirements for halibut gear buoys are set by the IPHC. The IPHC's regulations for 2013 require that all setline or skate buoys carried onboard or used by any U.S. vessel for commercial halibut fishing shall be marked with the vessel's state license number or the vessel's registration number. Both State and IPHC commercial identification markings must be maintained in a legible condition, in characters at least four inches high (10.2 cm) and one-half-inch (1.3 cm) wide, in a contrasting color, and visible above the water. The principal difference between the State and IPHC commercial regulations and 50 CFR part 679 is the requirement for buoys to be marked with the vessel name.

Information on the extent of compliance with the existing regulations is not available; however, non-compliance has not been raised as a concern by enforcement agencies.

## Description of the Proposed Action

The proposed action would eliminate the requirement that buoys carried onboard or marking the location of hook-and-line, longline pot, and pot-and-line gear deployed by vessels with FFPs be marked with the vessel's name. This action is needed to remove a regulatory requirement that experience has shown is not necessary. While one vessel may share the same name as another vessel, vessel identification numbers are exclusive and unique to the

recipient vessel. Therefore, the proposed rule would eliminate the requirement in § 679.24(a) to mark buoys with the vessel's name, but maintain the requirement for marking buoys with either the vessel's FFP number or ADF&G number. The proposed action should reduce costs to vessel owners by reducing the labor and materials needed to mark buoys. In addition, the proposed action would make buoy marking regulations at § 679.24(a) consistent with Alaska's State crab and IPHC regulations.

**Classification**

Pursuant to section 305(d) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the BSAI and GOA Groundfish FMPs, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined not to be significant for the purposes of Executive Order 12866.

An RIR was prepared for this action that assesses all costs and benefits of available regulatory alternatives. The RIR describes the potential size, distribution, and magnitude of the economic impacts this action may be expected to have. The RIR finds that this action has a positive net economic impact to commercial fishing operations since it reduces the cost of compliance with identification marking requirements for buoys. This action does not create additional administrative costs and does not impose new requirements on fishing operations, or modify other existing ones.

Section 610 of the Regulatory Flexibility Act (RFA) requires ''periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. * * * The purpose of the review shall be to determine which such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statues, to minimize any significant economic impact of the rules upon a substantial number of such small entities.'' Regulations requiring vessel names on buoys was identified by NMFS during a section 610 review of past final rules as a requirement that was not necessary and could be removed from regulations.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule would have on small entities, if adopted. A description of the action, why it is being considered, and the legal basis for this action are contained in the Background and Description of the Proposed Action sections of this proposed rule. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

On June 20, 2013, the Small Business Administration issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398; June 20, 2013). The rule increased the size standard for Finfish Fishing from $4.0 to $19.0 million, Shellfish Fishing from $4.0 to $5.0 million, and Other Marine Fishing from $4.0 to $7.0 million. The new size standards were used to prepare the IRFA for this action.

Vessels are directly regulated by this action when required to carry an FFP and using hook-and-line, pot, or pot-and-line gear in Federal groundfish or halibut fisheries in the GOA or BSAI. NMFS estimates that, in 2012, the most recent year for which gross revenues information is available, 761 entities would have been directly regulated by this action. NMFS estimates that 693 would have been small entities. Median gross revenues for the small entities would have been about $327,000, while 75 percent would have had gross revenues under about $779,000, and 25 percent would have had gross revenues under about $144,000. The 99th percentile of gross revenues was about $2,974,000.

An IRFA also requires a description of any significant alternatives to the preferred alternative that accomplish the stated objectives, are consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. The preferred alternative (the action alternative removing the requirement that vessel names be placed on marker buoys) places somewhat smaller obligations on directly regulated small entities than the alternative of retaining the status quo. Thus, there are no alternatives that have a smaller adverse economic impact on directly regulated small entities.

This action will reduce, in a small way, the reporting and recordkeeping requirements of small entities participating in the BSAI and GOA groundfish fisheries.

The analysis revealed no Federal rules that would conflict with, overlap, or be duplicated by the alternatives under consideration.

*Collection-of-Information Requirements*

This rule contains collection-of-information requirements, subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to the OMB for approval under OMB control number 0648–0353. The public reporting burden is estimated to average per response 10 minutes or less to collect the information and paint it on a buoy.

This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden on the collection of information, including through the use of automated collection techniques or other forms of information technology.

Send comments on these or any other aspects of the collection of information to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 26, 2013.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

## PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

■ 2. In § 679.24, revise paragraph (a)(1) to read as follows:

**§ 679.24 Gear limitations.**

* * * * *

(a) * * *

(1) All hook-and-line, longline pot, and pot-and-line marker buoys carried on board or used by any vessel regulated under this part shall be marked with the vessel's Federal fisheries permit number or ADF&G vessel registration number.

* * * * *

[FR Doc. 2013–31416 Filed 1–2–14; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register
Vol. 79, No. 2
Friday, January 3, 2014

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Nez Perce-Clearwater National Forest; Idaho; Middle Fork Vegetation Management

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service gives notice of its intent to prepare an Environmental Impact Statement for the Middle Fork Vegetation Management Project. The Proposed action would use a combination of timber harvest, pre-commercial thinning, prescribed fire and reforestation to achieve the desired range of age classes, size classes, vegetative species distributions habitat complexity (diversity) and landscape pattern across the forested portions of the project area. Road decommissioning, and road improvements are also proposed to improve watershed health. The EIS will analyze the effects of the proposed action and alternatives. The Nez Perce-Clearwater Forests invites comments and suggestions on the issues to be addressed. The agency gives notice of the National Environmental Policy Act (NEPA) analysis and decision making process on the proposal so interested and affected members of the public may participate and contribute to the final decision.

**DATES:** Comments concerning the scope of the analysis must be received by February 3, 2014. The draft environmental impact statement is expected in May 2014 and the final environmental impact statement is expected November 2014.

**ADDRESSES:** Send written comments to Mike Ward, Interdisciplinary Team Leader; 502 Lowry Street, Kooskia, Idaho 83539. Comments may also be sent via email to *comments-northern-nezperce-moose-creek@fs.fed.us*

**FOR FURTHER INFORMATION CONTACT:** Mike Ward, Interdisciplinary Team Leader, (208) 926–6413

**SUPPLEMENTARY INFORMATION:** The objective of the Middle Fork Project is to move the area towards a more diverse and resilient landscape structure by creating a range of age and size classes that more closely emulates a mixed-severity fire regime. Also, the desired species composition would be moved more towards the early-seral species (ponderosa pine, western larch, and white pine) by retaining these species in variable retention harvesting and by planting post-harvest, which would improve resilience to root diseases, bark beetles, fire and a changing climate over the long-term.

Watershed improvement activities would reduce road related impacts to the watershed and important aquatic habitats while still providing a stable and cost efficient transportation system and dispersed recreation opportunities.

#### Vegetation Management

*Purpose:* Trend vegetation species composition, structure, and distributions toward desired conditions described in the Forest Plan.

*Need:* The project area has a high proportion of grand fir/Douglas fir cover types. These species tend to be more susceptible/vulnerable to insects and diseases and grand fir is unlikely to survive in wildfire. There is a need to trend the area towards a more diverse and resilient forest structure by creating a range of age classes, size classes, species diversity and disturbance patterns that more closely emulate natural mixed severity disturbance. Shifting tree species composition by retaining and planting early seral species (i.e. ponderosa pine, western larch and western white pine) in managed areas would help trend the area toward or maintain desired habitat conditions and would make these habitats more resistant and resilient to change agents such as insect, disease, and fire.

#### Goods and Service

*Purpose:* To utilize timber outputs produced through forest management activities to support the economic structure of local communities.

*Need:* The need to provide a sustained yield of resource outputs is directed in the Forest Plan. Much of the area consists of grand fir dominated stands that have insect and disease infestations that are contributing to increased tree mortality, or are at risk from stand replacing events. Stands proposed for treatment are currently losing volume and value due to insects and disease. Harvest of the timber would provide materials to local industries.

#### Fire Regime/Natural Disturbance Restoration and Fuel Reduction

*Purpose:* Break up fuel continuity created by past wildfires which would reduce the potential for large scale crown fires. Reduce shade tolerant ladder fuels around existing legacy trees to retain those more fire resistant legacy trees on the landscape over the long term. These activities would emulate mixed severity fire.

*Need:* Effective fire suppression in this area has created a vegetative shift to less fire resistant species, and an increase in ladder fuels that can contribute to the risk of high intensity and potentially resource damaging wildfire. Past harvest patterns do not emulate natural disturbance patterns nor do they emulate natural habitat structure. There is a need to increase patch sizes to shift age and size class distributions to increase high quality early seral wildlife habitats. Landscape burning and timber harvest that mimics natural fire would help increase forest resilience, help reduce risk of wildfires, and help create high quality habitats that would benefit birds, small mammals, and big game species. Fire dependent wildlife species would benefit from landscape burning.

#### Watershed Improvement

*Purpose:* Reduce potential sediment inputs into the aquatic ecosystem.

*Need:* Sediment input from gravel and native surface roads can flow into streams, negatively affecting fish habitat and water quality. Improvement of watershed function and stream conditions can be accomplished by reducing road densities and repairing existing roads and culverts to reduce sediment and improve drainage. Decompacting soils and adding organic material on old skid trails and landings can also help to improve watershed function.

The Proposed Action would:

Improve forest health, provide goods and services, reduce fuels and improve wildlife habitat by:

• Conducting ''variable retention'' regeneration harvest and post-harvest burning activities on up to 2300 acres distributed across the focus areas to create early sucessional plant communities and improve wildlife habitat while re-establishing long-lived early seral tree species. Variable retention harvest would include areas of full retention (clumps), irregular edges, and retention of snags and legacy trees to provide structure and a future source of woody debris. Openings would likely exceed 40 acres. Creation of openings over 40 acres requires 60 day public review and Regional Forest approval. This letter provides public notice that an environmental impact statement will be prepared and Regional Forester approval requested.

• Applying improvement harvest (thin from below) on approximately 875 acres to remove encroachment and ladder fuels from ponderosa pine dominated stands.

• Construct up to 18 miles of temporary roads to carry out the proposed action. Roads would be designed and located to minimize environmental effects and decommissioned after use.

• Harvest would be conducted by ground based (tractor/skyline) and aerial (helicopter) logging systems. Logs would likely be landed in the Wild and Scenic River corridor at designated helicopter landings.

• Creating a shaded fuel break and defensible space for approximately 300 feet on NFS lands adjacent to private properties within the project area. This may include commercial and non-commercial thinning, pruning of ladder fuels and hand piling of slash.

**Watershed Improvement**

• 2–3 miles of system roads no longer considered necessary for transportation needs would be decommissioned.

• Maintaining and improving of 7–10 miles of roads used to support the proposed actions. Maintenance or improvement may include culvert installation or replacement, ditch cleaning, and riprap placement for drainage improvement. It may also include gravel placement, road grading and dust abatement.

Possible Alternatives the Forest Service will consider include a no-action alternative, which will serve as a baseline for comparison of alternatives. The proposed action will be considered along with additional alternatives that will be developed to meet the purpose and need for action, and to address significant issues identified during scoping.

**Responsible Official and Lead Agency**

The USDA Forest Service is the lead agency for this proposal. The Nez Perce-Clearwater Forest Supervisor is the responsible official.

The Decision To Be Made is whether to adopt the proposed action, in whole or inpart, or another alternative; and what mitigation measures and management requirements will be implemented.

The Scoping Process for the EIS is being initiated with this notice. The scoping process will identify issues to be analyzed in detail and will lead to the developemnt of alternatives to the proposal. The Forest Service is seeking information and comments from other Federal, State, and local agencies; Tribal Governments; and organizations and individuals who may be interested in or affected by the proposed action. Comments received in response to this notice, including the names and addresses of those who comment, will be a part of the project record and available for public review.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The second major opportunity for public input will be when the draft EIS is published. The comment period for the draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Draft EIS is anticipated to be available for public review in May 2013.

Dated: December 20, 2013.

**Rick Brazell,**

*Forest Supervisor.*

[FR Doc. 2013–31457 Filed 1–2–14; 8:45 am]

BILLING CODE 3410–11–P

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meeting

**TIME AND DATE:** 10:00 a.m., Friday, January 10, 2014.

**PLACE:** 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** Surveillance, Enforcement Matters, and Examinations. In the event that the times, dates, or locations of this or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov*.

**CONTACT PERSON FOR MORE INFORMATION:** Melissa D. Jurgens, 202–418–5516.

**Melissa D. Jurgens,**

*Secretary of the Commission.*

[FR Doc. 2013–31549 Filed 12–31–13; 4:15 pm]

BILLING CODE 6351–01–P

## BUREAU OF CONSUMER FINANCIAL PROTECTION

**[Docket No.: CFPB–2013–0036]**

### Request for Information Regarding the Mortgage Closing Process

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for information.

**SUMMARY:** This notice requests information from the public about mortgage closing. Specifically, the Consumer Financial Protection Bureau (CFPB) seeks information on key consumer ''pain points'' associated with mortgage closing and how those pain points might be addressed by market innovations and technology.

The CFPB seeks to encourage the development of a more streamlined, efficient, and educational closing process as the mortgage industry increases its usage of technology, electronic signatures, and paperless processes. The next phase of CFPB's *Know Before You Owe* initiative aims to identify ways to improve the mortgage closing process for consumers. This project will encourage interventions that increase consumer knowledge, understanding, and confidence at closing.

This notice seeks information from market participants, consumers, and other stakeholders who work closely with consumers. The information will inform the CFPB's understanding of what consumers find most problematic about the current closing process and inform the CFPB's vision for an improved closing experience.

**DATES:** Submit comments on or before February 7, 2014.

**ADDRESSES:** You may submit responsive information and other comments, identified by Docket No. CFPB–2013–0036, by any of the following methods:

• *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

*Instructions:* The Bureau encourages the early submission of comments. All

submissions must include the document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. Please note the number associated with any question to which you are responding at the top of each response (you are not required to answer all questions to receive consideration of your comments). In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Submissions will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** For general inquiries, submission process questions or any additional information, please contact Monica Jackson, Office of Executive Secretary, at 202–435–7275.

**Authority:** 12 U.S.C. 5511(c).

**SUPPLEMENTARY INFORMATION:** Buying a home is often a consumer's single largest financial purchase. According to the latest numbers from the National Association of Realtors, the median price of homes purchased in the United States is now $207,000. By comparison, the median household income is about $51,000, according to the Census Bureau. It is crucial that consumers consider the numbers carefully before making this potentially long-term commitment, and closing is often their last opportunity to do so.

However, closing can be stressful and confusing for consumers. The CFPB plans to conduct several initiatives in order to test and study various ways in which the closing process might be improved. This information will help inform those initiatives.

The Bureau encourages comments from the public, including:

- Consumers;
- Mortgage lenders and loan servicers;
- Housing finance professionals;
- Brokers and service providers in the residential real estate industry;
- Real estate agents;
- Housing attorneys;
- Fair lending, civil rights, and consumer and community advocates;
- Providers of financial and housing counseling;
- Settlement closing agents; and
- Other interested parties.

The Bureau is interested in responses in the following general areas, as well as specific questions below. Please feel free to respond to any of the questions outlined below.

### Consumers and Closing

1. What are common problems or issues consumers face at closing? What parts of the closing process do consumers find confusing or overwhelming?

2. Are there specific parts of the closing process that borrowers find particularly helpful?

3. What do consumers remember about closing as related to the overall mortgage/home-buying process? What do consumers remember about closing?

4. How long does the closing process usually take? Do borrowers feel that the time at the closing table was an appropriate amount of time? Is it too long? Too short? Just right?

5. How empowered do consumers seem to feel at closing? Did they come to closing with questions? Did they review the forms beforehand? Did they know that they can request their documents in advance? Did they negotiate?

6. What, if anything, have you found helps consumers understand the terms of the loan?

### Errors and Changes at Closing

7. What are some common errors you have seen at closing? How are these errors detected, if at all? Tell us about errors that were detected after closing.

8. What changes, diverging from what was originally presented at closing, often surprise consumers at closing? How do consumers react to changes at closing?

### Other Parties at Closing

9. How, if at all, do consumers typically seek advice during closing? In person? By phone? Online?

10. Where and to whom do consumers turn for advice during closing? Whom do they typically trust?

### Closing Documents

11. What documents do borrowers usually remember seeing? What documents they remember signing?

12. What documents do consumers find particularly confusing?

13. What resources do borrowers use to define unfamiliar terms of the loan?

### Improving Closing

14. What, if anything, would you change about the closing process to make it a better experience for consumers?

15. What questions should consumers ask at closing? What are the most important pieces of information/documents for them to review?

16. What is the single most important question a consumer should ask at closing?

17. What is the single most important thing a consumer should do before coming to the closing table?

Dated: December 13, 2013.

**Christopher D'Angelo,**

*Chief of Staff, Bureau of Consumer Financial Protection.*

[FR Doc. 2013–31436 Filed 1–2–14; 8:45 a.m.]

BILLING CODE 4810–AM–P

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meeting

**TIME AND DATE:** Wednesday, January 8, 2014, 10 a.m.–12 p.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Open to the Public.

**MATTER TO BE CONSIDERED:** Decisional Matter: Bedside Sleepers (Section 104)—Final Rule.

A live Webcast of the Meeting can be viewed at *www.cpsc.gov/live*.

For a recorded message containing the latest agenda information, call (301) 504–7948.

**CONTACT PERSON FOR MORE INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: December 31, 2013.

**Todd A. Stevenson,**

*Secretary.*

[FR Doc. 2013–31536 Filed 12–31–13; 11:15 am]

BILLING CODE 6355–01–P

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Proposed Information Collection; Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (CNCS), as part

of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general 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 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to 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 requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed Senior Corps RSVP Notice Of Funding Opportunity Non-applicant Study. The study involves two data collection phases. Phase I is a survey of individuals representing organizations, non-profits, and public agencies that are (1) current applicants, (2) current non-applicants, and (3) potential applicants for the RSVP Notice of Funding Opportunity. Phase II involves in-depth interviews with a range of stakeholders that includes individuals who administer grants, administer non-profits and public agencies applying for RSVP grants and representatives of state commissions.

The survey and interviews are designed to allow CNCS Senior Corps administrators to understand how grantees and potential grantees view the application process, what factors are important in the decision to apply, and how the NOFO can be written to generate a higher response rate from potential grant applicants.

Copies of the information collection request can be obtained by contacting the office listed in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by March 4, 2014.

**ADDRESSES:** You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Senior Corps Program; Attention Anthony Nerino, Research Associate, Office #10913A; 1201 New York Avenue NW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 6010 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through the Corporation's email system to *anerino@cns.gov*.

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Anthony Nerino, (202–606–3913), or by email at *anerino@cns.gov*.

**SUPPLEMENTARY INFORMATION:**

CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, 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 expected 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 submissions of responses).

## Background

CNCS has contracted with GMMB and Freedman Consulting LLC to implement a study of the RSVP grant application process in order to better understand the positive and prohibitive factors associated with the Retired and Senior Volunteer Program Notice of Funding Opportunity application process. This project involves a survey of grant applicants, non-applicants and potential applicants for the 2013 RSVP NOFO. Additionally the study involves a series of brief interviews with various stakeholders in the application process to augment and assist in understanding the survey results.

Potential survey respondents will be drawn from three sources; current applicants, potential applicants that filed a notice of intent to apply but did not file a grant application, and potential applicants (non-profits and public agencies) that have not yet applied or filed notice of intent letter.

Potential interview respondents will include grant applicant stakeholders including grant managers, non-profit and public agency administrators.

Survey data will be collected using an on-line survey program. Interview data will be collected via taped and written responses to telephone conversations.

Data analysis will focus on identifying and understanding factors associated with the decision to apply, factors associated with the decision to not apply, and perceived and real barriers to completing the grant application. Quantitative data analysis will include descriptive statistics and inferential analysis of survey responses by respondent and organization characteristics.

*Current Action:* CNCS seeks public comment on a new data collection instrument and a set of interview questions developed for this project. The instrument and interview questionnaire is being designed by the contractor for this project.

*Type of Review:* New.

*Agency:* Corporation for National and Community Service.

*Title:* Retired and Senior Volunteer Program NOFO Non-applicant Study.

*OMB Number:* None.

*Agency Number:* None.

*Affected Public:* RSVP Grant Applicants and Potential Applicants.

*Total Respondents:* Written Surveys 300. Interviews 40.

*Frequency:* One time.

*Average Time per Response:* 30 minutes.

| Respondent category | Number | Time (minutes) | Total hours |
|---|---|---|---|
| Survey Respondents | 300 | 30 | 150 |
| Interview Participants | 40 | 30 | 20 |

*Estimated Total Burden Hours:* 170.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of

Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 27, 2013.

**Erwin Tan,**

*Program Director, Senior Corps.*

[FR Doc. 2013–31481 Filed 1–2–14; 8:45 am]

BILLING CODE 6050–28–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket ID: DoD–2013–OS–0199]**

### Submission for OMB Review; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**DATES:** Consideration will be given to all comments received by February 3, 2014.

**FOR FURTHER INFORMATION CONTACT:** Fred Licari, 571–372–0493.

**SUPPLEMENTARY INFORMATION:**

*Title, Associated Form and OMB Number:* Project Time Record System; OMB Control Number 0704–0452.

*Type of Request:* Reinstatement.

*Number of Respondents:* 1,200.

*Responses per Respondent:* 52.

*Annual Responses:* 62,400.

*Average Burden per Response:* 15 minutes.

*Annual Burden Hours:* 15,600.

*Needs and Uses:* Contractors working for the Defense Logistics Agency, Information Operations, J–6, log into an automated project time record system and annotate their time on applicable projects. The system collects the records for the purpose of tracking workload/project activity for analysis and reporting purposes, and labor distribution data against projects for financial purposes; and to monitor all aspects of a contract from a financial perspective and to maintain financial and management records associated with the operations of the contract; and to evaluate and monitor the contractor performance and other matters concerning the contract, i.e., making payments, and accounting for services provided and received. Defense Logistics Agency, Information Operations, J–6, intends to execute this option on new contracts and, as necessary, modify existing contract agreements.

*Affected Public:* Business or other for-profit; individuals or households; not for profit institutions.

*Frequency:* Weekly.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

*DOD Clearance Officer:* Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: December 30, 2013.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2013–31456 Filed 1–2–14; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### Defense Acquisition University Board of Visitors; Notice of Federal Advisory Committee Meeting

**AGENCY:** Defense Acquisition University, DoD.

**ACTION:** Meeting notice.

**SUMMARY:** The Department of Defense is publishing this notice to announce that the following Federal advisory committee meeting of the Defense Acquisition University Board of Visitors (BoV) will take place. This meeting is open to the public.

**DATES:** Wednesday, February 12, 2014, from 9:30 a.m. to 2:30 p.m.

**ADDRESSES:** DAU Headquarters, 9820 Belvoir Road, Fort Belvoir, VA 22060.

**FOR FURTHER INFORMATION CONTACT:** Christen Goulding, Protocol Director, DAU. Phone: 703–805–5134. Fax: 703–805–5940. Email: *christen.goulding@dau.mil.*

**SUPPLEMENTARY INFORMATION:** This meeting is being held 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.

*Purpose of the Meeting:* The purpose of this meeting is to report back to the BoV on continuing items of interest.

Agenda:

9:30 a.m. Welcome and announcements
9:45 a.m. 2013 Year in Review
10:45 a.m. Massive Open Online Courses
12:30 p.m. Knowledge Repository Web site Development
2:30 p.m. Adjourn

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. However, because of space limitations, allocation of seating will be made on a first-come, first served basis. Persons desiring to attend the meeting should call Ms. Christen Goulding at 703–805–5134.

*Written Statements:* 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 statements to the Defense Acquisition University Board of Visitors about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Defense Acquisition University Board of Visitors. All written statements shall be submitted to the Designated Federal Officer for the Defense Acquisition University Board of Visitors, and this individual will ensure that the written statements are provided to the membership for their consideration.

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Defense Acquisition University Board of Visitors until its next meeting. Committee's Designated

Federal Officer or Point of Contact: Ms. Kelley Berta, 703–805–5412.

Dated: December 30, 2013.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2013–31463 Filed 1–2–14; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

**[Docket ID: USN–2013–0048]**

### Proposed Collection; Comment Request

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by March 4, 2014.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Judge Advocate General, ATTN: Code 61. 1322 Patterson Ave SE., Suite 3000, Washington Navy Yard, DC 20374–5066, or call Code 61 at 202–685–7715.

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* Navy JAG Corps Application; OMB Control Number 0703–XXXX.

*Needs and Uses:* The U.S. Navy Judge Advocate General requires a method to collect information from applicants to confirm their eligibility to serve and determine which applicants are best suited to joining the Navy JAG Corps.

*Affected Public:* Individuals or households.

*Annual Burden Hours:* 1200 hours.

*Number of Respondents:* 800.

*Responses per Respondent:* 1.

*Average Burden per Response:* 1.5 hours.

*Frequency:* Semi-Annual.

The Navy JAG Corps has two distinct application deadlines per year; one in the Fall and one in late Winter or early Spring. Application deadlines will be posted on the Navy JAG Corps official Web site. The online application is open for several months prior to each application deadline.

This online application is used by the Navy JAG Corps to help determine which applicants are best suited for commissioning as a Navy JAG Corps officer. The online application consists of an online questionnaire as well as several documents which must be uploaded by the applicant. The questionnaire requires applicants to provide their home and mailing addresses, phone number, email address, personal academic history (e.g., colleges attended, graduate or law schools attended, grade point average, and Law School Admissions Test (LSAT) scores), foreign language fluency, as well as information regarding their participation in or association with any extra-curricular activities, clubs, sports, or organizations. Applicants must also provide information about any history of criminal conduct (being arrested for, charged with, or convicted of any misdemeanor or felony) or any history of drug use or drug/alcohol counseling. In addition, applicants are asked to provide their employment history, including any prior military service or legal employment, and whether or not the applicant has ever left employment under unfavorable circumstances. Finally, the applicants are asked to write a statement concerning their motivation for applying to the Navy JAG Corps and to select from a list of options the different reasons for applying. In addition to answering the questions and providing the information required in the online questionnaire, applicants must upload the following documentation to complete their application: A full length color photo, college and law school transcripts for each school attended, their LSAT Score Report, a complete resume, and at least two letters of recommendation. Applicants with prior military service are required to upload their ''Certificate of Release or Discharge from Active Duty'' (DD–214) or other records substantiating military service, as well as any fitness reports or performance evaluations received. Once the online application is completed, applicants are required to set up a JAG Corps Structured Interview. Information on setting up an interview can be found at the Navy JAG Corps Web site, *www.jag.navy.mil.* Once the applicant is interviewed, answers to the interview questions are captured on the OPNAV 1070/5 JAG Corps Structured Interview Assessment Form and objectively scored.

Dated: December 30, 2013.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2013–31460 Filed 1–2–14; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2013–ICCD–0125]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Student Aid Internet Gateway (SAIG) Enrollment Document

**AGENCY:** Federal Student Aid (FSA), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection.

**DATES:** Interested persons are invited to submit comments on or before February 3, 2014.

**ADDRESSES:** Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0125 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E103, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:** For questions related to collection activities or burden, please call Kate Mullan, 202–401–0563 or electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here. We will ONLY accept comments in this mailbox when the regulations.gov site is not available to the public for any reason.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. 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:* Student Aid Internet Gateway (SAIG) Enrollment Document.

*OMB Control Number:* 1845–0002.

*Type of Review:* Revision of an existing collection of information.

*Respondents/Affected Public:* State, Local, or Tribal Governments, Private Sector.

*Total Estimated Number of Annual Responses:* 33,140.

*Total Estimated Number of Annual Burden Hours:* 10,128.

*Abstract:* Enrollment in the Federal Student Aid (FSA) Student Aid Internet Gateway (SAIG) allows eligible entities to securely exchange Title IV, Higher Education Act (HEA) assistance programs data electronically with the Department of Education processors. Organizations establish Destination Point Administrators (DPAs) to transmit, receive, view and update student financial aid records using telecommunication software. Eligible respondents include, but are not limited to, the following institutions of higher education that participate in Title IV, HEA assistance programs, third-party servicers of eligible institutions, Guaranty Agencies, Federal Family Education Loan Program (FFELP) lenders, Federal Loan Servicers, and local educational agencies (LEAs). The Enrollment Form for Post-Secondary Schools and Servicers represents the full complement of questions that must be presented for an organization enrolling in SAIG. The Enrollment Form for State Grant Agencies and the Enrollment Form for tracking Free Application for Federal Student Aid (FAFSA) Completion for Local Educational Agencies (LEAs) are a subset of selected questions (from the full complement of questions) to streamline the form for ease of use. The SAIG Application for State Grant Agencies Form was revised to create a two-part form. The first part is the SAIG Enrollment application and the second part is the new Participation Agreement which establishes the conditions under which the Department will permit the disclosure of certain data received or generated by the Department concerning FSA applicants. The Institutions, Third-Party Servicers, Guaranty Agencies, Federal Loan Servicers, Lenders Enrollment Form was revised to allow Lenders and their Servicers to enroll for COD Online access in order to receive completed electronic IBR/Pay As You Earn/ICR Repayment Request. Additionally, all forms were revised to accommodate annual rollover changes (i.e. new award years).

Dated: December 30, 2013.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2013–31479 Filed 1–2–14; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Northern New Mexico

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Wednesday, January 29, 2014, 1:00 p.m.–5:00 p.m.

**ADDRESSES:** The Lodge at Santa Fe, 750 N. St. Francis Drive, Santa Fe, New Mexico 87501.

**FOR FURTHER INFORMATION CONTACT:** Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *Menice.Santistevan@nnsa.doe.gov*.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

**Tentative Agenda**

1:00 p.m. Call to Order by Deputy Designated Federal Officer (DDFO), Lee Bishop
Establishment of a Quorum: Roll Call and Excused Absences, William Alexander
Welcome and Introductions, Carlos Valdez, Chair
Approval of Agenda and November 20, 2013 Meeting Minutes
1:15 p.m. Public Comment Period
1:30 p.m. Old Business
- Written Reports
- Other Items

1:45 p.m. New Business
- Review Bi-monthly Meeting Schedule for 2014
- Other items

2:00 p.m. Upcoming Hearings, Permits and Public Comment Periods,

Environmental Safety Health and Quality Staff

2:30 p.m. Presentation on Performance Assessment and Composite Analysis, Sean French

3:00 p.m. Presentation on Material Disposal Area G Corrective Measures Evaluation, David Rhodes

3:30 p.m. Update from Liaison Members

- New Mexico Environment Department, John Kieling
- Los Alamos National Laboratory, Jeffrey Mousseau
- DOE, Peter Maggiore

4:30 p.m. Items from DDFO, Lee Bishop

4:45 p.m. Wrap-Up and Comments from Board Members, Carlos Valdez

5:00 p.m. Adjourn

*Public Participation:* The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.energy.gov/.*

Issued at Washington, DC, on December 30, 2013.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2013–31467 Filed 1–2–14; 8:45 am]

BILLING CODE 6405–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Savannah River Site

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Monday, January 27, 2014 1:00 p.m.–5:00 p.m., Tuesday, January 28, 2014, 8:30 a.m.–5:15 p.m.

**ADDRESSES:** Hilton Garden Inn, 1065 Stevens Creek Road, Augusta, GA 30907.

**FOR FURTHER INFORMATION CONTACT:** Gerri Flemming, Office of External Affairs, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–7886.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

**Tentative Agenda**

*Monday, January 27, 2014*

1:00 p.m. Combined Committees Session

Order of committees:

- Nuclear Materials
- Administrative & Outreach
- BREAK (2:15 p.m.)
- Facilities Disposition & Site Remediation
- Waste Management
- Strategic & Legacy Management

4:45 p.m. Public Comments Session

5:00 p.m. Adjourn

*Tuesday, January 28, 2014*

8:30 a.m. Opening, Pledge, Approval of Minutes, Annual Voting on Approval of Existing Position Statements, Chair and Agency Updates

10:00 a.m. Public Comments Session

Break (10:15 a.m.)

Nuclear Materials Report

Waste Management Report

12:00 p.m. Public Comments Session

12:15 p.m. Lunch Break

1:30 p.m. Facilities Disposition & Site Remediation Report

Strategic & Legacy Management Report

Administrative & Outreach Committee Report

- Ballots passed out for committee chair elections*
- Recognition by DOE for outgoing Board members

4:45 p.m. Public Comments Session

*Results of election announced directly after Public Comment session

5:00 p.m. Adjourn

*Public Participation:* The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Gerri Flemming at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gerri Flemming's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Gerri Flemming at the address or phone number listed above. Minutes will also be available at the following Web site: *http://cab.srs.gov/srs-cab.html.*

Issued at Washington, DC, on December 30, 2013.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2013–31468 Filed 1–2–14; 8:45 am]

BILLING CODE 6450–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–9012–8]**

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 12/23/2013 Through 12/27/2013

Pursuant to 40 CFR 1506.9.

**Notice**

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

*EIS No. 20130381, Draft EIS, FHWA, TX,* US 181 Harbor Bridge Project, Comment Period Ends: 03/03/2014, Contact: Gregory Punske 512–536–5960.

*EIS No. 20130382, Draft EIS, NPS, 00,* Glen Canyon National Recreation Area Off-road Vehicle Management Plan, Comment Period Ends: 03/04/2014, Contact: Brian Carey 928–608–6209.

*EIS No. 20130383, Final EIS, USACE, CA,* Berryessa Creek Element Coyote and Berryessa Creek California Flood Control Project, Review Period Ends: 02/03/2014, Contact: Tyler Stalker 916–557–5107.

**Amended Notices**

*EIS No. 20130325, Draft EIS, NPS, MO,* Ozark National Scenic Riverways Draft General Management Plan, Wilderness Study, Comment Period Ends: 02/07/2014, Contact: William Black 573–323–4236, Revision to the FR Notice Published 12/06/2013; Extending Comment Period from 01/08/2014 to 02/07/2014.

*EIS No. 20130360, Final EIS, USFS, AZ,* Rosemont Copper Project, Proposed Construction, Operation with Concurrent Reclamation and Closure of an Open-Pit Copper Mine, Review Period Ends: 02/14/2014, Contact: Mindy Vogel 520–388–8300, Revision to FR Notice Published 12/20/2013; Correcting the Review Period End Date to read 02/14/2014.

Dated: December 30, 2013.

**Dawn Roberts,**

*Management Analyst, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2013–31448 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–TRI–2013–0281; FRL–9904–82–OEI]**

## Petition To Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required To Report Under the Toxics Release Inventory; Notice of Receipt of Petition

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of receipt of petition.

**SUMMARY:** The Environmental Integrity Project (EIP) and sixteen other organizations submitted a petition to the Environmental Protection Agency (EPA), dated October 24, 2012, requesting that EPA add the Oil and Gas Extraction sector, Standard Industrial Classification (SIC) code 13, to the scope of sectors covered by the Toxics Release Inventory (TRI) under section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA). The petition also requests that EPA publish the petition in the **Federal Register**. This **Federal Register** Notice provides notice of receipt of this petition, along with the Docket Identification Number that can be used to view the petition and related documents. EPA is not soliciting public comment regarding this notice.

**FOR FURTHER INFORMATION CONTACT:** Gilbert Mears, Toxics Release Inventory Program Division, Office of Environmental Information (mail code 2844T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566–0954; fax number: (202) 566–0715; email address: *mears.gilbert@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. How can I get copies of this document and other related information?*

1. *Docket.* EPA has established a docket for this action under Docket ID No EPA–HQ–TRI–2013–0281. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the ''Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required To Report under the Toxics Release Inventory'' Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center 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 ''Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required To Report under the Toxics Release Inventory'' Docket is (202) 566–1752.

2. *Electronic Access.* You may access this **Federal Register** document electronically from the Government Printing Office under the ''**Federal Register**'' listings at FDSys (*http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR*).

Dated: December 16, 2013.

**Arnold E. Layne,**

*Director, Office of Information Analysis and Access, Office of Environmental Information.*

[FR Doc. 2013–31484 Filed 1–2–14; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Medicare Program; Appellant Forum Regarding the Administrative Law Judge Hearing Program for Medicare Claim Appeals

**AGENCY:** Office of Medicare Hearings and Appeals (OMHA), HHS.

**ACTION:** Notice of Meeting.

**SUMMARY:** This notice announces an Office of Medicare Hearings and Appeals (OMHA) Medicare Appellant Forum. The purpose of this event is to provide updates to OMHA appellants on the status of OMHA operations; to relay information on a number of OMHA initiatives designed to mitigate a growing backlog in the processing of Medicare appeals at the OMHA-level of the administrative appeals process; and provide information on measures that appellants can take to make the administrative appeals process work more efficiently at the OMHA-level.

**DATES:** *Meeting Date:* The OMHA Medicare Appellant Forum announced in this notice will be held on Wednesday, February 12, 2014. The OMHA Medicare Appellant Forum will begin at 10:00 a.m. Eastern Standard Time (e.s.t.) and check-in will begin at 9:00 a.m. e.s.t.

*Deadline for Registration of Attendees and Requests for Special Accommodation:* The deadline to register to attend the OMHA Medicare Appellants Forum and request a special accommodation, as provided for in the American's with Disabilities Act, is 5:00

p.m., e.s.t. on Tuesday, January 28, 2014.

**ADDRESSES:** *Meeting Location:* The OMHA Medicare Appellants Forum will be held in the Cohen Auditorium of the Wilbur J. Cohen building located at 330 Independence Ave. SW., Washington, DC 20024.

We are exploring the feasibility of providing a toll-free phone line and/or live stream technology and/or webinar. Information on these options will be posted at a later date on the OMHA Web site; *http://www.hhs.gov/omha/index.html*.

*Registration and Special Accommodations:* Individuals wishing to attend the OMHA Medicare Appellant Forum must register by following the on-line registration instructions located in section III. of this notice or by contacting staff listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individuals who need special accommodations should contact staff listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Sylvia Baquero, (703) 235–0145, *sylvia.baquero@hhs.gov,* or Paula Taylor, (703) 235–0125, *paula.taylor@hhs.gov.* Alternatively, you may forward your requests via email to *OSOMHAAppellantForum@hhs.gov*; please indicate ''Request for information'' or ''Request for special accommodation'' in the subject line.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Office of Medicare Hearings and Appeals (OMHA), a staff division within the Office of the Secretary of the U.S. Department of Health and Human Services (HHS), administers the nationwide Administrative Law Judge hearing program for Medicare claim and entitlement appeals under sections 1869(b)(1), 1155, 1876, 1852(g)(5), and 1860D–4(h) of the Social Security Act. OMHA ensures that Medicare beneficiaries and the providers and suppliers that furnish items or services to Medicare beneficiaries have a fair and impartial forum to address disagreements with Medicare coverage determinations made by Medicare contractors and determinations related to Medicare eligibility and entitlement, and income-related premium surcharges made by the Social Security Administration.

OMHA serves a broad sector of the public, including Medicare providers and suppliers, and Medicare beneficiaries, who are often elderly or disabled and among the nation's most vulnerable populations. OMHA administers its program in four field offices, including the Southern Field Office in Miami, Florida; the Midwestern Field Office in Cleveland, Ohio; the Western Field Office in Irvine, California; and the Mid-Atlantic Field Office in Arlington, Virginia. OMHA uses in-person, video-teleconferencing (VTC) and telephone conference formats to provide appellants with hearings.

OMHA was established in July 2005 pursuant to section 931 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173), which required the transfer of responsibility for the Administrative Law Judge hearing level of the Medicare claim and entitlement appeals process from the Social Security Administration to HHS. OMHA was expected to improve service to appellants and reduce the average 368-day time frame to receive a hearing decision that appellants experienced with the Social Security Administration, in accordance with 90-day adjudication time frame mandate required by the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (Pub. L. 106–554).

At the time of OMHA was established, it was envisioned that OMHA would receive the traditional claim and entitlement appeals workload from the Medicare Part A and Part B programs, and the Medicare Part C Medicare Advantage program; and a new workload of appeals from the Medicare Part D Prescription Drug program and the Income Related Monthly Adjustment Amount (IRMAA) premium surcharges assessed by the Social Security Administration. However, beginning in fiscal year 2010, new workloads including permanent establishment of the Recovery Audit (RA) program and termination of several demonstration projects involving Medicare State Agencies (MSA), have emerged that had not been built into the OMHA workload models. The steady growth in traditional Medicare appeals combined with these new workloads has strained OMHA's ability to meet the adjudication time frame mandate while maintaining quality.

As a result of the anticipated workload increase from the traditional appeals and the increased workload resulting from MSA appeals and the RA program, a backlog of appeals began to form in fiscal year 2012 in which more requests for hearing were being filed than could be adjudicated. In 2013, appealed claims related to the RA program grew to over 136,000, further exacerbating the backlog of cases and resulting in a substantial increase in the adjudication time frame.

As the unprecedented growth in claim appeals continues to exceed the available adjudication resources to address appeals, OMHA is taking measures to mitigate the workload increase and planning future activities to bring efficiencies to the appeals process at the OMHA-level. One of the immediate measures has been to ensure that the relatively small numbers of beneficiary-initiated appeals are being immediately addressed by prioritizing their cases. For the remaining cases, OMHA has suspended assignments of new requests for hearing until an adjudicator becomes available, which will allow cases to be assigned more efficiently on a first in/first out basis as an Administrative Law Judge's case docket is able to accommodate additional workload. In addition, OMHA is vigorously pursuing an electronic case adjudication processing environment (ECAPE) to bring new efficiencies and appellant-access to the OMHA-level of the appeals process.

The OMHA Medicare Appellant Forum will address these initiatives, as well as potential future initiatives, and will solicit input from the appellant community to help OMHA evaluate its policies and procedures to achieve meaningful backlog reduction strategies and process efficiencies while remaining compliant with applicable legal authorities.

## II. Medicare Claim Appeal Appellant Forum and Conference Calling/Webinar Information

### *A. Format of the OMHA Medicare Appellant Forum*

As noted in section I. of this notice, OMHA is conducting this outreach to appellants of the Medicare claim appeals process to provide updates on initiatives to mitigate a growing backlog in the processing Medicare appeals at the OMHA-level, and to solicit input to achieve meaningful backlog reduction strategies and process efficiencies. Information regarding the OMHA Medicare Appellant Forum can be found on the OMHA Web site at: *http://www.hhs.gov/omha/index.html*.

The majority of the forum will be reserved for presentations of workload data, processes and policy discussions, and recommendations from agency presenters. The time for each presentation will be approximately 30 to 60 minutes and will be based on the material being addressed in the presentation.

Questions and comments from in-person attendees will be solicited at the

end of each planned presentation and during a separate question and answer session as time permits. In addition, questions related to the OMHA-level of the Medicare claim appeals process will also be accepted on the attendee registration, for potential response during the appropriate presentation.

*B. Conference Call, Live Streaming, and Webinar Information*

For participants who cannot attend the OMHA Medicare Appellant Forum in person, there may be an option to view and participate in the OMHA Medicare Appellant Forum via live streaming technology and/or a webinar. Information on the whether these capabilities will be available as part of this forum will be posted on the OMHA Web site at: *http://www.hhs.gov/omha/index.html*. Please continue to check the Web site for updates on this upcoming event.

Disclaimer: We cannot guarantee reliability for live streaming technology and/or a webinar.

**III. Registration Instructions**

The OMHA Executive Office is coordinating attendee registration for the OMHA Medicare Appellant Forum. While there is no registration fee, individuals planning to attend the forum must register to attend. In-person participation is limited to two (2) representatives from each organization. Additional individuals can participate by telephone conference or webinar if these services are made available. Information on participation by telephone conference or webinar will be posted on the OMHA Web site at: *http://www.hhs.gov/omha/index.html*. Registration may be completed online at the following web address: *http://www.hhs.gov/omha/index.html*. Seating capacity for in-person attendees is limited to the first 400 registrants.

After completing the registration, online registrants will receive a confirmation email which they should bring with them to the meeting(s). If you are unable to register online, you may register by sending an email to *OSOMHAAppellantForum@hhs.gov*. Please include your first and last name, title, organization, address, office telephone number, and email address. If seating capacity has been reached, you will be notified that the meeting has reached capacity.

**IV. Security, Building, and Parking Guidelines**

Because the OMHA Medicare Appellant Forum will be conducted on Federal property, for security reasons, any persons wishing to attend these meetings must register by the date specified in the **DATES** section of this notice. Please allow sufficient time to go through the security checkpoints. It is suggested that you arrive at the Wilbur J. Cohen building, located at 330 Independence Ave. SW., Washington, DC 20024, no later than 9:30 a.m. e.s.t. if you are attending the forum in person so that you will be able to arrive promptly for the meeting.

Security measures include the following:

- Presentation of photographic identification to the Federal Protective Service or Guard Service personnel.
- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to the Cohen Building, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

**Note:** Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the forum in person. The public may not enter the building earlier than 45 minutes prior to the convening of the forum.

Attendees must enter the Cohen Building thru the C-Street entrance and proceed to the registration desk. All visitors must be escorted in areas other than the auditorium area and access to the rest rooms on the same level in the building. Seating capacity is limited to the first 400 registrants.

Parking in Federal buildings is not available for this event. In addition, street side and commercial parking is extremely limited in the downtown area. Attendees are advised to use Metro-rail to either the Federal Center SW station (Blue/Orange line) or the L'Enfant Plaza station (Yellow/Green or Blue/Orange lines). The Wilbur J. Cohen building is approximately 1½ blocks from each of these Metro-rail stops.

(Catalog of Federal Domestic Assistance Program No. 93.770, Medicare—Prescription Drug Coverage; Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 24, 2013.

**Nancy J. Griswold,**

*Chief Administrative Law Judge, Office of Medicare Hearings and Appeals.*

[FR Doc. 2013–31461 Filed 1–2–14; 8:45 am]

BILLING CODE 4150–46–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–14–0892]**

### 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 (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 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

*Clostridium difficile* Infection (CDI) Surveillance (0920–0892, Expiration 07/31/2014)—Extension—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Steady increases in the rate and severity of *Clostridium difficile* infection (CDI) indicate a clear need to conduct longitudinal assessments to continue to monitor changes in CDI epidemiology, including changes in risk factors for disease, as well as increases in incidence and severity of illness related to this pathogen.

The title and the goals of the project have remained the same since the publication of the 60-day **Federal Register** Notice and there were no changes in burden estimates or data collection forms from what is shown in the current inventory.

The surveillance population will consist of persons residing in the catchment area of the participating Emerging Infections Program (EIP) sites who are 1 year of age or older. This surveillance poses no more than minimal risk to the study participants as there will be no interventions or modifications to the care study participants receive.

EIP surveillance personnel will perform active case finding from laboratory reports of stool specimens testing positive for *C. difficile* toxin and abstract data on cases using a standardized case report form. For a subset of cases (e.g., community-associated *C. difficile* cases) sites will administer a health interview.

A total of 600 individuals who develop CDI will be contacted for a telephone interview annually and, of those, it is estimated that 500 will meet study inclusion criteria. The interview screening is estimated to take 5 minutes and the full telephone interview is estimated to take 40 minutes. Therefore, the total estimated annualized burden for this data collection is estimated to be 383 hours.

There are no costs to the respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hrs.) |
|---|---|---|---|---|
| Persons in the community infected with *C. difficile* | Screening Form | 600 | 1 | 5/60 |
| | Telephone interview | 500 | 1 | 40/60 |

**Leroy Richardson,**

*Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2013–31478 Filed 1–2–14; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–14–0200]**

### 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 LeRoy Richardson, 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 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*—Coal Workers' Health Surveillance Program (CWHSP) (OMB Control No. 0920–0200, Expiration 06/30/2014)—Revision—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

NIOSH would like to submit an Information Collection Request (ICR) to revise the data collection instruments being utilized within the Coal Workers' Health Surveillance Program (CWHSP). The current ICR incorporates all four components that fall under the CWHSP. Those four components include: Coal Workers' X-ray Surveillance Program (CWXSP), B Reader Program, Enhanced Coal Workers' Health Surveillance Program (ECWHSP), and National Coal Workers' Autopsy Study (NCWAS). The CWHSP is a congressionally-mandated medical examination program for monitoring the health of underground coal miners, established under the Federal Coal Mine Health and Safety Act of 1969, as amended in 1977 and 2006, Public Law 95–164 (the Act). The Act provides the regulatory authority for the administration of the CWHSP. This Program is useful in providing information for protecting the health of miners (whose participation is entirely voluntary), and also in documenting trends and patterns in the prevalence of coal workers' pneumoconiosis (''black lung disease'') among miners employed in U.S. coal mines. The total estimated annualized burden hours of 4,420 is based on the following:

- Coal Mine Operators Plan (2.10)—Under 42 CFR Part 37.4, every coal operator and construction contractor for each underground coal mine must submit a coal mine operator's plan every 3 years, providing information on how they plan to notify their miners of the opportunity to obtain the chest radiographic examination. To complete this form with all requested information (including a roster of current employees) takes approximately 30 minutes.
- Facility Certification Document (2.11)—X-ray facilities seeking NIOSH-approval to provide miner radiographs under the CWHSP must complete an approval packet which requires approximately 30 minutes for completion.
- Miner Identification Document (2.9)—Miners who elect to participate in the CWHSP must fill out this document which requires approximately 20 minutes. This document records demographic and occupational history, as well as information required under the regulations from x-ray facilities in relation to coal miner examinations. In addition to completing this form, the process of capturing the chest image takes approximately 15 minutes.
- Chest Radiograph Classification Form (2.8)—Under 42 CFR Part 37, NIOSH utilizes a radiographic classification system developed by the International Labour Office (ILO), in the determination of pneumoconiosis among underground coal miners. Physicians (B Readers) fill out this form regarding their interpretations of the radiographs (each image has at least two separate interpretations). Based on prior practice it takes the physician approximately 3 minutes per form.
- Physician Application for Certification (2.12)—Physicians taking the B Reader examination are asked to complete this registration form which provides demographic information as well as information regarding their medical practices. It typically takes the physician about 10 minutes to complete this form.
- Spirometry Testing—Miners participating in the ECWHSP component of the Program are asked to perform a spirometry test which requires no additional paperwork on the part of the miner, but does require approximately 15 to 20 minutes for the test itself. Since spirometry testing is offered as part of the ECWHSP only, the 2,500 respondents listed in the burden

table below account for about half of the total participants in the CWHSP.

• Pathologist Invoice—42 CFR 37.202 specifies procedures for the NCWAS. The invoice submitted by the pathologist must contain a statement that the pathologist is not receiving any other compensation for the autopsy. Each participating pathologist may use their individual invoice as long as this statement is added. It is estimated that only 5 minutes is required for the pathologist to add this statement to the standard invoice that they routinely use.

• Pathologist Report—42 CFR 37.203 provides the autopsy specifications. The pathologist must submit information found at autopsy, slides, blocks of tissue, and a final diagnosis indicating presence or absence of pneumoconiosis. The format of the autopsy reports are variable depending on the pathologist conducting the autopsy. Since an autopsy report is routinely completed by a pathologist, the only additional burden is the specific request for a clinical abstract of terminal illness and final diagnosis relating to pneumoconiosis. Therefore, only 5 minutes of additional burden is estimated for the pathologist's report.

• Consent, Release and History Form (2.6)—This form documents written authorization from the next-of-kin to perform an autopsy on the deceased miner. A minimum of essential information is collected regarding the deceased miner including the occupational history and smoking history. From past experience, it is estimated that 15 minutes is required for the next-of-kin to complete this form.

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/ response (in hrs) | Total burden (in hrs) |
|---|---|---|---|---|---|
| Coal Mine Operators | Form 2.10 | 200 | 1 | 30/60 | 100 |
| X-ray Facility Supervisor | Form 2.11 | 100 | 1 | 30/60 | 50 |
| X-ray—Coal Miners | No form required | 5,000 | 1 | 15/60 | 1,250 |
| Coal Miners | Form 2.9 | 5,000 | 1 | 20/60 | 1,667 |
| B Reader Physicians | Form 2.8 | 10,000 | 1 | 3/60 | 500 |
| Physicians taking the B Reader Examination. | Form 2.12 | 100 | 1 | 10/60 | 17 |
| Spirometry Test—Coal Miners | No form required | 2,500 | 1 | 20/60 | 833 |
| Pathologist | Invoice—No standard form | 5 | 1 | 5/60 | 1 |
| Pathologist | Pathology Report—No standard form. | 5 | 1 | 5/60 | 1 |
| Next-of-kin for deceased miner | Form 2.6 | 5 | 1 | 15/60 | 1 |
| Total | | | | | 4,420 |

**Leroy Richardson,**

*Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2013–31464 Filed 1–2–14; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

### Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), (last amended at **Federal Register**, Vol. 76, No. 75, pp. 21908–21909, dated April 19, 2011, and Vol. 77, No. 140, p. 42740, dated July 20, 2012) is amended to reflect the abolishment of the Office of Public Engagement (OPE). The Offices of Hearings and Inquiries (OHI) was established and reports directly to the Chief Operating Officer (COO).

CMS modified its structure to: (1) Conduct Marketplace eligibility appeals; (2) assist Medicare beneficiaries with complaints, inquiries, and grievances, and to gather the information necessary to file Medicare appeals; and (3) conduct administrative hearings for institutional appeals which fall under the jurisdiction of the Provider Reimbursement Review Board, the Medicare Geographic Classification Review Board, and the CMS Hearings Officers.

The functions in OPE include the Medicare Ombudsman, tribal affairs, and emergency preparedness and continuity of operations. The Medicare Ombudsman was moved to OHI, tribal affairs was moved to the Center for Medicaid and CHIP Services (CMCS), and emergency preparedness and continuity of operations was moved to the Consortium for Quality Improvement and Survey & Certification Operations (CQISCO). In addition, the Office of Marketplace Eligibility Appeals was established in OHI, and the Office of Hearings was moved from the Office of Operations Management (OOM) to OHI.

Part F., Section FC. 10 (Organization) is revised as follows:

Office of the Administrator (FC)
Office of Equal Opportunity and Civil Rights (FCA)
Office of Legislation (FCC)
Office of the Actuary (FCE)
Office of Strategic Operations and Regulatory Affairs (FCF)
Center for Clinical Standards and Quality (FCG)
Center for Medicare (FCH)
Center for Medicaid and CHIP Services (FCJ)
Center for Strategic Planning (FCK)
Center for Program Integrity (FCL)
Chief Operating Officer (FCM)
Office of Minority Health (FCN)
Center for Medicare and Medicaid Innovation (FCP)
Federal Coordinated Health Care Office (FCQ)
Center for Consumer Information and Insurance Oversight (FCR)
Office of Communications (FCT)

**Delegations of Authority**

All delegations and re-delegations of authority made to officials and employees of affected organizational

components will continue in them or their successor organization pending further re-delegation, provided they are consistent with the movement of functions.

**Authority:** 44 U.S.C. 3101.

Dated: December 24, 2013.

**Marilyn Tavenner,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2013–31206 Filed 1–2–14; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2013–N–0001]**

### Risk Communications Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee:* Risk Communications Advisory Committee.

*General Function of the Committee:* To provide advice and recommendations to the Agency on FDA's regulatory issues.

*Date and Time:* The meeting will be held on February 3 and 4, 2014, from 9 a.m. to 5 p.m.

*Location:* FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

*Contact Person:* Luis G. Bravo, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3274, Silver Spring, MD 20993–0002, 240–402–5274, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

If you are unable to join us in person, we encourage you to watch the Webcast. Visit the Risk Communication Advisory Committee Web site at *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/RiskCommunicationAdvisoryCommittee/default.htm.* The link will become active shortly before the open session begins at 9 a.m.

*Agenda:* On February 3 and 4, 2014, the committee will meet to discuss methods for identifying the impact and increasing the reach of communications on topics of interest to consumers. The discussion will also address how FDA can evaluate whether its ''Consumer Updates'' (*http://www.fda.gov/ForConsumers/ConsumerUpdates/default.htm*) are reaching the targeted population, and whether they are increasing awareness and understanding of the key risk messages. The discussion will also assess whether the communications are having the intended impact on knowledge, behaviors, or outcomes.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

*Procedure:* Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before January 27, 2014. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 17, 2014. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 21, 2014.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Luis G. Bravo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 30, 2013.

**Jill Hartzler Warner,**

*Acting Associate Commissioner for Special Medical Programs.*

[FR Doc. 2013–31486 Filed 1–2–14; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments

from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received within 60 days of this notice.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

**Information Collection Request Title: Special Study—Emerging Issues Related to Affordable Care Act Implementation: The Future of Ryan White HIV/AIDS Services: A Snapshot of Outpatient Ambulatory Medical Care**

*OMB No.* 0915–xxxx–New.

*Abstract:* The Health Resources and Services Administration, HIV/AIDS Bureau (HRSA/HAB) administers the Ryan White HIV/AIDS Program (RWHAP) authorized under Title XXVI of the Public Health Service Act as amended by the Ryan White HIV/AIDS Treatment Extension Act of 2009. This program provides HIV-related services in the United States for individuals who do not have sufficient health care coverage or financial resources for coping with HIV disease. Starting January 1, 2014, the Affordable Care Act will begin making health care coverage available to many HIV-positive individuals who did not previously have access to such coverage. This Affordable Care Act expansion of health coverage will impact a significant portion of RWHAP's traditional clients who will be moving into third party reimbursement care. The transition will require increased support and coordination to ensure clients do not experience gaps in coverage or gaps in care. The purpose of this evaluation study is to assess the current status of Ryan White HIV/AIDS program services during the early and later stages of Affordable Care Act implementation and to collect information on service provisions, quality of care, barriers, gaps, and challenges related to Affordable Care Act implementation.

*Need and Proposed Use of the Information:* The Affordable Care Act will offer new options for obtaining health care services for many individuals with HIV. Due to these changes, additional information concerning staffing, continuity and coordination of care, and utilization of RWHAP funds to provide essential services is necessary. Data from this evaluation study will be used to assess the current status of Ryan White HIV/AIDS program services during the early (January 2014–June 2014) and later (July 2014–December 2014) stages of Affordable Care Act implementation and how well the RWHAP is positioned to improve clinical outcomes, including viral suppression, retention to care, and linkage to care services.

*Likely Respondents:* HIV/AIDS Care Providers.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Site Staff Interviews—Early Implementation | 90 | 1 | 90 | 2.0 | 180 |
| Site Staff Interviews—Later Implementation | 90 | 1 | 90 | 1.0 | 90 |
| List of Site HIV Outpatient Ambulatory Medicare Care Visit Activities/Services | 30 | 1 | 30 | 0.5 | 15 |
| Total | 180 | | 180 | | 285 |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Dated: December 24, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013–31473 Filed 1–2–14; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection

projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received within 60 days of this notice.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

*Information Collection Request Title:* Ryan White HIV/AIDS Program Part F Dental Services Report.

*OMB No.:* 0915–0151—Revision.

*Abstract:* The Dental Reimbursement Program (DRP) and the Community Based Dental Partnership Program under Part F of the Ryan White HIV/AIDS Program offer funding to accredited dental education programs to support the provision of oral health services for HIV-positive individuals. Institutions eligible for these Ryan White HIV/AIDS programs are accredited schools of dentistry, post-doctoral dental education programs, and dental hygiene programs. The DRP Application is the Dental Services Report that schools and programs use to apply for funding of non-reimbursed costs incurred in providing oral health care to patients with HIV, or to report annual program data. Awards are authorized under section 2692(b) of the Public Health Service Act (42 U.S.C. 300ff–111(b). The Dental Services Report collects data in four different areas: Program information, patient demographics and services, funding, and training. It also requests applicants to provide narrative descriptions of their services and facilities, as well as their links and collaboration with community-based providers of oral health services. The form used to collect this information is being revised to comply with the National HIV/AIDS Strategy directive to standardize data collection and reduce grantee reporting burden. The revised form implements data collection standards for race, ethnicity, and sex and eliminates some narrative description items; however, the average burden per response is anticipated to remain unchanged.

*Need and Proposed Use of the Information:* The primary purpose of collecting this information annually is to verify eligibility and determine reimbursement amounts for DRP applicants, as well as to document the program accomplishments of Community-Based Dental Partnership Program grant recipients. This information also allows HRSA to learn about (1) the extent of the involvement of dental schools and programs in treating patients with HIV, (2) the number and characteristics of clients who receive HIV/AIDS program-supported oral health services, (3) the types and frequency of the provision of these services, (4) the non-reimbursed costs of oral health care provided to patients with HIV, and (5) the scope of grant recipients' community-based collaborations and training of providers. In addition to meeting the goal of accountability to Congress, clients, advocacy groups, and the general public, information collected in the Dental Services Report is critical for HRSA, state and local grantees, and individual providers, to help assess the status of existing HIV-related health service delivery systems.

*Likely Respondents:* Accredited dental education programs, including schools of dentistry, post-doctoral dental education programs, and dental hygiene programs.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Dental Services Report | 70 | 1 | 70 | 20 | 1,400 |
| Total | 70 | 1 | 70 | 20 | 1,400 |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Dated: December 27, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013–31475 Filed 1–2–14; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received within 60 days of this notice.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

*Information Collection Request Title:* Client-Level Data Reporting System.

*OMB No.:* 0915–0323—Revision.

*Abstract:* The Ryan White HIV/AIDS Program's client-level data reporting system, entitled the Ryan White HIV/AIDS Program Services Report or the Ryan White Services Report (RSR), was created in 2009 by the Health Resources and Services Administration (HRSA). It is designed to collect information from grantees as well as their subcontracted service providers, funded under Parts A, B, C, and D, and the Part F Minority AIDS Initiative of the Ryan White HIV/AIDS Treatment Extension Act of 2009 (Ryan White HIV/AIDS Program). The Ryan White HIV/AIDS Program authorized under Title XXVI of the Public Health Service Act, as amended by the Ryan White HIV/AIDS Treatment Extension Act of 2009, provides entities funded by the program with flexibility to respond effectively to the changing HIV epidemic, with an emphasis on providing life-saving and life-extending services for people living with HIV across this country, as well as targeting resources to areas that have the greatest needs.

*Need and Proposed Use of the Information:* All parts of the Ryan White HIV/AIDS Program specify HRSA's responsibilities in administering grant funds, allocating funds, evaluating programs for the populations served, and improving quality of care. Accurate records of the providers receiving Ryan White HIV/AIDS Program funding, the clients served, and services provided continue to be critical issues for the implementation of the legislation and are necessary for HRSA to fulfill its responsibilities.

The RSR provides data on the characteristics of Ryan White HIV/AIDS Program-funded grantees, their contracted service providers, and the clients served with program funds. The RSR is intended to support clinical quality management, performance measurement, service delivery, and client monitoring at the systems and client levels. The reporting systems consist of two online data forms, the Grantee Report and the Service Provider Report, as well as a data file containing the client-level data elements. Data are submitted annually.

The legislation specifies the importance of grantee accountability and linking performance to budget. The RSR is used to ensure compliance with the requirements of the legislation, to evaluate the progress of programs, to monitor grantee and provider performance, and to meet reporting responsibilities to the Department, Congress, and OMB.

In addition to meeting the goal of accountability to Congress, clients, advocacy groups, and the general public, information collected through the RSR is critical for HRSA, state and local grantees, and individual providers to assess the status of existing HIV-related service delivery systems, investigate trends in service utilization, and identify areas of greatest need.

*Likely Respondents:* Ryan White HIV/AIDS Program Part A, Part B, Part C, and Part D grantees and their contracted service providers.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

The estimate includes burden hours associated with revisions and updates to client-level data (CLD) electronic data collections systems (60,720 total hours) and burden hours for the actual submission of the data (15,749 total hours). Total Estimated Annualized burden hours: 76,469.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| RSR component | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Grantee Report: | | | | | |
| Part A | 52 | 1 | 52 | 2.04 | 106 |
| Part B | 51 | 1 | 51 | 2.52 | 129 |
| Part C | 351 | 1 | 351 | 0.32 | 122 |
| Part D | 115 | 1 | 115 | 0.33 | 38 |
| Subtotal | 569 | | | | 395 |
| The response burden for service providers is estimated as: | | | | | |
| Service Provider Report | *2,025 | 1 | *2,025 | 2.30 | 4,658 |
| Subtotal | 2,025 | | | | 4,658 |
| Service Providers requiring revisions/updates to CLD collection systems | 1,012 | 1 | 1,012 | 60 | 60,720 |
| Subtotal | 1,012 | | 1,012 | | 60,720 |
| Client Report (client-level data): | | | | | |
| • Providers without electronic data systems | 37 | 1 | 37 | 106.25 | 3,931 |
| • Providers with electronic data systems | 1,804 | 1 | 1,804 | 3.75 | 6,765 |
| Subtotal | **1,841 | | **1,841 | | 10,696 |
| TOTAL | 5,447 | 1 | 5,447 | 14.04 | 76,469 |

* All providers, including providers of administrative support services and direct client services.
** Providers of direct client services only.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Dated: December 26, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013–31472 Filed 1–2–14; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### National Vaccine Injury Compensation Program: Revised Amount of the Average Cost of a Health Insurance Policy

The Health Resources and Services Administration (HRSA) is publishing an updated monetary amount of the average cost of a health insurance policy as it relates to the National Vaccine Injury Compensation Program (VICP).

Section 100.2 of the VICP's implementing regulation (42 CFR Part 100) states that the revised amounts of an average cost of a health insurance policy, as determined by the Secretary, are to be published periodically in a notice in the **Federal Register** and filed with the United States Court of Federal Claims (the Court). This figure is calculated using the most recent Medical Expenditure Panel Survey-Insurance Component (MEPS–IC) data available as the baseline for the average monthly cost of a health insurance policy. This baseline is adjusted by the annual percentage increase/decrease obtained from the most recent annual Kaiser Family Foundation and Health Research and Educational Trust (KFF/HRET) Employer Health Benefits survey or other authoritative source that may be more accurate or appropriate.

In 2013, MEPS–IC, available at *www.meps.ahrq.gov,* published the annual 2012 average total single premium per enrolled employee at private-sector establishments that provide health insurance. The figure published was $5,384. This figure is divided by 12 months to determine the cost per month of $448.67. The $448.67 shall be increased or decreased by the percentage change reported by the most recent KFF/HRET, available at *www.kff.org.* The percentage increase from 2012 to 2013, was published at 5 percent. By adding this percentage increase, the calculated average monthly cost of a health insurance policy is $471.10 for 2013.

Therefore, the Secretary announces that the revised average cost of a health insurance policy under the VICP is $471.10 per month. In accordance with § 100.2, the revised amount was effective upon its delivery by the Secretary to the Court. Such notice was delivered to the Court on November 21, 2013.

Dated: December 26, 2013.

**Mary K. Wakefield,**

*Administrator.*

[FR Doc. 2013–31470 Filed 1–2–14; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Proposed Collection; 60-Day Comment Request: Questionnaire Cognitive Interviewing and Pretesting (NCI)

**SUMMARY:** In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of

Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**TO SUBMIT COMMENTS AND FOR FURTHER INFORMATION:** To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Gordon Willis, Division of Cancer Control and Population Sciences, 9609 Medical Center Drive, Rm 3E358, Bethesda, MD 20892–9762 or call non-toll-free number 240–276–6788 or Email your request, including your address to: *willis@mail.nih.gov*. Formal requests for additional plans and instruments must be requested in writing.

**DATES:** *Comment Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

*Proposed Collection:* Questionnaire Cognitive Interviewing and Pretesting (NCI), 0925–0589, Expiration Date 4/30/2014, REVISION, National Cancer Institute (NCI), National Institutes of Health (NIH).

*Need and Use of Information Collection:* For many surveys and self-report-based data collection efforts, it is advantageous to the government if development follows a pretesting sequence equivalent to that used at National Center for Health Statistics or the Census Bureau. For example, the Health Information National Trends Survey (HINTS: OMB No. 0925–0538) has undergone multiple cycles of cognitive testing to refine both the questionnaire, and supporting materials such as advance letters and brochures. The types of activities covered by this Generic request include: (1) Survey material development and pretesting based on cognitive interviewing methodology and use of focus groups, (2) Research on the cognitive aspects of survey methodology, (3) Research on computer-user interface design for computer-assisted instruments, also known as Usability Testing, (4) Pilot Household interviews are pilot tests (either personal, telephone, or Web-based) conducted with respondents using professional field interviewers; and (5) Formative research that depends on the use of interviewing techniques to develop products such as research priorities, or expert consensus on best practices.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 3,600.

3-YEAR ESTIMATED BURDEN HOURS

| Type of respondents | Number of respondents | Number of responses per respondent | Time per response (in hours) | Burden hours |
|---|---|---|---|---|
| Physicians, Scientists and similar Respondents | 1,200 | 1 | 75/60 | 1,500 |
| Experts in their Field | 600 | 1 | 75/60 | 750 |
| Administrators/Managers | 600 | 1 | 75/60 | 750 |
| General Public | 1,200 | 1 | 30/60 | 600 |

Dated: December 27, 2013.

**Vivian Horovitch-Kelley,**

*NCI Project Clearance Liaison, National Institutes of Health.*

[FR Doc. 2013–31477 Filed 1–2–14; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development (NICHD); Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. A portion of this meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended for the review and discussion of grant applications. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the contact person listed below in advance of the meeting.

*Name of Committee:* National Advisory Child Health and Human Development Council.

*Date:* January 23, 2014.

*Open:* January 23, 2014, 8:00 a.m. to 12:00 p.m.

*Agenda:* The agenda will include: (1) Update on program issues; (2) Report of the Director, NICHD; (3) Report of the Director, Vision of Scientific Research; and (4) Other business of the Council.

*Closed* January 23, 2014, 1:00 p.m. to Adjournment.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, Center Drive, C-Wing, Conference Room 6, Bethesda, MD 20892.

*Contact Person:* Yvonne T. Maddox, Ph.D., Deputy Director, Eunice Kenney Shriver National Institute of Child Health and Human Development, NIH, 9000 Rockville Pike MSC 7510, Building 31, Room 2A03, Bethesda, MD 20892, (301) 496–1848.

Any interested person may file written comments with the committee by forwarding the statement to the contact person listed on this notice. The statement should include the name, address, telephone number, and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

In order to facilitate public attendance at the open session of Council in the main meeting room, Conference Room 6, please

contact Ms. Lisa Kaeser, Program and Public Liaison Office, NICHD, at 301–496–0536 to make your reservation, additional seating will be available in the meeting overflow rooms, Conference Rooms 7 and 8. Individuals will also be able to view the meeting via NIH Videocast. Please go to the following link for Videocast access instructions at: *http://www.nichd.nih.gov/about/advisory/nachhd/Pages/virtual-meeting.aspx*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment program, National Institutes of Health, HHS)

Dated: December 26, 2013.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2013–31427 Filed 1–2–14; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Bacterial Pathogenesis and Virulence.

*Date:* January 7, 2014.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Gagan Pandya, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, RM 3200, MSC 7808, Bethesda, MD 20892, 301–435–1167, *pandyaga@mai.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 27, 2013.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2013–31428 Filed 1–2–14; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Agency Information Collection Activities: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security

**ACTION:** 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0051.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C 3507).

**DATES:** Written comments should be received on or before March 4, 2014, to be assured of consideration.

**ADDRESSES:** Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

*Title:* Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement.

*OMB Number:* 1651–0051.

*Form Number:* None.

*Abstract:* In accordance with 19 CFR 146.4 and 146.25 foreign trade zone (FTZ) operators are required to account for zone merchandise admitted, stored, manipulated and removed from FTZs. FTZ operators must prepare a reconciliation report within 90 days after the end of the zone year for a spot check or audit by CBP. In addition, within 10 working days after the annual reconciliation, FTZ operators must submit to the CBP port director a letter signed by the operator certifying that the annual reconciliation has been prepared and is available for CBP review and is accurate. These requirements are authorized by Foreign Trade Zones Act, as amended (Title 19 U.S.C. 81a).

*Current Actions:* CBP proposes to extend the expiration date of this information collection with a change to the burden hours resulting from the addition of burden hours for the certification letter. There is no change to the information collected or to the record keeping requirements.

*Type of Review:* Extension (with change).

*Affected Public:* Businesses or other for-profit institutions.

*Recordkeeping Requirements Under 19 CFR 146.4.*

*Estimated Number of Respondents:* 260.

*Estimated Time per Respondent:* 45 minutes.

*Estimated Total Annual Burden Hours:* 195.

*Certification Letter Under 19 CFR 146.25.*

*Estimated Number of Respondents:* 260.

*Estimated Time per Respondent:* 20 minutes.

*Estimated Total Annual Burden Hours:* 85.8.

Dated: December 30, 2013.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2013–31474 Filed 1–2–14; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5750–N–01]**

### Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 26, 2013.

**Mark Johnston,**

*Deputy Assistant Secretary for Special Needs.*

[FR Doc. 2013–31391 Filed 1–2–14; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLNMF02000.L16100000.DP0000]**

### Notice of Intent to Amend the Resource Management Plan for the Taos Field Office and Prepare an Associated Environmental Assessment for the Río Grande del Norte National Monument, NM

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), the Federal Land Policy and Management Act of 1976, as amended (FLPMA), and Presidential Proclamation No. 8946 (Establishment of the Rio Grande del Norte National Monument) (March 25,2013), the Bureau of Land Management (BLM) Taos Field Office, Taos, New Mexico, intends to prepare a Resource Management Plan (RMP) Amendment with an associated Environmental Assessment (EA) for the Río Grande del Norte National Monument (Monument) and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

**DATES:** This notice initiates the public scoping process for the RMP Amendment and associated EA. Comments on issues may be submitted in writing until February 18, 2014.

The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local news media, newspapers, and the BLM Web site at: *http://www.blm.gov/nm/riograndedelnorte*

In order to be included in the analysis, all comments must be received prior to the close of the 45-day scoping period or 30 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation as appropriate.

**ADDRESSES:** You may submit comments on issues and planning criteria related to the Monument plan and EA by any of the following methods:

- *Web site: http://www.blm.gov/nm/riograndedelnorte*
- *Email: blm_nm_tafo_comments@blm.gov*
- *Fax:* 575–758–1620
- *Mail:* BLM Taos Field Office, Attention: Brad Higdon, 226 Cruz Alta Road, Taos, NM 87571

Documents pertinent to this proposal may be examined at the Taos Field Office at 226 Cruz Alta Road in Taos, New Mexico.

**FOR FURTHER INFORMATION CONTACT:** Brad Higdon, Planning and Environmental Specialist, and to have your name added to our mailing list at telephone 575–751–4725; address 226 Cruz Alta Road, Taos, NM 87571; or by email *bhigdon@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** This document provides notice that the BLM Taos Field Office, New Mexico, intends to prepare an RMP Amendment with an associated EA for the Monument, announces the beginning of the scoping process, and seeks public input on issues and planning criteria. The planning area is located in Taos and Rio Arriba Counties, New Mexico, and encompasses approximately 242,500 acres of public land. The Monument was established on March 25, 2013, by Presidential Proclamation (Proclamation) for the purposes of protecting the historic and scientific values of the Rio Grande and Rio San Antonio Gorges and the Taos Plateau. The Proclamation specified that the BLM ''shall prepare and maintain a management plan for the monument and provide for maximum public involvement in the development of the plan including, but not limited to, consultation with tribal, State, and local governments as well as community land grant and acequia associations.'' A majority of the planning area was previously managed as an Area of Critical Environmental Concern under the Taos RMP, completed in 2012. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the plan amendment area have been identified by BLM personnel, Federal, State, and local agencies; and other stakeholders. The issues include those associated with the objects and resources for which the monument was designated, including cultural, ecological, geological, and wildlife; opportunities for recreation and interpretation; and land use authorizations, such as rights-of-way for utilities transmission. Preliminary planning criteria include: (1) The plan amendment will adhere to the mandates of the Presidential Proclamation which established the Monument; (2) The plan

amendment will be developed in compliance with FLPMA, NEPA, and all other applicable laws, regulations, Executive and Secretarial Orders, and policies; (3) The RMP will incorporate, where appropriate, management decisions brought forward from the Taos RMP, approved in May 2012; (4) Broad-based public participation and collaboration will be an integral part of the planning process; (5) The planning process will provide for ongoing consultation with Native American tribal governments and strategies for protecting traditional uses; (6) The BLM will work collaboratively with cooperating agencies and all other interested groups, agencies, and individuals; and (7) The plan amendment will recognize the State of New Mexico's authority to manage wildlife and will encourage a cooperative partnership with the New Mexico Department of Game and Fish.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments by the close of the 45-day scoping period or within 30 days after the last public meeting, whichever is later.

The BLM will use the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency. 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. The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate identified issues to be addressed in the plan, and will place them into one of three categories:

1. Issues to be resolved in the plan amendment;
2. Issues to be resolved through policy or administrative action; or
3. Issues beyond the scope of this plan amendment.

The BLM will provide an explanation in the Draft RMP Amendment/EA as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The BLM will use an interdisciplinary approach to develop the plan amendment in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Archaeology, geology, wildlife and fisheries, rangeland ecology and management, outdoor recreation, forestry, and lands and realty.

**Authority:** 40 CFR 1501.7 and 43 CFR 1610.2.

**Aden L. Seidlitz,**

*Associate State Director.*

[FR Doc. 2013–31440 Filed 1–2–14; 8:45 am]

**BILLING CODE 4310–FB–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLNV912000 L10200000.PH0000 LXSS0006F0000; 14–08807; MO#4500061004]**

### Notice of Public Meeting: Resource Advisory Councils, NV

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Public Meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972 (FACA), the Department of the Interior, Bureau of Land Management (BLM) Nevada will hold a joint meeting of its three Resource Advisory Councils (RACs), the Sierra Front-Northwestern Great Basin RAC, the Northeastern Great Basin RAC, and the Mojave-Southern Great Basin RAC in Elko, Nevada. The meeting is open to the public and a public comment period will be available.

*Dates and Times:* The three RACs will meet on Thursday, February 6, 2014, from 8 a.m. to 4:30 p.m. and Friday, February 7, 2014, from 8:00 a.m. to 1:00 p.m. A public comment period will be held and additional information will be included in the agenda, which will be available two weeks prior to the meetings at *www.blm.gov/nv.*

**FOR FURTHER INFORMATION CONTACT:** Chris Rose, telephone: (775) 861–6480, email: *crose@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The three 15-member Nevada RACs advise the Secretary of the Interior, through the BLM Nevada State Director, on a variety of planning and management issues associated with public land management in Nevada. The meeting will be held at The Red Lion Inn & Casino, 2065 Idaho Street, Elko, Nevada. Agenda topics include a presentation and discussion of accomplishments during 2013; closeout reports of the three RACs; the year ahead for the BLM in Nevada; breakout meetings of the three RACs; and scheduling meetings of the individual RACs for the upcoming year. The public may provide written comments to the three RAC groups or to an individual RAC. Individuals who plan to attend and need further information about the meeting or need special assistance such as sign language interpretation or other reasonable accommodations may contact Chris Rose at the phone number or email address above.

**JoLynn Worley,**

*Acting Chief, Office of Communications.*

[FR Doc. 2013–31458 Filed 1–2–14; 8:45 am]

**BILLING CODE 4310–HC–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLIDT000000.L11200000.DD0000.241A.00]**

### Notice of Public Meetings, Twin Falls District Resource Advisory Council, Idaho

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Public Meetings.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) will meet as indicated below.

**DATES:** The Twin Falls District Resource Advisory Council meeting originally scheduled for January 8, 2014, has been re-scheduled to take place on January 16, 2014, at the Sawtooth Best Western Inn, 2653 South Lincoln Ave., Jerome, Idaho. The meeting will begin at 9:00 a.m. and end no later than 4:30 p.m. The public comment period will take place from 10:10 a.m. to 10:40 a.m.

**FOR FURTHER INFORMATION CONTACT:** Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho 83301, (208) 736–2352.

**SUPPLEMENTARY INFORMATION:** The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. During the January 16th meeting, RAC subcommittee members will report to the full RAC with their recommendation for the Idaho and Southwest Montana Sub-regional Draft Environmental Impact Statement. There will also be a new member orientation for RAC members along with field manager reports, a budget outlook and wild horse issue update.

Additional topics may be added and will be included in local media announcements. More information is available at *www.blm.gov/id/st/en/res/resource_advisory.3.html*. RAC meetings are open to the public.

Dated: December 18, 2013.

**Jenifer L. Arnold,**

*District Manager (Acting).*

[FR Doc. 2013–31449 Filed 1–2–14; 8:45 am]

**BILLING CODE 4310–GG–P**

## INTERNATIONAL TRADE COMMISSION

### Correction to Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Correction to notice.

**CORRECTION:** This notice corrects the supplementary information for DN 2995 entitled *Certain Soft-Edged Trampolines and Components Thereof* as follows: The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain soft-edged trampolines and components thereof.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,[1] and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at USITC.[2] The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.[3] Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

By order of the Commission.

Issued: December 30, 2013.

**William R. Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2013–31485 Filed 1–2–14; 8:45 am]

**BILLING CODE 7020–02–P**

[1] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

[2] United States International Trade Commission (USITC): *http://edis.usitc.gov.*

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–13–039]**

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** January 6, 2014 at 11:30 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–448 and 731–TA–1117 (Review) (Certain Off-the-Road Tires From China). The Commission is currently scheduled to complete and file its determinations and views on or before January 15, 2014.
5. Vote in Inv. Nos. 701–TA–452 and 731–TA–1129–1130 (Review) (Raw Flexible Magnets From China and Taiwan). The Commission is currently scheduled to complete and file its determinations and views on or before January 15, 2014.
6. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier notification of this meeting was not possible.

By order of the Commission.

Dated: December 30, 2013.

**William R. Bishop,**

*Supervisory Hearings and Information Officer.*

[FR Doc. 2013–31535 Filed 12–31–13; 11:15 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Comment Request for Information Collection for Form ETA–750, Application for Alien Employment Certification, Extension of Currently Approved Collection

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL), 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 Form ETA–750, *Application for Alien Employment Certification* (OMB Control Number 1205–0015), which expires April 30, 2014. The form is used by employers to request permission to bring professional athletes to the United States and by individuals applying for a waiver in the national interest of the job offer requirement in employment-based immigration.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before March 4, 2014.

**ADDRESSES:** Submit written comments to William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Room C–4312, Employment & Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3010 (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). Fax: 202–693–2768. Email: *ETA.OFLC.Forms@dol.gov* subject line: ETA–750. A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The information collection is required by sections 203(b)(2)(B)(i) and 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1153(b)(2)(B)(i) and 1182(a)(5)(A) and 8 CFR 204.5(k)(4)(ii). The Secretary of Labor is required by the INA to certify that any alien seeking to enter the United States for the purpose of performing skilled or unskilled labor does not adversely affect wages and working conditions of U.S. workers similarly employed and that there are not sufficient U.S. workers able, willing, and qualified to perform such skilled or unskilled labor. Many foreign professional athletes must qualify as skilled labor to gain permanent admission into the United States. The Form ETA–750 is used to certify that the admission of an alien athlete meets these requirements. Section 212(a)(5)(A)(iii) of the INA deals specifically with professional athletes coming to the United States on a permanent basis as immigrants. Part B of Form ETA–750 is also required by the Department of Homeland Security under 8 CFR 204.5(k)(4)(ii) for aliens applying for the National Interest Waiver (NIW) of the job offer requirement, which allows aliens to self-petition without an employer sponsor and does not require a labor certification.

## II. Review Focus

DOL 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 submissions of responses.

## III. Current Actions

In order to meet its statutory responsibilities under the INA, DOL needs to extend an existing collection of information pertaining to employers seeking to import foreign labor. The form used to collect the information is used not only by DOL, but also by other Federal agencies to meet the requirements of the INA. DOL uses the information collected in its permanent certification program for the employment of alien professional athletes. The Department of Homeland Security U.S. Citizenship and Immigration Services uses the form for its NIW program for employment-based immigration.

*Type of Review:* Extension.

*Title:* Form ETA–750, *Application for Alien Employment Certification.*

*OMB Number:* 1205–0015.

*Affected Public:* Individuals, Business or other for-profits, and not-for-profit institutions.

*Form(s):* ETA–750.

*Total Annual Respondents:* 2033.

*Annual Frequency:* On occasion.

*Total Annual Responses:* 2033.

*Average Time per Response:* 1 hour 49 minutes.

*Estimated Total Annual Burden Hours:* 3,692.

*Total Annual Burden Cost for Respondents:* 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 at Washington, DC, this 13th day of December, 2013.

**Eric M. Seleznow,**

*Acting Assistant Secretary for Employment and Training, Labor.*

[FR Doc. 2013–31469 Filed 1–2–14; 8:45 am]

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## DEPARTMENT OF LABOR

### Employment and Training Administration

**[TA–W–82,728]**

### The Boeing Company, Boeing Defense and Space Division, Including On-Site Leased Workers From Geologics Corporation, Wichita, Kansas; Notice of Negative Determination on Remand

On October 22, 2013, the United States Court of International Trade (USCIT) granted the Department of Labor's request for voluntary remand to conduct further investigation in *Former Employees of The Boeing Company, Boeing Defense and Space Division, Wichita, Kansas* v. *United States Secretary of Labor* (Court No. 13–00281).

On May 14, 2013, former workers of The Boeing Company, Boeing Defense and Space Division, Wichita, Kansas (subject firm) filed a petition for Trade Adjustment Assistance (TAA) on behalf of workers at the subject firm. AR 1–3. Workers at the subject firm (subject worker group) are engaged in employment related to the maintenance and modification of military aircraft.

The initial investigation revealed that the subject firm had not shifted abroad services like or directly competitive with those provided by the subject worker group, had not acquired such services from abroad, and there had not been an increase in imports of articles like or directly competitive with those

produced or services supplied by the subject firm. AR 54–62.

Additionally, with respect to Section 222(c) of the Act, the initial investigation revealed that the subject firm could not be considered a Supplier or Downstream Producer to a firm that employed a worker group eligible to apply for TAA benefits. AR 54–62.

On June 12, 2013, the Department of Labor (Department) issued a negative Determination regarding eligibility to apply for TAA applicable to workers and former workers of the subject firm. The Department's Notice of negative determination was published in the **Federal Register** on July 2, 2013 (78 FR 39776).

The petitioning workers did not request administrative reconsideration of the Department's negative determination.

In the complaint filed with the USCIT on August 6, 2013, the Plaintiffs claimed that their separations were directly caused by the subject firm shifting services like or directly competitive with those supplied by the subject firm worker group to a certified Boeing facility within the U.S. The Plaintiffs claimed that the Wichita facility should fall under the certification umbrella covered under various other Boeing certified facilities. AR 80.

The intent of the Department is for a certification to cover all workers of a subject firm, or appropriate subdivision, who were adversely affected by increased imports of articles produced or services supplied by the firm or shifts in production or services, based on facts obtained during the investigation of the TAA petition. On October 20, 2013, the Department requested voluntary remand to address the allegations made by the Plaintiffs, to determine whether the subject worker group is eligible to apply for TAA under the Trade Act of 1974, as amended (hereafter referred to as the Act), and to issue a new determination.

The group eligibility requirements for workers of a firm under Section 222(a) of the Act, 19 U.S.C. 2272(a), can be satisfied if the following criteria are met:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) the sales or production, or both, of such firm have decreased absolutely;

(ii)(I) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(II) imports of articles like or directly competitive with articles—

(aa) into which one or more component parts produced by such firm are directly incorporated, or

(bb) which are produced directly using services supplied by such firm, have increased; or

(III) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

(B)(i)(I) there has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or

(II) such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and

(ii) the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

During the remand investigation, the Department confirmed all previously collected information, obtained additional information from the subject firm regarding domestic and foreign operations, and solicited input from the Plaintiffs. AR 71–452.

The information the Department received on remand contained additional detail regarding the operations of the subject firm domestically and abroad. In order to determine whether there was a shift abroad of the maintenance and modification services provided by the subject worker group, the Department had to first determine whether the services provided are covered under the International Traffic in Arms Regulations, 22 U.S.C. 2778, 22 CFR 120.1–130.17 (ITAR).

The investigation revealed that the maintenance and modification services provided by the workers at the subject firm are covered as stipulated in ITAR and, therefore, cannot be completed outside of the United States. AR 456–465.

Although the Plaintiffs declare that the subject firm shifted maintenance and modification services like or directly competitive with those provided by the subject worker group to Boeing facilities which employ worker groups eligible to apply for TAA located in the United States (AR 160), based upon the information collected during the remand investigation, the Department determines that the services supplied by the certified worker groups at those Boeing facilities are not like or directly competitive with those provided by the subject worker group. AR 456–465. Specifically, due to the nature of the services supplied by the subject worker group and the laws and regulations governing the services provided by the subject firm worker group, the work is not considered to be interchangeable with the work performed by other certified Boeing facilities. Consequently, the Department determines that the services supplied by the subject worker group are neither like nor directly competitive with those supplied by the above-mentioned former and current workers of Boeing who are eligible to apply for TAA benefits.

The remand investigation findings confirmed that the workers were not impacted by a shift in services or foreign acquisition of services by Boeing at other facilities. AR 456–465.

The remand investigation findings also confirmed that the subject firm worker group does not provide services like or directly competitive with the work which the Plaintiffs claimed was done by the subject firm worker group within the relevant time period under investigation. AR 456–465.

For Section 222(a)(A)(ii)(II)(bb) of the Act to be met, imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, must have increased. Because ITAR establishes that imports of services like or directly competitive with those provided by the workers at the subject firm is illegal, the criterion has not been met.

Based on a careful review of previously submitted information and new information obtained during the remand investigation, the Department reaffirms that the petitioning workers have not met the eligibility criteria of Section 222(a) of the Trade Act of 1974, as amended.

**Conclusion**

After careful reconsideration of the administrative record, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance applicable to workers and former workers of The Boeing Company, Boeing Defense and Space Division, including on-site leased workers from Geologics Corporation, Wichita, Kansas.

Signed at Washington, DC this 20th day of December 2013.

**Del Min Amy Chen,**

*Certifying Officer, Office of Trade Adjustment Assistance.*

[FR Doc. 2013–31424 Filed 1–2–14; 8:45 am]

**BILLING CODE 4510–FN–P**

## LIBRARY OF CONGRESS

### Copyright Royalty Board

**[14–CRB–0002–NSR (2016–2020)]**

### Determination of Royalty Rates for New Subscription Services for Digital Performance Right in Sound Recordings and Ephemeral Recordings

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Notice announcing commencement of proceeding with request for Petitions to Participate.

**SUMMARY:** The Copyright Royalty Judges announce the commencement of the proceeding to determine the rates and terms for the use of sound recordings in transmissions made by new subscription services and for the making of ephemeral recordings necessary for the facilitation of such transmissions for the period beginning on January 1, 2016, and ending on December 31, 2020. A party wishing to participate in this rate determination proceeding must file its Petition to Participate and the accompanying $150 filing fee by the deadline in this notice.

**DATES:** Petitions to Participate and the filing fee are due no later than February 3, 2014.

**ADDRESSES:** Participants must submit a Petition to Participate in a hard-copy original, with five paper copies and an electronic copy in Portable Document Format (PDF) on a Compact Disc, along with the $150 filing fee, to the Copyright Royalty Board by either mail or hand delivery. Participants may not submit Petitions to Participate and the $150 filing fee by an overnight delivery service other than the U.S. Postal Service Express Mail. If participants choose to use the U.S. Postal Service (including overnight delivery), they must address their submissions to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If participants choose hand delivery by a private party, they must deliver the submissions to the Library of Congress, James Madison Memorial Building, LM–401, 101 Independence Avenue SE., Washington, DC 20559–6000. If participants choose delivery by a commercial courier, they must deliver the submissions to the Congressional Courier Acceptance Site, located at 2nd and D Street NE., Washington, DC. The envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue SE., Washington, DC 20559–6000.

**FOR FURTHER INFORMATION CONTACT:** LaKeshia Keys, CRB Program Specialist, by telephone at (202) 707–7658 or email at *crb@loc.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

Section 114(f)(2)(C) of the Copyright Act, title 17 of the United States Code, provides that a copyright owner of sound recordings or an eligible nonsubscription service or a new subscription service may file a petition with the Copyright Royalty Judges (Judges) requesting the determination of reasonable terms and rates of royalty payments for a new type of eligible nonsubscription service or a new subscription service on which sound recordings are performed that is or is about to become operational. Upon receipt of such a petition, the Judges must commence a proceeding to determine such reasonable terms and rates by publishing a notice in the **Federal Register**. 17 U.S.C. 803(b)(1)(A)(i)(III), 804(b)(3)(C)(ii).

In 2005, the Judges received a petition requesting that reasonable rates and terms be set for a new type of subscription service that ''performs sound recordings on digital audio channels programmed by the licensee for transmission by a satellite television distribution service to its residential customers, where the audio channels are bundled with television channels as part of a 'basic' package of service and not for a separate fee''; the Judges commenced a proceeding as required by section 804(b)(3)(C)(ii). *See* 70 FR 72471, 72472 (Dec. 5, 2005). The Judges adopted the rates and terms agreed to by the parties to that proceeding [1]; those rates expired on December 31, 2010. *See* 72 FR 72253 (Dec. 20, 2007).

In order to have successor rates and terms in place prior to the expiration of those rates, the Judges, in 2009, commenced the rate determination proceeding for the 2011–2015 period for the new subscription service as defined in § 383.2(h). *See* 17 U.S.C. 804(b)(3)(C), 74 FR 319 (Jan. 5, 2009). The parties reached agreement regarding the rates and terms for the 2011–2015 license period and the Judges adopted them in 2010. *See* 75 FR 14074 (Mar. 24, 2010). With the current rates set to expire on December 31, 2015, the Judges, by this notice, commence the rate proceeding for the license period 2016–2020. *See* 17 U.S.C. 803(b)(1)(A)(i)(III), 804(b)(3)(C).

#### Scope of Proceeding

In addition to all other submissions and arguments required by the Act and the applicable regulations, and in addition to any other submissions or arguments that the Participants choose to make, the Judges note below certain potential matters that the Participants may elect to address in this proceeding.

The Judges are open to receiving evidence, testimony, and argument regarding any reasonable rate structure that a Participant may elect to propose, such as, *inter alia,* a rate structure based on the number of subscribers or a percentage of webcaster revenue. This openness is consistent with the determination in *Web II,* 72 FR at 24089,[2] in which the Judges held that, although the record did not support a percentage-of-revenue based royalty, ''[t]his does not mean that some revenue-based metric could not be successfully developed as a proxy for the usage-based metric at some time in the future. . . .'' The Judges make particular note of this holding in *Web II* because they recognize that, as a practical and strategic matter, participants in these proceedings carefully consider prior rate proceedings as roadmaps to ascertain the structure of the rates they propose.

Pursuant to 17 U.S.C. 114(f)(2)(B), ''[i]n determining . . . rates and terms the Copyright Royalty Judges shall base their decision on . . . *information presented by the parties*. . . .'' (emphasis added). Thus, the Judges are best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act. As a former federal appellate jurist has noted:

> The truism that judicial analysis, economic or otherwise, takes place only in the context of lawsuits between two or more parties imposes a practical constraint on the judge's ability to use economic analysis. . . . [A] judge will, for the most part, be limited by what the parties serve up to her.

Patricia Wald, *Limits on the Use of Economic Analysis in Judicial*

[1] The rates are codified at 37 CFR Part 383.

[2] *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order,* 72 FR 24084 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 574 F.3d 748 (D.C. Cir. 2009) (*Web II*).

*Decisionmaking,* 50 Duke J.L. & Contemp. Prob. 225, 228 (1987).

Accordingly, the Judges invite Participants, within the written direct statements, written rebuttal statements, proposed findings of fact and conclusions of law, and through their witnesses and attorneys, as appropriate, to consider addressing the following questions.[3]

**1. What is the importance, if any, of the presence of economic variations among buyers and sellers?**

*Web II* contains the following observation.

> In the hypothetical marketplace we attempt to replicate, there would be *significant variations, among both buyers and sellers,* in terms of sophistication, *economic resources, business exigencies, and myriad other factors.*

*Web II,* 72 FR at 24087 (emphasis added). This statement echoed the Librarian's finding in *Webcaster I (Web I)*[4] that a marketplace unconstrained by a statutory license would experience ''a range of negotiated rates. . . .'' *Web I,* 67 FR at 45244.

If the marketplace indeed would establish multiple rates, the adoption of a rate structure consistent with that result might be more realistic than a single per-performance rate. When such ''significant variations'' exist, especially among ''willing buyers,'' each buyer may place a different economic value on a performance. To impose a rate that is economically appropriate for one such willing buyer upon any or all other willing buyers might not necessarily satisfy the statutory requirement of replicating the marketplace, but rather might be inconsistent with the rate structure of an actual market for sound recordings. Thus, the Judges invite the Participants to address in their proffered evidence, testimony, and/or arguments whether any economic variations among commercial webcasters might affect the selection of an appropriate rate structure.

**2. Should royalty rates embody any form of economic ''price discrimination'' in order to reflect the statutory hypothetical marketplace?**

In *Web II,* the Judges set forth a concise and accurate summary of market circumstances in which price discrimination—and therefore multiple prices for the same good or service—will arise:

> A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. . . . In other words, *price differentiation or price discrimination* is a feature of such markets. The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. . . . Typically, the submarket characterized by lesser price elasticity will exhibit a higher price. All the economists who testified in this proceeding, for both the Services and the copyright owners generally agreed with this description.

72 FR at 24097 (emphasis added); *see also Web I,* 67 FR at 45258 (''economic differences between . . . businesses'' would cause a per-performance rate appropriate for one type of business ''to overstate the market value'' of a performance for another type of business).[5]

''[A] seller price discriminates by charging different prices to buyers when the price difference cannot be explained by a cost difference in supplying the copyrighted work.'' Michael Meurer, *Copyright Law and Price Discrimination,* 23 Cardozo L. Rev. 55, 58 (2001); *see also* Jean Tirole, *The Theory of Industrial Organization* 133–34 (1988) (''Price discrimination reflects differences in the mark-up of price over marginal cost across sales.''); Harold Demsetz, *The Private Production of Public Goods,* 13 J. Law & Econ. 293, 303–04 (1970) (''There is no single price that can satisfy all equilibrium requirements . . . under the condition that differences in demand prices can be identified at relatively low cost. . . . [C]ompetitively produced public goods lend themselves to price discrimination.''); Paul Samuelson, *Aspects of Public Expenditure Theories,* 40 The Rev. of Econ. & Statistics, 332, 336 (1958) (when attempting to price additional copies of public goods with marginal costs approximating zero ''the easy formulas of classical economics no longer light our way.''); *see generally* William Baumol, *Regulation Misled by Misread Theory* 6 (AEI-Brookings Joint Center Distinguished Lecture Award Monograph 2006) (''[U]nder common conditions, firms will adopt price discrimination as their optimal strategy for recoupment of common costs. . . . [U]nder competitive conditions, the firm will normally be *forced* to adopt discriminatory pricing wherever that is feasible. Put another way, uniform pricing is *not* to be taken as the normal characteristic of equilibrium of the competitive firm.'') (emphasis in the original).

The Judges invite the Participants to include in their proffered evidence, testimony, and/or arguments a consideration of the potential applicability or inapplicability of price discrimination *within* the commercial webcaster segment of the market as well.

**3. What are the potential disadvantages of establishing a statutory royalty rate not based on a per performance royalty rate?**

Although there are possible advantages to the establishment of a statutory royalty rate based upon a structure other than a per-performance method, there are potential disadvantages as well. Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, information regarding any potential disadvantages to modifying or departing from a per-performance royalty rate. In response to this question, the Judges invite the Participants to consider the following specific sub-issues.

*a. Is it prohibitively difficult to identify webcaster revenues for the purpose of calculating a percentage-of-revenue based royalty rate?*

In *Web II,* the Judges described the following three areas in which potential problems existed in the percentage-of-revenue rate proposals presented by the participants in that proceeding: (1) Revenue measurement; (2) revenue definition; and (3) auditing and enforcement. 72 FR at 24089–90. The present Judges remain concerned with whether those potential problems would affect any potential use of a percentage-of-revenue based royalty rate. Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of such potential problems and any proposed means to resolve such problems.

[3] Nothing in this section should be construed as a statement by the Judges that any evidence or testimony proffered will be ultimately deemed admissible, competent, relevant, probative, or dispositive as to any issue, or that the Judges will ultimately consider, accept, or adopt any argument made in response to this section. Additionally, nothing in this section should be construed as an indication that the Judges will consider ultimately any of these issues in any determination rendered by them. Finally, by soliciting information regarding these issues, the Judges are not indicating that they have reached any preliminary decisions as to any of these issues.

[4] *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240 (July 8, 2002) (*Web I*).

[5] The Judges understand the foregoing statements in *Web I* and *Web II* regarding price discrimination to explain why rates for noncommercial webcasters were lower than rates for commercial webcasters.

*b. Is there an ''intrinsic'' value to a performance of a sound recording that is omitted if a percentage of revenue royalty rate were to be adopted?*

In *Web II,* the Judges expressed a concern that a percentage-of-revenue based royalty rate would fail to capture the ''intrinsic'' value of a performance of a sound recording. *Id.* The Judges in *Web IV* are interested in the Participants' understanding of the ''intrinsic'' value, if any, of a performance of a sound recording.

Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of their understanding of the ''intrinsic'' value, if any, of a performance of a sound recording, and how it might not be embodied in a royalty rate calculated as a percentage of webcaster revenue.

*c. Would a royalty rate calculated as a percentage of webcasters' revenue be ''disproportionate'' to webcasters' use of sound recordings?*

In *Web II,* the Judges also expressed concern regarding whether a disparity could arise between a royalty rate calculated as a percentage of webcaster royalty and webcaster use of sound recordings. *Id.* The present Judges share that concern.

Specifically, the Judges inquire whether ''disproportionality'' could arise if some webcasters declined to attempt to maximize profits, and instead attempted to maximize market share. Licensors then would suffer the ''opportunity cost'' of foregone revenues. *Cf.* William Baumol, *The Free Market Innovation Machine* 221 (2002) (licensors must consider not only the marginal dollar cost, but also the ''opportunity cost'' of granting a licensing to a given licensee). As noted by one of SoundExchange's economic experts during the proceedings in *Web III,* Dr. Janusz Ordover, both of these reactions—profit maximization and market share maximization—would be possible outcomes. Ordover WRT at ¶¶ 25–26.

The Judges also seek evidence, testimony and argument on whether this risk could be mitigated by combining a percentage-of-revenue based royalty rate with a significant minimum fee. *See* H.R. Rep. No. 105–796, at 85–86 (1998) (Conf. Rep.) (''A minimum fee should ensure that copyright owners are fairly compensated in the event that other methodologies for setting rates might deny copyright owners an adequate royalty. For example . . . a minimum fee [should be set] that guarantees that a reasonable royalty rate is not diminished by different types of marketing practices or contractual relationships. . . . [I]*f the base royalty for a service were a percentage of revenues, the minimum fee might be a flat rate per year (or a flat rate per subscription per year for a new subscription service)''* (emphasis added).

Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of the problem of ''disproportionality'' between a royalty rate based upon a percentage of webcaster revenue and the use by webcasters of sound recordings, including the details identified *supra.*

**Petitions To Participate**

Parties with a significant interest must file Petitions to Participate (PTP) in accordance with 37 CFR 351.1(b)(1). PTPs must be accompanied by the $150 filing fee in the form of check or money order payable to the ''Copyright Royalty Board''; cash will not be accepted.

The Judges will address scheduling and further procedural matters after receiving PTPs.

Dated: December 20, 2013.

**Suzanne M. Barnett,**

*Chief Copyright Royalty Judge.*

[FR Doc. 2013–30916 Filed 1–2–14; 8:45 am]

BILLING CODE 1410–72–P

## LIBRARY OF CONGRESS

## Copyright Royalty Board

**[14–CRB–0001–WR (2016–2020)]**

## Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Notice announcing commencement of proceeding with request for Petitions to Participate.

**SUMMARY:** The Copyright Royalty Judges announce the commencement of the proceeding to determine reasonable rates and terms for two statutory licenses permitting certain digital performances of sound recordings and the making of ephemeral recordings for the period beginning January 1, 2016, and ending on December 31, 2020. A party wishing to participate in this rate determination proceeding must file its Petition to Participate and the accompanying $150 filing fee by the deadline in this notice.

**DATES:** Petitions to Participate and the filing fee are due no later than February 3, 2014.

**ADDRESSES:** Participants must submit a Petition to Participate in a hard-copy original, with five paper copies and an electronic copy in Portable Document Format (PDF) on a Compact Disc, along with the $150 filing fee, to the Copyright Royalty Board by either mail or hand delivery. Participants may not submit Petitions to Participate and the $150 filing fee by an overnight delivery service other than the U.S. Postal Service Express Mail. If participants choose to use the U.S. Postal Service (including overnight delivery), they must address their submissions to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If participants choose hand delivery by a private party, they must deliver the submissions to the Library of Congress, James Madison Memorial Building, LM–401, 101 Independence Avenue SE., Washington, DC 20559–6000. If participants choose delivery by a commercial courier, they must deliver the submissions to the Congressional Courier Acceptance Site, located at 2nd and D Street NE., Washington, DC. The envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue SE., Washington, DC 20559–6000.

**FOR FURTHER INFORMATION CONTACT:** LaKeshia Keys, CRB Program Specialist, by telephone at (202) 707–7658 or email at *crb@loc.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

Section 804(b)(3)(A) of the Copyright Act, title 17 of the United States Code, requires the Copyright Royalty Judges (Judges) to commence a proceeding to determine the rates and terms for public performances of sound recordings by means of an eligible nonsubscription transmission and transmissions made by a new subscription service, under 17 U.S.C. 114, and the making of an ephemeral recording in furtherance of making a permitted public performance of the sound recording, under 17 U.S.C. 112, every five years. Section 803(b)(1)(A)(i)(III) of the Copyright Act requires the Judges to publish in the **Federal Register** a notice of commencement for a proceeding to determine rates and terms for the section 114 and 112 statutory licenses ''by no later than January 5 of a year specified in [section 804(b)(3)(A)].'' The Judges commenced the proceeding to determine the rates and terms for the section 114 and 112 licenses for the

term 2011–2015 on January 5, 2009.[1] *See* 74 FR 318. Thus, in accordance with sections 803(b)(1)(A)(i)(III) and 804(b)(3)(A) of the Copyright Act, the Judges must commence the proceeding to determine the rates and terms for the period January 1, 2016, through December 31, 2020, by publishing in the **Federal Register** a notice of commencement by no later than January 5, 2014. Today's notice fulfills this obligation.

**Scope of Proceeding**

In addition to all other submissions and arguments required by the Act and the applicable regulations, and in addition to any other submissions or arguments that the Participants choose to make, the Judges note below certain potential matters that the Participants may elect to address in this proceeding.

The Judges are open to receiving evidence, testimony, and argument regarding any reasonable rate structure that a Participant may elect to propose, such as, *inter alia,* a rate structure based on the number of subscribers or a percentage of webcaster revenue. This openness is consistent with the determination in *Web II,* 72 FR at 24089,[2] in which the Judges held that, although the record did not support a percentage-of-revenue based royalty, ''[t]his does not mean that some revenue-based metric could not be successfully developed as a proxy for the usage-based metric at some time in the future. . . .'' The Judges make particular note of this holding in *Web II* because they recognize that, as a practical and strategic matter, participants in these proceedings carefully consider prior rate proceedings as roadmaps to ascertain the structure of the rates they propose.

Pursuant to 17 U.S.C. 114(f)(2)(B), ''[i]n determining . . . rates and terms the Copyright Royalty Judges shall base their decision on . . . *information presented by the parties. . . .*'' (emphasis added). Thus, the Judges are best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act. As a former federal appellate jurist has noted:

> The truism that judicial analysis, economic or otherwise, takes place only in the context of lawsuits between two or more parties imposes a practical constraint on the judge's ability to use economic analysis. . . . [A] judge will, for the most part, be limited by what the parties serve up to her.

Patricia Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking,* 50 Duke J.L. & Contemp. Prob. 225, 228 (1987).

Accordingly, the Judges invite Participants, within the written direct statements, written rebuttal statements, proposed findings of fact and conclusions of law, and through their witnesses and attorneys, as appropriate, to consider addressing the following questions.[3]

*1. What is the importance, if any, of the presence of economic variations among buyers and sellers?*

*Web II* contains the following observation.

> In the hypothetical marketplace we attempt to replicate, there would be *significant variations, among both buyers and sellers,* in terms of sophistication, *economic resources, business exigencies, and myriad other factors.*

*Web II,* 72 FR at 24087 (emphasis added). This statement echoed the Librarian's finding in *Webcaster I (Web I)*[4] that a marketplace unconstrained by a statutory license would experience ''a range of negotiated rates. . . .'' *Web I,* 67 FR at 45244.

If the marketplace indeed would establish multiple rates, the adoption of a rate structure consistent with that result might be more realistic than a single per-performance rate. When such ''significant variations'' exist, especially among ''willing buyers,'' each buyer may place a different economic value on a performance. To impose a rate that is economically appropriate for one such willing buyer upon any or all other willing buyers might not necessarily satisfy the statutory requirement of replicating the marketplace, but rather might be inconsistent with the rate structure of an actual market for sound recordings. Thus, the Judges invite the Participants to address in their proffered evidence, testimony, and/or arguments whether any economic variations among commercial webcasters might affect the selection of an appropriate rate structure.

*2. Should royalty rates embody any form of economic ''price discrimination'' in order to reflect the statutory hypothetical marketplace?*

In *Web II,* the Judges set forth a concise and accurate summary of market circumstances in which price discrimination—and therefore multiple prices for the same good or service—will arise:

> A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. . . . In other words, *price differentiation or price discrimination* is a feature of such markets. The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. . . . Typically, the submarket characterized by lesser price elasticity will exhibit a higher price. All the economists who testified in this proceeding, for both the Services and the copyright owners generally agreed with this description.

72 FR at 24097 (emphasis added); *see also Web I,* 67 FR at 45258 (''economic differences between . . . businesses'' would cause a per-performance rate appropriate for one type of business ''to overstate the market value'' of a performance for another type of business).[5]

''[A] seller price discriminates by charging different prices to buyers when the price difference cannot be explained by a cost difference in supplying the copyrighted work.'' Michael Meurer, *Copyright Law and Price Discrimination,* 23 Cardozo L. Rev. 55, 58 (2001); *see also* Jean Tirole, *The Theory of Industrial Organization* 133–34 (1988) (''Price discrimination reflects differences in the mark-up of price over marginal cost across sales.''); Harold Demsetz, *The Private Production of*

[1] The Judges announced their final determination for the rates and terms for the 2011–2015 license period on March 9, 2011. *See* 76 FR 13026. A participant appealed the final determination in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) asserting that the Judges' appointments violated the Appointments Clause, U.S. Const., article II, section 2, clause 2. The D.C. Circuit agreed and remanded the determination to the Judges. *Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 684 F.3d 1332 (D.C. Cir. 2012). The Judges are in the midst of their *de novo* review of the record on remand. *See Order Following Notice of Intention to Conduct Paper Proceeding on Remand,* Docket No. 2009–1 CRB Webcasting III (Oct. 22, 2013).

[2] *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order,* 72 FR 24084 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 574 F.3d 748 (D.C. Cir. 2009) (*Web II*).

[3] Nothing in this section should be construed as a statement by the Judges that any evidence or testimony proffered will be ultimately deemed admissible, competent, relevant, probative, or dispositive as to any issue, or that the Judges will ultimately consider, accept, or adopt any argument made in response to this section. Additionally, nothing in this section should be construed as an indication that the Judges will consider ultimately any of these issues in any determination rendered by them. Finally, by soliciting information regarding these issues, the Judges are not indicating that they have reached any preliminary decisions as to any of these issues.

[4] *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240 (July 8, 2002) (*Web I*).

[5] The Judges understand the foregoing statements in *Web I* and *Web II* regarding price discrimination to explain why rates for noncommercial webcasters were lower than rates for commercial webcasters.

*Public Goods,* 13 J. Law & Econ. 293, 303–04 (1970) (''There is no single price that can satisfy all equilibrium requirements . . . under the condition that differences in demand prices can be identified at relatively low cost. . . . [C]ompetitively produced public goods lend themselves to price discrimination.''); Paul Samuelson, *Aspects of Public Expenditure Theories,* 40 The Rev. of Econ. & Statistics, 332, 336 (1958) (when attempting to price additional copies of public goods with marginal costs approximating zero ''the easy formulas of classical economics no longer light our way.''); *see generally* William Baumol, *Regulation Misled by Misread Theory* 6 (AEI-Brookings Joint Center Distinguished Lecture Award Monograph 2006) (''[U]nder common conditions, firms will adopt price discrimination as their optimal strategy for recoupment of common costs. . . . [U]nder competitive conditions, the firm will normally be *forced* to adopt discriminatory pricing wherever that is feasible. Put another way, uniform pricing is *not* to be taken as the normal characteristic of equilibrium of the competitive firm.'') (emphasis in the original).

The Judges invite the Participants to include in their proffered evidence, testimony, and/or arguments a consideration of the potential applicability or inapplicability of price discrimination *within* the commercial webcaster segment of the market as well.

*3. What are the potential disadvantages of establishing a statutory royalty rate not based on a per performance royalty rate?*

Although there are possible advantages to the establishment of a statutory royalty rate based upon a structure other than a per-performance method, there are potential disadvantages as well. Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, information regarding any potential disadvantages to modifying or departing from a per-performance royalty rate. In response to this question, the Judges invite the Participants to consider the following specific sub-issues.

a. Is it prohibitively difficult to identify webcaster revenues for the purpose of calculating a percentage-of-revenue based royalty rate?

In *Web II,* the Judges described the following three areas in which potential problems existed in the percentage-of-revenue rate proposals presented by the participants in that proceeding: (1) Revenue measurement; (2) revenue definition; and (3) auditing and enforcement. 72 FR at 24089–90. The present Judges remain concerned with whether those potential problems would affect any potential use of a percentage-of-revenue based royalty rate. Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of such potential problems and any proposed means to resolve such problems.

b. Is there an ''intrinsic'' value to a performance of a sound recording that is omitted if a percentage of revenue royalty rate were to be adopted?

In *Web II,* the Judges expressed a concern that a percentage-of-revenue based royalty rate would fail to capture the ''intrinsic'' value of a performance of a sound recording. *Id.* The Judges in *Web IV* are interested in the Participants' understanding of the ''intrinsic'' value, if any, of a performance of a sound recording.

Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of their understanding of the ''intrinsic'' value, if any, of a performance of a sound recording, and how it might not be embodied in a royalty rate calculated as a percentage of webcaster revenue.

c. Would a royalty rate calculated as a percentage of webcasters' revenue be ''disproportionate'' to webcasters' use of sound recordings?

In *Web II,* the Judges also expressed concern regarding whether a disparity could arise between a royalty rate calculated as a percentage of webcaster royalty and webcaster use of sound recordings. *Id.* The present Judges share that concern.

Specifically, the Judges inquire whether ''disproportionality'' could arise if some webcasters declined to attempt to maximize profits, and instead attempted to *maximize market share.* Licensors then would suffer the ''opportunity cost'' of foregone revenues. *Cf.* William Baumol, *The Free Market Innovation Machine* 221 (2002) (licensors must consider not only the marginal dollar cost, but also the ''opportunity cost'' of granting a licensing to a given licensee). As noted by one of SoundExchange's economic experts during the proceedings in *Web III,* Dr. Janusz Ordover, both of these reactions—profit maximization and market share maximization—would be possible outcomes. Ordover WRT at ¶¶ 25–26.

The Judges also seek evidence, testimony and argument on whether this risk could be mitigated by combining a percentage-of-revenue based royalty rate with a significant minimum fee. *See* H.R. Rep. No. 105–796, at 85–86 (1998) (Conf. Rep.) (''A minimum fee should ensure that copyright owners are fairly compensated in the event that other methodologies for setting rates might deny copyright owners an adequate royalty. For example . . . a minimum fee [should be set] that guarantees that a reasonable royalty rate is not diminished by different types of marketing practices or contractual relationships. . . . [I]*f the base royalty for a service were a percentage of revenues, the minimum fee might be a flat rate per year (or a flat rate per subscription per year for a new subscription service*'') (emphasis added).

Accordingly, the Judges invite the Participants to include, in their proffered evidence, testimony, and/or arguments, a discussion of the problem of ''disproportionality'' between a royalty rate based upon a percentage of webcaster revenue and the use by webcasters of sound recordings, including the details identified *supra.*

**Petitions To Participate**

Parties with a significant interest must file Petitions to Participate (PTP) in accordance with 37 CFR 351.1(b)(1). PTPs must be accompanied by the $150 filing fee in the form of check or money order payable to ''Copyright Royalty Board;'' cash will not be accepted.

The Judges will address scheduling and further procedural matters after receiving PTPs.

Dated: December 20, 2013.

**Suzanne M. Barnett,**

*Chief Copyright Royalty Judge.*

[FR Doc. 2013–30917 Filed 1–2–14; 8:45 am]

BILLING CODE 1410–72–P

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2014–21; Order No. 1929]**

## New Postal Product

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing concerning a contract with Hongkong Post for the delivery of inbound Air CP. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* January 3, 2014.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

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II. The Postal Service's Filings
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## I. Introduction

On December 26, 2013, the Postal Service filed Notice, pursuant to 39 CFR 3015.5, that it has entered into a successor negotiated service agreement (Agreement) with Hong Kong's foreign postal operator, Hongkong Post.[1]

The Postal Service seeks to have the inbound portion of the Agreement, which concerns delivery of inbound Air CP in the United States, included within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product on the competitive product list. Notice at 1, 3.

## II. Contents of Filing

The Postal Service's filing consists of the Notice, financial workpapers, and four attachments.[2] Attachment 1 is a copy of the Agreement. Attachment 2 is the certified statement required by 39 CFR 3015.5(c)(2). Attachment 3 is a copy of Governors' Decision No. 10–3. Attachment 4 is an application for non-public treatment of materials filed under seal.

The Agreement's intended effective date is March 1, 2014. *Id.* at 3. The Agreement is set to expire one year after the effective date, subject to termination pursuant to contractual terms. *Id.*

The Postal Service states that the Agreement is the successor to the 2013–2014 Hongkong Post Agreement approved in Order No. 1580.[3] It also identifies the 2013–2014 Hongkong Post Agreement as the baseline agreement for purposes of determining functional equivalence.[4] Notice at 2. It asserts that the Agreement fits within applicable Mail Classification Schedule language included in Governors' Decision No. 10–3. See *id.* at 3, Attachment 3. The Postal Service identifies differences between the Agreement and the 2013–2014 Hongkong Post Agreement, such as revisions to existing articles and Annex 1, but asserts that these differences do not detract from a finding of functional equivalency.[5] *Id.* at 4–5. In addition, it states that both agreements incorporate the same cost attributes and methodology, thereby making the relevant cost and market characteristics the same. *Id.* at 5.

## III. Commission Action

*Notice of establishment of docket.* The Commission establishes Docket No. CP2014–21 for consideration of matters raised by the Notice. The Commission appoints Cassie D'Souza to serve as Public Representative in this docket.

Interested persons may submit comments on whether the Postal Service's filing in the above-captioned docket is consistent with the policies of 39 U.S.C. 3632, 3633, and 3642 and the requirements of 39 CFR parts 3015 and 3020. Comments are due no later than January 3, 2014. The public portions of this filing can be accessed via the Commission's Web site (*http://www.prc.gov*). Information on obtaining access to sealed material appears in 39 CFR part 3007.

## IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2014–21 for consideration of matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Cassie D'Souza is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments are due no later than January 3, 2014.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2013–31441 Filed 1–2–14; 8:45 am]

**BILLING CODE 7710–FW–P**

[1] Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, December 26, 2013 (Notice).

[2] The financial workpapers and Attachments 1 and 3 were filed in redacted and unredacted versions.

[3] Notice at 2; Docket No. CP2013–22, Order Approving an Additional Inbound Competitive Multi-Service Agreement With Foreign Operators Negotiated Service Agreement (with Hongkong Post), December 17, 2012 (Order No. 1580).

[4] The Postal Services notes that using the predecessor Hongkong Post Agreement as the baseline for comparison of agreements for the purpose of determining functional equivalence is consistent with the Postal Service's proposal that was submitted in its Motion for Partial Reconsideration of Order No. 1864 in Docket No. R2013–9. Notice at 2. See also Docket No. R2013–9, Order No. 1864, Order Approving an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with Korea Post), October 30, 2013, at 7–8; Docket No. R2013–9, Motion for Partial Reconsideration of Order No. 1864, November 6, 2013.

[5] See, e.g., in Article 13, revisions to procedures related to filings in the regulatory process; in Article 15, the Postal Service's contact information; and in Article 22, the Agreement's effective date. Notice, Attachment 1 at 4, 5, 6.

# RAILROAD RETIREMENT BOARD

## Proposed Collection; Comment Request

*Summary:* In accordance with the requirement of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*1. Title and purpose of information collection:* Application and Claim for Unemployment Benefits and Employment Service; OMB 3220–0022.

Section 2 of the Railroad Unemployment Insurance Act (RUIA), provides unemployment benefits for qualified railroad employees. These benefits are generally payable for each day of unemployment in excess of four during a registration period (normally a period of 14 days).

Section 12 of the RUIA provides that the RRB establish, maintain and operate free employment facilities directed toward the reemployment of railroad employees. The procedures for applying for the unemployment benefits and employment service and for registering and claiming the benefits are prescribed in 20 CFR 325.

The RRB utilizes the following forms to collect the information necessary to pay unemployment benefits. Form UI–1 (or its Internet equivalent, Form UI–1 (Internet)), *Application for*

*Unemployment Benefits and Employment Service,* is completed by a claimant for unemployment benefits once in a benefit year, at the time of first registration. Completion of Form UI–1 or UI–1 (Internet) also registers an unemployment claimant for the RRB's employment service.

The RRB also utilizes Form UI–3 (or its Internet equivalent Form UI–3 (Internet)) *Claim for Unemployment Benefits,* for use in claiming unemployment benefits for days of unemployment in a particular registration period, normally a period of 14 days.

Completion of Forms UI–1, UI–1 (Internet), UI–3, and UI–3 (Internet) is required to obtain or retain benefits. The number of responses required of each claimant varies, depending on their period of unemployment. The RRB proposes no changes to the forms in this information collection.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated annual respondent burden is as follows]

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| UI–1 | 6,817 | 10 | 1,136 |
| UI–1 (Internet) | 3,490 | 10 | 582 |
| UI–3 | 51,996 | 6 | 5,200 |
| UI–3 (Internet) | 36,286 | 6 | 3,629 |
| Total | 98,589 | | 10,547 |

*2. Title and purpose of information collection:* Representative Payee Monitoring; OMB 3220–0151.

Under Section 12 of the Railroad Retirement Act (RRA), the RRB may pay annuity benefits to a representative payee when an employee, spouse, or survivor annuitant is incompetent or a minor. The RRB is responsible for determining if direct payment to an annuitant or a representative payee would best serve the annuitant's best interest. The accountability requirements authorizing the RRB to conduct periodic monitoring of representative payees, including a written accounting of benefit payments received, are prescribed in 20 CFR 266.7. The RRB utilizes the following forms to conduct its representative payee monitoring program.

Form G–99a, *Representative Payee Report,* is used to obtain information needed to determine whether the benefit payments certified to the representative payee have been used for the annuitant's current maintenance and personal needs and whether the representative payee continues to be concerned with the annuitant's welfare. RRB Form G–99c, *Representative Payee Evaluation Report,* is used to obtain more detailed information from a representative payee who fails to complete and return Form G–99a or in situations when the returned Form G–99a indicates the possible misuse of funds by the representative payee. Form G–99c contains specific questions concerning the representative payee's performance and is used by the RRB to determine whether or not the representative payee should continue in that capacity. Completion of the forms in this collection is required to retain benefits. The RRB proposes minor editorial changes to both forms.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

[The estimated anual respondent burden is as follows]

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–99a (legal and all other, excepting parent for child) | 5,400 | 18 | 1,620 |
| G–99c (Parts I and II) | 300 | 24 | 120 |
| G–99c (Parts I, II, and III) | 120 | 31 | 62 |
| Total | 5,820 | | 1,802 |

*Additional Information or Comments:* To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Dana Hickman at (312) 751–4981 or *Dana.Hickman@RRB.GOV*. Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or emailed to *Charles.Mierzwa@RRB.GOV*. Written comments should be received within 60 days of this notice.

**Charles Mierzwa,**

*Chief of Information Resources Management.*

[FR Doc. 2013–31439 Filed 1–2–14; 8:45 am]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–71196; File No. SR–FINRA–2013–048]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) To Expand the Categories of Civil Judicial Disclosures Permanently Included in BrokerCheck

December 27, 2013.

### I. Introduction

On November 1, 2013, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to permanently make publicly available in BrokerCheck information about former associated persons of a member firm who have been the subject of an investment-related civil action brought by a state or foreign financial regulatory authority that has been dismissed pursuant to a settlement agreement. The proposal was published for comment in the **Federal Register** on November 20, 2013.[3] The Commission received four comments on the proposal.[4] This order approves the proposed rule change.

### II. Description of the Proposal

FINRA established BrokerCheck in 1988 (then known as the Public Disclosure Program) to provide the public with information on the professional background, business practices, and conduct of FINRA member firms and their associated persons. The information that FINRA releases to the public through BrokerCheck is derived from the Central Registration Depository (''CRD®''), which is the securities industry online registration and licensing database. FINRA member firms, their associated persons and regulators report information to the CRD system via the uniform registration forms. By making certain of this information publicly available, BrokerCheck, among other things, helps investors make informed choices about the individuals and firms with which they conduct business.

Pursuant to Rule 8312(b)(1), FINRA releases to the public through BrokerCheck information on current or former members, current associated persons, and persons who were associated with a member within the preceding ten years. Under Rule 8312(c)(1), FINRA currently makes publicly available in BrokerCheck on a permanent basis information about former associated persons of a member who have not been associated with a member within the preceding ten years, and (A) were ever the subject of a final regulatory action, or (B) were registered on or after August 16, 1999 and were (i) convicted of or pled guilty or nolo contendere to a crime; (ii) the subject of a civil injunction in connection with investment-related activity or a civil court finding of involvement in a violation of any investment-related statute or regulation (''Civil Judicial Disclosures''); or (iii) named as a respondent or defendant in an investment-related arbitration or civil litigation which alleged that the person was involved in a sales practice violation and which resulted in an arbitration award or civil judgment against the person.

The proposed rule change would amend Rule 8312(c)(1)(B)(ii) to expand the categories of Civil Judicial Disclosures that are permanently made publicly available in BrokerCheck to include information about former associated persons of a member who were registered on or after August 16, 1999[5] and who have been the subject of an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement, as reported to the CRD system via a uniform registration form.[6] This information is currently available in BrokerCheck for ten years from the date an individual ceases to be associated with a member. FINRA believes that these settled civil actions should be available permanently in BrokerCheck because they may involve significant events or considerable undertakings on the part of the subject individual. For example, FINRA noted that one civil action involving excessive and undisclosed markups was settled for over $200,000. As such, FINRA stated that the proposed rule change would provide the public with access to such relevant and important information about formerly registered persons who, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors and about whom investors may wish to learn relevant information.[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70876 (November 14, 2013), 78 FR 69728 (November 20, 2013) (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from: Sneha Parmar and Jeffrey Peters, Student Interns, and Elissa Germaine, Supervising Attorney, Pace Investor Rights Clinic, Pace University School of Law, dated December 9, 2013 (''Pace letter''); Jason Doss, President, Public Investors Arbitration Bar Association, dated December 9, 2013 (''PIABA letter''); David T. Bellaire, Executive Vice President and General Counsel, Financial Services Institute, dated December 11, 2013 (''FSI letter''); and Andrea Seidt, North American Securities Administrators Association, Inc., President and Ohio Securities Commissioner, dated December 13, 2013 (''NASAA letter'').

[5] The proposal will apply only to those individuals registered with FINRA on or after August 16, 1999. FINRA stated that filings for those individuals whose registrations terminated prior to August 16, 1999 were not made electronically so BrokerCheck reports for such firms and individuals cannot be made in an automated fashion. Furthermore, FINRA stated that data limitations apply to the information available for some of those individuals. *See* Notice, *supra* note 3.

[6] This information is currently elicited by Question 14H(1)(c) on Form U4 (Uniform Application for Securities Industry Registration or Transfer).

[7] In January 2011, Commission staff released a *Study and Recommendations on Improved Investor Access to Registration Information About Investment Advisers and Broker-Dealers* (''Study''), in furtherance of Section 919B of the Dodd-Frank Act. The Study is available online at *http://www.sec.gov/news/studies/2011/919bstudy.pdf*. The Study contains four recommendations for improving investor access to registration information through BrokerCheck. FINRA stated that it implemented three of these recommendations in May 2012, which are to (i) unify search returns for BrokerCheck and the Investment Adviser Public Disclosure (IAPD) database, (ii) add the ability to search BrokerCheck by zip code, and (iii) increase the educational content on BrokerCheck. FINRA stated that it is currently working on the Study's fourth recommendation, which is to analyze the feasibility and advisability of expanding information available through BrokerCheck, as well as the method and format in which BrokerCheck information is displayed. FINRA stated that, in light of this recommendation, FINRA initiated a review of

Continued

## III. Summary of Comments

The Commission received four comment letters on the proposed rule change.[8] Three comments support the proposal.[9] One of these commenters suggests FINRA should go further and include in BrokerCheck all information that is available on CRD reports absent a compelling reason to do otherwise.[10] The commenter suggests, for example, that BrokerCheck should include information regarding an associated person's educational background, continuing education history, CRD filing history, and reasons for and comments related to a person's termination, among other things.[11]

One commenter states that it is concerned that the proposal may lead to individuals uninvolved in the alleged violations that were dismissed pursuant to a settlement agreement having a permanent record on BrokerCheck when no such violation actually occurred.[12] For example, this commenter states that the proposed rule may capture individuals who were named in the regulatory action but did not have the opportunity to be dismissed from the litigation due to the settlement agreement.[13] While the Commission appreciates this commenter's concerns, the Commission notes that the information that is the subject of this proposed rule change (*i.e.,* an investment related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement) is already provided via BrokerCheck for current members as well as persons who have been associated with a member within the preceding ten years, and that this proposal simply expands the disclosure to make this information permanently available. Furthermore, to the extent a current or formerly associated person believes that the information disclosed through BrokerCheck relating to him is inaccurate or not accurately presented, he can initiate a dispute with FINRA to update, modify, or delete that information pursuant to FINRA Rule 8312(e).

## IV. Discussion and Commission Findings

After carefully reviewing the proposed rule change and the comment letters, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[14] In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[15] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Commission believes that the proposal to permanently make publicly available in BrokerCheck information about persons formerly associated with a member who have been the subject of an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement may help deter fraudulent and manipulative conduct and enhance investor protection by expanding the time frame for disclosure of this important information to investors and other users of BrokerCheck. Such formerly registered persons, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. The Commission believes that it is beneficial to investors and other users of BrokerCheck to have access to this information on a permanent basis. The Commission urges the public to utilize BrokerCheck as well as all other sources of information, particularly the databases of the state regulators, as well as legal search engines, and records searches, in conducting a thorough search of a firm or any associated person with whom they are considering doing business.

The Commission believes that the proposed rule change is also consistent with the provisions of Section 15A(i)(1) of the Act,[16] which require, among other things, FINRA to maintain a toll-free telephone listing and a readily accessible electronic or other process to receive and promptly respond to inquiries regarding registration information on members and their associated persons. The proposed rule change would allow FINRA, in response to inquiries via BrokerCheck, to make available certain information about persons formerly associated with members who were the subject of an investment-related civil action brought by a state or foreign financial regulatory authority that has been dismissed pursuant to a settlement agreement on a permanent basis, rather than for ten years from the date an individual ceases association with a member.

Finally, as stated in the past, the Commission believes that FINRA should continuously strive to improve BrokerCheck, reviewing what additional information could be disclosed, such as the additional information that NASAA suggested in its comment letter, because BrokerCheck is a valuable tool for the public to use in deciding whether to work with a firm or an industry member.[17] The Commission believes that this proposed rule change will enhance BrokerCheck by including information that should prove useful and beneficial to investors and the general public.

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–FINRA–2013–048), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**Lynn M. Powalski,**

*Deputy Secretary.*

[FR Doc. 2013–31421 Filed 1–2–14; 8:45 am]

**BILLING CODE 8011–01–P**

BrokerCheck and issued *Regulatory Notice* 12–10 requesting comment on ways to facilitate and increase investor use of BrokerCheck. *See* Regulatory Notice 12–10 (February 2012) available online at *http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125621.pdf.* In addition, FINRA stated that it engaged a market research consultant that conducted focus groups and surveyed investors throughout the country to obtain their opinions on the BrokerCheck program. FINRA stated that it filed this proposed rule change based on this evaluation, and that it continues to consider other comments regarding changes to BrokerCheck that were submitted in response to *Regulatory Notice* 12–10. *See* Notice, *supra* note 3.

[8] *See supra,* note 4.

[9] *See* Pace, PIABA, and NASAA letters.

[10] *See* NASAA letter.

[11] *Id.* at 2.

[12] *See* FSI Letter.

[13] *Id.*

[14] 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).

[15] 15 U.S.C. 78*o*–3(b)(6).

[16] 15 U.S.C. 78*o*–3(i)(1).

[17] *See, e.g.,* Securities Exchange Act Release Nos. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) and 62476 (July 8, 2010), 75 FR 41254 (July 15, 2010).

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–71195; File No. SR–FINRA–2013–047]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) To Include Information About the Member Firms and Their Associated Persons of Any Registered National Securities Exchange That Uses the CRD System for Registration Purposes

December 27, 2013.

### I. Introduction

On November 1, 2013, the Financial Industry Regulatory Authority, Inc. (''FINRA'') 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 amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to include in BrokerCheck information about the members and their associated persons of any registered national securities exchange that uses the Central Registration Depository (''CRD®'') for registration purposes. The proposal was published for comment in the **Federal Register** on November 20, 2013.[3] The Commission received two comments on the proposal.[4] This order approves the proposed rule change.

### II. Description of the Proposal

In 2006, Congress amended Section 15A(i) of the Act[5] with the enactment of the Military Personnel Financial Services Protection Act.[6] The amendment added a requirement that FINRA maintain a toll-free telephone listing and a readily accessible electronic or other process to receive and promptly respond to inquiries regarding registration information on the members and their associated persons of any registered national securities exchange that uses the CRD system to register its members and their associated persons (''CRD Exchange'').[7]

BrokerCheck provides the public with information on the professional background, business practices, and conduct of FINRA member firms and their associated persons. The information that FINRA releases to the public through BrokerCheck is derived from the CRD system, the securities industry online registration and licensing database. FINRA member firms, their associated persons, and regulators report information to the CRD system via the uniform registration forms. By making certain of this information publicly available, BrokerCheck, among other things, helps investors make informed choices about the FINRA member firms and their associated persons with which they conduct business. BrokerCheck allows investors and others to obtain registration information about FINRA member firms and their associated persons by telephone and the Internet.[8]

The registration information currently available through BrokerCheck is limited to firms that are currently or were previously members of FINRA and the associated persons of such firms. BrokerCheck does not contain information regarding firms or the associated persons of such firms, if the firms were only members of a registered national securities exchange (although such information is contained in the CRD system).

The proposed rule change would amend FINRA Rule 8312 to include these non-FINRA member firms and their associated persons in BrokerCheck. Specifically, the proposed rule change would make publicly available in BrokerCheck information about members and their associated persons of any CRD Exchange.[9] The information that would be disclosed through BrokerCheck about CRD Exchange members and their associated persons would be the same as the information disclosed about FINRA members and their associated persons pursuant to FINRA Rule 8312. CRD Exchange members and their associated persons would be able to dispute inaccuracies in their BrokerCheck reports as provided for in FINRA Rule 8312(e).[10]

Summary of Comments

The Commission received two comment letters on the proposed rule change.[11] Both comments support the proposal. One commenter states ''The significance of increasing public customers' awareness and access to background information about the member and/or associated person handling or potentially handling their account cannot be understated.''[12] The commenter suggests FINRA should include in BrokerCheck all information that is available on CRD reports from state regulators, eliminate time constraints for disclosure of information in BrokerCheck, and include in BrokerCheck disclosures about an associated person's educational background and professional designation.[13] While these comments are outside of the scope of the current proposal, they are legitimate and FINRA should consider them.

### III. Discussion and Commission Findings

After carefully reviewing the proposed rule change and the comment letters, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[14] In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[15] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Commission believes that the proposal will enhance investor

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 70880 (November 14, 2013), 78 FR 69732 (November 20, 2013) (''Notice'').

[4] *See* letter from Jason Doss, President, Public Investors Arbitration Bar Association, to Elizabeth M. Murphy, Secretary, Commission, dated December 9, 2011 (''PIABA letter'') and letter from William A. Jacobsen, Clinical Professor of Law, Cornell University Law School and Michael Baak, to Elizabeth M. Murphy, Secretary, Commission, dated December 11, 2013.

[5] 15 U.S.C. 78*o*–3(i).

[6] Public Law 109–290, 120 Stat. 1317 (2006).

[7] Section 15A(i) of the Act defines registration information as ''the information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule, and the source and status of such information.''

[8] The BrokerCheck Hotline telephone number is (800) 289–9999. BrokerCheck is available online at *http://www.finra.org/Investors/ToolsCalculators/BrokerCheck.*

[9] Firms and individuals that have been registered exclusively with a CRD Exchange will be included in BrokerCheck only if they were registered on or after August 16, 1999. According to FINRA, filings for those firms and individuals whose registrations terminated before August 16, 1999, were not made electronically, so BrokerCheck reports for such firms and individuals cannot be made in an automated fashion. *See* proposed Supplementary Material .03 to FINRA Rule 8312.

[10] The proposed rule change also makes non-substantive technical changes to FINRA Rule 8312 to reflect a change in FINRA's style convention for referencing the CRD system.

[11] *See supra,* note 4.

[12] *See* PIABA letter at 1.

[13] *See* PIABA letter.

[14] 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).

[15] 15 U.S.C. 78*o*–3(b)(6).

protection by making available, via BrokerCheck, information regarding the professional background, business practices, and conduct of firms and associated persons that were members solely of a national securities exchange. Making this information available via BrokerCheck harmonizes the disclosure across the securities industry. The information is relevant to investors and members of the public who wish to educate themselves with respect to a firm or the professional history of a current or formerly associated person of a CRD Exchange. Further, the public's ability to access information regarding a firm or current or former associated person, whether the individual is or was associated with FINRA or with any national securities exchange that uses CRD for registration purposes, may serve to protect investors, the integrity of the marketplace, and the public interest. The Commission urges the public to utilize BrokerCheck as well as all other sources of information, particularly the databases of the state regulators, as well as legal search engines, and records searches, to conduct a thorough search of a firm or any associated person's activities.

Furthermore, the proposed rule change is consistent with the provisions of Section 15A(i)(1) of the Act,[16] which require, among other things, that FINRA maintain a toll-free telephone listing and a readily accessible electronic or other process to receive and promptly respond to inquiries regarding registration information on CRD Exchange members and their associated persons. The proposed amendments require FINRA to release information through BrokerCheck about CRD Exchange members and their associated persons,[17] harmonizing the information available about broker-dealers and their associated persons across the industry.

Finally, the Commission reiterates the need for FINRA to continuously strive to improve BrokerCheck to enhance its value as a tool for the public to use in deciding whether to work with a firm or a particular associated person.[18] The suggestions for enhancement made by the commenter while outside the scope of this proposal should be considered.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–FINRA–2013–047), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**Lynn M. Powalski,**

*Deputy Secretary.*

[FR Doc. 2013–31420 Filed 1–2–14; 8:45 am]

**BILLING CODE 8011–01–P**

[16] 15 U.S.C. 78*o*–3(i)(1).

[17] *See* Section 15A(i) of the Act.

[18] *See, e.g.,* Securities Exchange Act Release Nos. 59916 (May 13, 2009), 74 FR 23750 (May 20, 2009) and 62476 (July 8, 2010), 75 FR 41254 (July 15, 2010).

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #13839 and #13840]**

### Texas Disaster #TX–00418

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Texas (FEMA–4159–DR), dated 12/20/2013.

*Incident:* Severe Storms and Flooding.

*Incident Period:* 10/30/2013 through 10/31/2013.

*Effective Date:* 12/20/2013.

*Physical Loan Application Deadline Date:* 02/18/2014.

*Economic Injury (EIDL) Loan Application Deadline Date:* 09/22/2014.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 12/20/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

**Primary Counties:**

Caldwell, Hays, Travis.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Non-Profit Organizations With Credit Available Elsewhere | 2.625 |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.625 |
| *For Economic Injury:* | |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.625 |

The number assigned to this disaster for physical damage is 138396 and or economic injury is 138406.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2013–31504 Filed 1–2–14; 8:45 am]

**BILLING CODE 8025–01–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### 2014 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Request for written submissions from the public and announcement of public hearing.

**SUMMARY:** Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242) requires the United States Trade Representative (Trade Representative) to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. The provisions of Section 182 are commonly referred to as the ''Special 301'' provisions of the Trade Act. The Trade Act requires the Trade Representative to determine which, if any, of these countries to identify as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a Priority Foreign Country can be subject to the procedures set out in sections 301–305 of the Trade Act.

In addition, the Office of the United States Trade Representative (USTR) has created a ''Priority Watch List'' and ''Watch List'' to assist the Administration in pursuing the goals of the Special 301 provisions. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons that rely on intellectual property protection. Trading partners

placed on the Priority Watch List are the focus of increased bilateral attention concerning the problem areas.

USTR chairs the Special 301 Subcommittee of the Trade Policy Staff Committee (Subcommittee). The Subcommittee reviews information from many sources, and consults with and makes recommendations to the Trade Representative on issues arising under Special 301. Written submissions from interested persons are a key source of information for the Special 301 review process. In 2014, USTR again will conduct a public hearing as part of the review process as well as offer the opportunity, as described below, for hearing participants to provide additional information relevant to the review. At the conclusion of the process, USTR will publish the results of the review in a ''Special 301'' Report.

USTR is hereby requesting written submissions from the public concerning foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR requests that interested parties provide the information described below in the ''Public Comments'' section, and identify whether a particular trading partner should be named as a Priority Foreign Country under Section 182 of the Trade Act or placed on the Priority Watch List or Watch List. Foreign governments that have been identified in previous Special 301 Reports or that are nominated for review in 2014 are considered interested parties, and are invited to respond to this request for public submissions. Interested parties, including foreign governments, wishing to submit information to be considered during the review or testify at the public hearing must adhere to the procedures and deadlines set forth below.

*Dates/Deadlines:* The schedule and deadlines for the 2014 Special 301 review are as follows:

Friday, February 7, 2014—Deadline for interested parties, except foreign governments, to submit written comments, notice of intent to testify at the Special 301 Public Hearing, and hearing statements.

Friday, February 14, 2014—Deadline for foreign governments to submit written comments, notice of intent to testify at the Special 301 Public Hearing, and, although not mandatory, any prepared hearing statements.

Monday, February 24, 2014—Public Hearing—The Special 301 Subcommittee will hold a Public Hearing for interested parties, including representatives of foreign governments, at the offices of USTR, 1724 F Street NW., Washington, DC 20508. No later than Wednesday, February 19, 2014, USTR will confirm the date and location of the hearing and provide the schedule at *http://www.ustr.gov.*

Friday, March 7, 2014—Deadline for submitting post-hearing written comments. Interested parties may provide written comments after the hearing. To ensure consideration, comments must be received no later than Friday, March 7, 2014. Please submit additional written comments electronically via *http://www.regulations.gov,* docket number USTR–2013–0040.

On or about April 30, 2014—USTR will publish the 2014 Special 301 Report within 30 days of the publication of the National Trade Estimate (NTE) Report.

*Procedures/Addresses:* All written comments, notices of intent to testify at the public hearing, hearing statements and post-hearing written responses must be in English and submitted electronically via *http://www.regulations.gov,* docket number USTR–2013–0040. Please specify ''2014 Special 301 Review'' in the ''Type Comment'' field on *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Susan F. Wilson, Director for Intellectual Property and Innovation, Office of the United States Trade Representative, at *Special301@ustr.eop.gov.* Information on the Special 301 annual review is also available at *http://www.ustr.gov.*

**SUPPLEMENTARY INFORMATION:**

## 1. Background

USTR requests that interested persons identify through the process outlined in this notice those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.

Section 182 further requires the Trade Representative, to identify any act, policy or practice of Canada that affects cultural industries, is adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). The public is invited to submit views relevant to this aspect of the review.

Section 182 requires the Trade Representative to identify all such acts, policies or practices within 30 days of the publication of the National Trade Estimate (NTE) Report. In accordance with this statutory requirement, USTR will publish the annual Special 301 Report on or about April 30, 2014.

## 2. Comments From the Public

### *a. Requirements for Written Comments*

To facilitate the review, written comments should be as detailed as possible and provide all necessary information for identifying and assessing the effect of the acts, policies, and practices. USTR requests that interested parties provide specific references to laws, regulations, policy statements, executive, presidential or other orders, administrative, court or other determinations that should factor in the review. USTR also requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention. Finally, submissions proposing countries for review should include data, loss estimates, and other information regarding the economic impact on the United States, U.S. industry and the U.S. workforce caused by the denial of adequate and effective intellectual property protection. Comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses.

### *b. Filing Instructions*

Comments must be in English. All comments should be sent electronically via *http://www.regulations.gov,* docket number USTR–2013–0040. To submit comments to *http://www.regulations.gov,* locate the docket (folder) by entering the number USTR–2013–0040 in the ''Enter Keyword or ID'' window at the *http://www.regulations.gov* home page and click ''Search.'' The site will provide a search-results page listing all documents associated with this docket. Locate the reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Comment Now!''.

The *http://www.regulations.gov* site provides the option of submitting comments by filling in a ''Type comment'' field, or by attaching a document. USTR requests that comments be provided in an attached document. If a document is attached, please type ''2014 Special 301 Review'' in the ''Type Comment'' field. Please submit documents prepared in (or compatible with) Microsoft Word (.doc) or Adobe Acrobat (.pdf) formats. If the submission was prepared in a compatible format, please indicate the

name of the relevant application in the ''Type comment'' field. For further information on using the *http://www.regulations.gov* Web site, please select ''How to use Regulations.gov'' on the bottom of any page.

**3. Public Hearing**

*a. Notice of Public Hearing*

The Special 301 Subcommittee will hold a hearing at the offices of USTR, 1724 F Street NW., Washington, DC 20508 for interested parties, including representatives of foreign governments, on February 24, 2014. The hearing will be open to the public. Please consult *http://www.ustr.gov* to confirm the date and location of the hearing, and to obtain copies of the hearing schedule and transcript of the event.

*b. Submission of Notice of Intent To Testify and Hearing Statements*

Prepared oral testimony before the Special 301 Subcommittee must be delivered in person, in English, and will be limited to five minutes. Subcommitte member agencies may ask questions following the prepared statement.

Interested parties, except foreign governments, wishing to testify at the hearing must submit a ''Notice of Intent to Testify'' and ''Hearing Statement'' to *http://www.regulations.gov* (following the procedures set forth in ''Filing Instructions'' above). The filing deadline is Friday, February 7, 2014. The Notice of Intent to Testify must include the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and email address. A Hearing Statement must accompany the Notice of Intent to Testify. There is no requirement regarding the length of the Hearing Statement; however, the content of the testimony must be relevant to the Special 301 review.

All interested foreign governments that wish to testify at the hearing must submit a ''Notice of Intent to Testify'' to *http://www.regulations.gov* (following the procedures set forth in ''Filing Instructions'' above). The Notice of Intent to Testify must be filed by Friday, February 14, 2014, and include the name of the witness, name of the organization (if applicable), address, telephone number, fax number, and email address. Although not mandatory, government witnesses may submit a Hearing Statement when filing the Notice of Intent to Testify.

**4. Business Confidential Information**

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. The filenames of both documents should reflect their status—''BCI'' for the business confidential version and ''PUBLIC'' for the public version. In the document, confidential business information must be clearly designated as such, the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, the submitter should write ''Business Confidential'' in the ''Type Comment'' field. Anyone submitting a comment containing business confidential information must also submit, as a separate submission, a non-business confidential version of the submission, indicating where the business confidential information has been redacted. The non-business confidential version will be placed in the docket at *http://www.regulations.gov* and be available for public inspection.

**5. Inspection of Comments**

USTR will maintain a publicly accessible docket for the 2014 Special 301 Review. This public file will include all non-business confidential comments, notices of intent to testify, and hearing statements that USTR receives from the public, including foreign governments, in conjunction with the 2014 Special 301 Review. Comments will be placed in the docket upon receipt and be open to public inspection pursuant to 15 CFR 2006.13. Comments containing confidential business information are exempt from public inspection in accordance with 15 CFR 2006.15. However, USTR will require submission of non-business confidential versions of such documents, as described above, and will post non-business confidential versions to the public docket. Comments may be viewed at *http://www.regulations.gov* by entering docket number USTR–2013–0040 in the search field on the home page.

**Susan F. Wilson,**

*Director for Intellectual Property and Innovation.*

[FR Doc. 2013–31487 Filed 1–2–14; 8:45 am]

BILLING CODE 3290–F4–P

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2013 0153]**

### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel NORTHWIND; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before February 3, 2014.

**ADDRESSES:** Comments should refer to docket number MARAD–2013–0153. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov*.

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel NORTHWIND is:

*Intended Commercial Use Of Vessel:* ''Sailing charters with captain and crew in the San Juan islands of Washington state.''

*Geographic Region:* ''Washington''

The complete application is given in DOT docket MARAD–2013–0153 at *http://www.regulations.gov*. Interested parties may comment on the effect this

action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.
Dated: December 17, 2013.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2013–30369 Filed 1–2–14; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. AB 303 (Sub-No. 43X)]**

### Wisconsin Central Ltd.—Abandonment Exemption—in Barron County, WI

On December 16, 2013, Wisconsin Central Ltd. (WCL) [1] filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon a 0.80-mile line of railroad between mileposts 55.2 and 56.0 in Rice Lake, Barron County, Wis. (the Line).[2] The Line traverses United States Postal Service Zip Code 54868.

WCL states that, based on information in its possession, the Line does not contain federally granted rights-of-way. Any documentation in WCL'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 issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 4, 2014.

Any offer of financial assistance (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 $1,600 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 January 23, 2014. 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 303 (Sub-No. 43X) and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Audrey L. Brodrick, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606. Replies to the petition are due on or before January 23, 2014.

Persons seeking further information concerning abandonment procedures 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 part 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 generally will be within 30 days of its service.

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV.*''

Decided: December 30, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Derrick A. Gardner,**

*Clearance Clerk.*

[FR Doc. 2013–31465 Filed 1–2–14; 8:45 am]

**BILLING CODE 4915–01–P**

[1] WCL is a wholly owned indirect subsidiary of Canadian National Railway Company.

[2] WCL states that the Line is a stub-ended line that begins at a connection with its mainline at milepost 55.2 and ends at milepost 56.0. The track north of milepost 56.0 was approved for abandonment in *Wisconsin Central Ltd.—Abandonment Exemption—in Douglas, Washburn, & Barron Counties, Wis.,* AB 303 (Sub-No. 12X) (ICC served Apr. 20, 1993). According to WCL, the abandoned line in that proceeding is now a trail, except for a small portion immediately north of milepost 56.0, on which abandonment was consummated, but the track remains in place to allow for headroom for switching purposes.

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[Docket No. AB 290 (Sub-No. 351X)]**

### Norfolk Southern Railway Company—Abandonment Exemption—in Botetourt County, VA

On December 16, 2013, Norfolk Southern Railway Company (NSR) 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 approximately 0.71 miles of rail line, consisting of part of the Cloverdale Branch and extending from milepost C 8.19 to milepost C 8.90 in Troutville, Botetourt County, Va. The line traverses United States Postal Service Zip Code 24175. There is one station on the line that will remain open to serve the remainder of the Cloverdale Branch.[1]

NSR states that, based on information in its possession, the line does not contain federally granted rights-of-way. Any documentation in NSR'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

[1] NSR states that there is one shipper on the line, Roanoke Cement Company LLC (Roanoke). According to NSR, Roanoke has requested abandonment to allow expansion of its facilities, and Roanoke will continue to be served by NSR post-abandonment. NSR seeks expedited consideration in this proceeding to allow Roanoke to move forward with its plans as soon as possible. This request will be addressed in the final decision.

pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 4, 2014.

Any offer of financial assistance (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 $1,600 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 January 23, 2014. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27). However, NSR states that, because it seeks abandonment to allow expansion of Roanoke's facilities, NSR is unwilling to negotiate interim trail use.

All filings in response to this notice must refer to Docket No. AB 290 (Sub-No. 351X) and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Robert A. Wimbish, Baker & Miller PLLC, 2401 Pennsylvania Avenue NW., Suite 300, Washington, DC 20037. Replies to the petition are due on or before January 23, 2014.

Persons seeking further information concerning abandonment procedures 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 comment during its presentation. 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 generally will be within 30 days of its service.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: December 30, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**Derrick Gardner,**

*Clearance Clerk.*

[FR Doc. 2013–31466 Filed 1–2–14; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### Prompt Payment Interest Rate; Contract Disputes Act

**AGENCY:** Bureau of the Fiscal Service, Treasury.

**ACTION:** Notice.

**SUMMARY:** For the period beginning January 1, 2014, and ending on June 30, 2014, the prompt payment interest rate is 2⅛ per centum per annum.

**ADDRESSES:** Comments or inquiries may be mailed to: Sam Doak, Reporting Team Lead Accountant, Bureau of the Fiscal Service, Federal Borrowings Branch, Room 119, Parkersburg Warehouse & Operations Center Dock 1, 257 Bosley Industrial Park Drive, Parkersburg, West Virginia 26101. Comments or inquiries may also be emailed to *borrowings@bpd.treas.gov.* A copy of this notice is available at *http://www.treasurydirect.gov.*

**DATES:** Effective January 1, 2014, to June 30, 2014.

**FOR FURTHER INFORMATION CONTACT:** Adam Charlton, Manager, Fiscal Accounting Operations, Federal Borrowings Branch, (304) 480–5248; Sam Doak, Reporting Team Lead Accountant, Fiscal Accounting Operations, Federal Borrowings Branch, (304) 480–5117; or Elisha S. Garvey, Attorney-Advisor, Office of the Chief Counsel, (202) 504–3715.

**SUPPLEMENTARY INFORMATION:** An agency that has acquired property or service from a business concern and has failed to pay for the complete delivery of property or service by the required payment date shall pay the business concern an interest penalty. 31 U.S.C. 3902(a). The Contract Disputes Act of 1978, Sec. 12, Public Law 95–563, 92 Stat. 2389, and the Prompt Payment Act, 31 U.S.C. 3902(a), provide for the calculation of interest due on claims at the rate established by the Secretary of the Treasury.

The Secretary of the Treasury has the authority to specify the rate by which the interest shall be computed for interest payments under section 12 of the Contract Disputes Act of 1978 and under the Prompt Payment Act. Under the Prompt Payment Act, if an interest penalty is owed to a business concern, the penalty shall be paid regardless of whether the business concern requested payment of such penalty. 31 U.S.C. 3902(c)(1). Agencies must pay the interest penalty calculated with the interest rate, which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty. 31 U.S.C. 3902(a). ''The interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made.'' 31 U.S.C. 3902(b).

Therefore, notice is given that the Secretary of the Treasury has determined that the rate of interest applicable for the period beginning January 1, 2014, and ending on June 30, 2014, is 2⅛ per centum per annum.

**Mark Reger,**

*Deputy Assistant Secretary for Accounting Policy.*

[FR Doc. 2013–31205 Filed 1–2–14; 8:45 am]

**BILLING CODE 4810–39–M**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0001]**

### Proposed Information Collection (Veteran's Application for Compensation and/or Pension) Activity: Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each revision of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a veteran's eligibility, dependency, and income, as applicable, for compensation and/or pension benefit sought.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before March 4, 2014.

**ADDRESSES:** Submit written comments on the collection of information through *www.Regulations.gov;* or to Nancy J.

Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0001'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

**Titles**

a. Veteran's Application for Compensation and/or Pension, VA Form 21–526.

b. Veteran's Supplemental Claim Application, VA Form 21–526b.

c. Authorization and Consent Release Information to the Department of Veterans Affairs (VA), VA Form 21–4142.

*OMB Control Number:* 2900–0001.

*Type of Review:* Revision of a currently approved collection.

**Abstracts**

a. Veterans complete VA Form 21–526 to initially apply for compensation and/or pension benefits.

b. Veterans who previously filed a claim using VA Form 21–526, and who wish to request an increase in a service connected condition, reopen their claim for a previously denied claim, and/or file a claim for a new service-connected condition must complete VA Form 21–526b. VA Form 21–526b will be used for supplemental disability or ancillary benefit claims.

c. Veterans who need VA's assistance in obtaining non-VA medical records must complete VA Form 21–4142.

*Affected Public:* Individuals or households.

**Estimated Annual Burden**

a. VA Form 21–526—391,708.
b. VA Form 21–526b—50,000.
c. VA Form 21–4142—274.

**Estimated Average Burden per Respondent**

a. VA Form 21–526—1 hour.
b. VA Form 21–526b—15 minutes.
b. VA Form 21–4142—5 minutes.

*Frequency of Response:* On occasion.

**Estimated Number of Respondents**

a. VA Form 21–526—391,708.
b. VA Form 21–526b—200,000.
c. VA Form 21–4142—3,292.

Dated: December 30, 2013.

By direction of the Secretary:

**Crystal Rennie,**

*VA Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2013–31451 Filed 1–2–14; 8:45 am]

**BILLING CODE 8320–01–P**

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## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0215]**

## Proposed Information Collection (Request for Information To Make Direct Payment to Child Reaching Majority); Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine a schoolchild's eligibility to VA death benefits.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before March 4, 2014.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0215'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

*Title:* Request for Information to Make Direct Payment to Child Reaching Majority, VA Form Letter 21–863.

*OMB Control Number:* 2900–0215.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form Letter 21–863 is used to determine a schoolchild's continued eligibility to death benefits and eligibility to receive direct payment at the age of majority. Death pension or dependency and indemnity compensation is paid to an eligible Veteran's child when there is not an eligible surviving spouse and the child is between the ages of 18 and 23 is attending school. Until the child reaches the age of majority, payment is made to a custodian or fiduciary on behalf of the child. An unmarried schoolchild, who is not incompetent, is entitled to begin receiving direct payment on the age of majority.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 3 hours.

*Estimated Average Burden per Respondent:* 10 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 20.

Dated: December 30, 2013.

By direction of the Secretary.

**Crystal Rennie,**

*VA Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2013–31453 Filed 1–2–14; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0404]**

### Proposed Information Collection (Veteran's Application for Increased Compensation Based on Unemployability); Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to apply for increased disability compensation based on unemployability.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before March 4, 2014.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0404'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

*Title:* Veteran's Application for Increased Compensation Based on Unemployability, VA Form 21–8940.

*OMB Control Number:* 2900–0404.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 21–8940 is used by veterans to file a claim for increased disability compensation based on unemployability. Claimants are required to provide current medical, educational, and occupational history in order for VA to determine whether he or she is unable to secure or follow a substantially gainful employment due to service-connected disabilities.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 18,000 hours.

*Estimated Average Burden per Respondent:* 45 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 24,000.

Dated: December 30, 2013.

By direction of the Secretary.

**Crystal Rennie,**

*VA Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2013–31455 Filed 1–2–14; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0394]**

### Proposed Information Collection (Certification of School Attendance—REPS); Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to verify beneficiaries receiving Restored Entitlement Program for Survivors (REPS) benefits are actually in enrolled in an approved school.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before March 4, 2014.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0394'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

*Title:* Certification of School Attendance—REPS, VA Form 21–8926.

*OMB Control Number:* 2900–0394.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 21–8926 is used to verify beneficiaries receiving REPS benefits based on schoolchild status are in fact enrolled full-time in an approved school and is otherwise eligible for continued benefits. The program pays benefits to certain surviving spouses and children of Veterans who died in service prior to August 13, 1981 or who died as a result of a service-connected disability incurred or aggravated prior to August 13, 1981. Beneficiaries over age 18 and under age 23 must be enrolled full–time in an approved post–secondary school at the beginning of the school year to continue receiving REPS benefits.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 300 hours.

*Estimated Average Burden per Respondent:* 15 minutes.

*Frequency of Response:* Annually.

*Estimated Number of Respondents:* 1,200.

Dated: December 30, 2013.

By direction of the Secretary.

**Crystal Rennie,**

*VA Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2013–31454 Filed 1–2–14; 8:45 am]

**BILLING CODE 8320–01–P**

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## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0114]**

## Proposed Information Collection (Statement of Marital Relationship); Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to this notice. This notice solicits comments on the information needed to determine the validity of a common law marriage.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before March 4, 2014.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0114'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

*Title:* Statement of Marital Relationship, VA Form 21–4170.

*OMB Control Number:* 2900–0114.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 21–4170 is completed by individuals claiming to be common law widows/widowers of deceased Veterans and by Veterans and their claimed common law spouses to establish marital status. VA uses the information collected to determine whether a common law marriage was valid under the law of the place where the parties resided at the time of the marriage or under the law of the place where the parties resided when the right to benefits accrued.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 2,708 hours.

*Estimated Average Burden per Respondent:* 25 minutes.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 6,500.

Dated: December 30, 2013.

By direction of the Secretary.

**Crystal Rennie,**

*VA Clearance Officer, Department of Veterans Affairs.*

[FR Doc. 2013–31452 Filed 1–2–14; 8:45 am]

**BILLING CODE 8320–01–P**

# FEDERAL REGISTER

Vol. 79 Friday,

No. 2 January 3, 2014


Part II

## Department of Veterans Affairs

38 CFR Parts 3 and 13
Fiduciary Activities; Proposed Rule

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 3 and 13

**RIN 2900–AO53**

### Fiduciary Activities

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its fiduciary program regulations, which govern the oversight of beneficiaries who, because of injury, disease, the infirmities of advanced age, or minority, are unable to manage their VA benefits, and the appointment and oversight of fiduciaries for these vulnerable beneficiaries. The proposed amendments would update and reorganize regulations consistent with current law, VA policies and procedures, and VA's reorganization of its fiduciary activities. They would also clarify the rights of beneficiaries in the program and the roles of VA and fiduciaries in ensuring that VA benefits are managed in the best interest of beneficiaries and their dependents.

**DATES:** Comments must be received by VA on or before March 4, 2014.

**ADDRESSES:** Written comments may be submitted through *www.regulations.gov;* by mail or hand-delivery to Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AO53, Fiduciary Activities.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Cynthia Lewis, Chief, Fiduciary Policy and Procedures Staff, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420; (202) 632–8863. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Since as early as 1924, VA and its predecessor agencies have administered a fiduciary program for beneficiaries who, as a result of injury, disease, the infirmities of advanced age, or being less than 18 years of age, cannot manage their own VA benefits. Under this program, VA oversees these vulnerable beneficiaries, and appoints and oversees fiduciaries who manage these beneficiaries' benefits. VA's current statutory authority for this program is in 38 U.S.C. chapters 55 and 61.

Under current law, ''[w]here it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary [of Veterans Affairs] may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary.'' 38 U.S.C. 5502(a)(1). VA's longstanding interpretation of this authority is that the Department may establish a fiduciary program, under which it oversees beneficiaries who cannot manage their own VA benefits, and may either pay benefits directly to a beneficiary under VA supervision or to a third-party fiduciary, who may be a relative or some other individual or entity. We interpret ''regardless of legal disability'' in section 5502(a)(1) to mean that in creating the fiduciary program, Congress intended to preempt State law regarding guardianships and other matters to the extent necessary to ensure a national standard of practice for payment of benefits to or on behalf of VA beneficiaries who cannot manage their benefits. This proposed rule would establish that national standard of practice and remove the distinction between ''Federal'' fiduciaries and ''court-appointed'' fiduciaries. Except as discussed below in this preamble, we intend to apply this approach to all fiduciary matters on the effective date of the final rule.

VA implemented its authority to administer a fiduciary program in current 38 CFR part 13, most of which has not been updated since as early as 1975. There have been several significant changes to the program since the last update. First, in 2004, Congress amended 38 U.S.C. chapters 55 and 61 to add new provisions, which, among other things, authorize VA to conduct specific investigations regarding the fitness of individuals to serve as fiduciaries, conduct onsite reviews of fiduciaries who serve more than 20 beneficiaries, require fiduciaries to file reports or accountings, and reissue certain benefits that are misused by fiduciaries. *See* 38 U.S.C. 5507–5510, 6106–6107. VA has not implemented these changes in law in its regulations.

Second, VA has consolidated its fiduciary activities into six regional fiduciary hubs and one foreign fiduciary activity at the VA Manila, Philippines Regional Office. This consolidation, which VA completed in March 2012, was based on the positive results of a pilot project at the Western Area Fiduciary Hub in Salt Lake City, Utah. Among other things, VA found that the consolidation improved the timeliness and accuracy of fiduciary operations. Under the consolidation, authority is delegated to the Fiduciary Hub Manager (Hub Manager) for each hub to administer VA's regional fiduciary activities. Each Hub Manager reports to the Director of the VA Regional Office where the hub is located. Accordingly, current regulations, which refer to the authority delegated to the Veterans Service Center Manager in each regional office, are out of date.

Finally, as we describe in greater detail in this preamble, the U.S. Court of Appeals for Veterans Claims (Veterans Court) held in April 2011 that VA's fiduciary appointments may be appealed to the Board of Veterans' Appeals and thereafter to the Veterans Court and the U.S. Court of Appeals for the Federal Circuit. Prior to this holding, it was VA's view that fiduciary appointments were, by law, committed to the discretion of the Secretary of Veterans Affairs and could not be appealed. Therefore, current regulations do not address the right to appeal a fiduciary appointment or the notice and transparency that are necessary to provide beneficiaries a meaningful right of appeal.

Also, VA's current fiduciary regulations tend to be general policy statements, rather than the binding rules for VA, beneficiaries, and fiduciaries that one might expect to find in regulations. Current regulations are also written in archaic language. For example, current regulations use the terms ''estate,'' ''incompetent adult,'' ''payee,'' ''legal custodian,'' ''custodian-in-fact,'' ''court-appointed fiduciary,'' and ''commission.'' As a result, current regulations are not written in plain, easy-to-understand language for the general public.

Although VA's current fiduciary regulations are in 38 CFR part 13, there are regulations in 38 CFR part 3 that also address fiduciary matters. *See* 38 CFR 3.850 through 3.857. VA generally promulgated these regulations in the 1960s and 1970s, and they are either obsolete, redundant of current part 13 provisions, or general policy statements that do not constitute binding rules. Accordingly, we propose to remove these regulations from part 3 and consolidate all rules applicable to the fiduciary program in part 13. There are references to these part 3 regulations in

38 CFR 3.401, 3.403, 3.452, 3.500, and 3.501, which generally pertain to effective dates. We propose to update §§ 3.403 and 3.452 consistent with our proposed regulations and current VA policy and to remove the other references because they are also obsolete or are not applicable to fiduciary matters. There are a few references to current part 13 regulations in current 38 CFR 3.353. We propose to update § 3.353 by replacing these references with references to proposed provisions.

As described in the section-by-section supplementary information below, we propose to rewrite all of VA's part 13 fiduciary regulations consistent with current law, current VA policy and procedures, and VA's current organizational structure. We also propose to rewrite the regulations in plain language that is easier for beneficiaries and current and proposed fiduciaries to understand.

**13.10 Purpose and applicability of other regulations**

This regulation would provide general notice regarding the statutory authority for and purpose of VA's fiduciary program. It would also distinguish fiduciary matters from benefit claims and clarify that the VA regulations in 38 CFR part 3 are not for application in fiduciary matters, unless VA has prescribed applicability in its part 13 fiduciary regulations.

**13.20 Definitions**

Proposed § 13.20 would set forth definitions applicable to part 13.

The fiduciary program is responsible for ensuring that VA benefit payments made directly to a beneficiary in the fiduciary program or to a fiduciary on behalf of a beneficiary in the fiduciary program are used to maintain the well-being of the beneficiary and the beneficiary's dependents. Consistent with this responsibility, we propose to define *dependent* to mean the beneficiary's spouse, child, or parent who does not have income sufficient for reasonable maintenance and who obtains support for such maintenance from the beneficiary. For purposes of this definition, we propose to define *spouse* to mean a husband or wife whose marriage meets the requirements of 38 U.S.C. 103(c), including ''common law'' marriage and same-sex marriage, and use the definition of *child* in current 38 CFR 3.57, and the definition of *parent* in current 38 CFR 3.59.

We propose to define *fiduciary* to mean an individual or entity that has been appointed by VA to receive VA benefits on behalf of a beneficiary for the use and benefit of the beneficiary and the beneficiary's dependents. We interpret sections 5502 and 5506 to mean that a fiduciary appointed to manage VA benefits on behalf of a beneficiary has a financial obligation to the beneficiary and his or her dependents. We intend the definition to cover any individual or entity that has been appointed pursuant to VA's part 13 fiduciary regulations.

As noted above in this preamble, since the promulgation of VA's current part 13 fiduciary regulations, VA consolidated all of its fiduciary activities, except the activities at the VA Manila, Philippines Regional Office, into regional entities called fiduciary hubs. Within each hub, the Hub Manager has the authority to oversee the hub's activities, but the Veterans Service Center Manager at the Manila Regional Office retains jurisdiction over fiduciary matters in the Philippines. Because the term *Hub Manager* is used throughout our proposed part 13 regulations, we propose to define the term to mean the individual who has the authority to oversee the activities of a VA Fiduciary Hub or the Veterans Service Center Manager of the Manila Regional Office.

We propose to define *in the fiduciary program* to mean that a beneficiary has been rated by VA as incapable of managing his or her own VA benefits as a result of injury, disease, or the infirmities of advanced age, has been determined by a court with jurisdiction as unable to manage his or her own financial affairs, or is less than 18 years of age.

We use the term *rating authority* throughout our proposed regulations to refer to the VA entity with the authority to determine whether a beneficiary can manage his or her own VA benefits. We propose to define the term to mean VA employees who have authority under 38 CFR 3.353 to determine whether a beneficiary can manage his or her VA benefits. These employees generally work in VA's regional offices under the direction of a Veterans Service Center Manager or in a VA Pension Management Center (PMC) under the direction of a PMC Manager.

We propose to define *relative* to mean an adopted child or a person who is related to a beneficiary by blood or marriage. We intend a broad definition of this term consistent with current law and VA policy, under which VA prefers appointing relatives to serve as fiduciaries for beneficiaries. This broad definition would also be consistent with current VA policy regarding appointment of paid fiduciaries. VA prefers to appoint unpaid relatives prior to considering any other individual who is willing to provide fiduciary services only for a fee. VA's order of preference is based on the type of fiduciary relationship and seeks to establish the least restrictive and most effective relationship. Relatives typically have a one-on-one relationship with the beneficiary they serve and also serve without a fee.

Restricted withdrawal agreements are used in some cases to protect VA benefit funds under management by a fiduciary when adequate bonding is not available. In order for a bond to be adequate, it must be reasonably priced and easily enforced by VA. In cases where the beneficiary and fiduciary reside in a territory of the United States or the Republic of the Philippines and the surety company fails to perform the obligation stated in the bond, it would be difficult to commence legal action and collect the liability from the surety company. For this reason, a fiduciary in the Commonwealth of Puerto Rico, Guam, or any other territory of the United States, or in the Republic of the Philippines, whose location precludes adequate bonding would be able to use a restricted withdrawal agreement in lieu of a corporate surety bond. We propose to define *restricted withdrawal agreement* to mean a written contract between VA, a fiduciary, and a financial institution in which the fiduciary has VA benefit funds under management for a beneficiary, under which certain funds cannot be withdrawn without the consent of the VA Hub Manager.

To refer to the VA benefits that a fiduciary manages for a beneficiary, to include funds in accounts and invested funds, we use the term *VA benefit funds under management* throughout our proposed regulations. We propose to define the term to mean the combined value of the fiduciary account or accounts managed by a fiduciary for a beneficiary and any funds invested by the fiduciary for the beneficiary, to include any interest income and return on investment derived from any account.

**13.30 Beneficiary rights**

Generally, a person to whom VA has awarded monetary benefits, a beneficiary, has the right to have VA pay those benefits directly to him or her. However, under 38 U.S.C. 5502(a)(1), VA may appoint a fiduciary on behalf of a beneficiary when it appears that ''the interest of the beneficiary'' would be served by such appointment. In fact, section 5502(a)(1) authorizes VA to pay benefits directly to a beneficiary even if VA or a court has determined that the beneficiary is incapable of managing his benefits if VA determines that direct payment would serve the beneficiary's

interest. Beneficiaries also have the right to seek appointment of a successor fiduciary if the current fiduciary is not performing his or her responsibilities adequately. Under 38 U.S.C. 6107(a), certain beneficiaries have the right to reissuance of benefits that a fiduciary misused. Further, under *Freeman* v. *Shinseki,* 24 Vet. App. 404 (2011), a beneficiary has a right to appeal VA's fiduciary appointment decisions. In addition, VA has established various beneficiary rights in its policies and procedures. Current regulations do not clearly prescribe these rights. For purposes of clear notice regarding beneficiary rights under current law and policy, we propose to add § 13.30 as described below. We intend this regulation as a comprehensive list of the various rights addressed in more detail in other proposed part 13 regulations.

In the introductory text to proposed § 13.30, we propose to state VA's policy that, except as prescribed in the part 13 fiduciary regulations, a beneficiary in the fiduciary program has the same rights as any other VA beneficiary. In proposed paragraph (a), we state that a beneficiary generally has a right to manage his or her own VA benefits, subject only to VA's authority under section 5502(a)(1) to pay benefits directly to a beneficiary with limited VA supervision or to appoint a fiduciary to receive and manage VA benefit payments on behalf of a beneficiary.

Paragraph (b) would provide notice regarding specific rights that we believe Congress intended to afford beneficiaries when it created the fiduciary program. We would prescribe that, if the beneficiary is 18 years old or older, a beneficiary in the fiduciary program has the right to receive recurring monthly benefit payments until VA has completed the process required to appoint a fiduciary. This policy would ensure that beneficiaries and their dependents receive the benefits they need while VA is fulfilling its statutory obligations in the appointment of a fiduciary.

Proposed paragraph (b)(2) would prescribe that every beneficiary in the fiduciary program has the right to notice regarding VA's appointment of a fiduciary or any other decision on a fiduciary matter that affects VA's provision of benefits to the beneficiary. The Hub Manager would provide written notice of such decisions to the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited veterans service organization representative, attorney, or claims agent. This notice is essential because beneficiaries would have the right to appeal some of these determinations. Proposed paragraph (b)(3) would prescribe that a beneficiary in the fiduciary program has the right to appeal to the Board of Veterans' Appeals VA's appointment of a fiduciary.

Proposed paragraph (b)(4) through (6) would prescribe the beneficiary's basic right to be informed of a fiduciary's name, telephone number, mailing address, and email address; the right to contact his or her fiduciary and request a disbursement of funds for current or foreseeable needs or consideration for payment of previously incurred expenses or other information or assistance consistent with the responsibilities of the fiduciary prescribed in proposed § 13.140; and the right to obtain from the fiduciary a copy of the fiduciary's VA-approved annual accounting. These rights are basic to a fiduciary-beneficiary relationship and are necessary to define a fiduciary's role in such a relationship. They are also necessary to clarify that VA is not the beneficiary's fiduciary and is limited to an oversight role.

Proposed paragraph (b)(7) would provide notice regarding a beneficiary's right under 38 U.S.C. 6107 to have VA reissue benefits misused by a fiduciary under certain circumstances, and proposed paragraph (b)(8) would prescribe a beneficiary's right to appeal VA's determination regarding its own negligence in misuse and reissuance of benefits matters.

Proposed paragraph (b)(9) would allow a beneficiary to make a reasonable request for the appointment of a successor fiduciary if the current fiduciary receives a fee paid from the beneficiary's benefits and the beneficiary is requesting an unpaid volunteer fiduciary who has a higher preference under proposed § 13.100(e), or if the beneficiary provides credible information that the current fiduciary is not acting in the beneficiary's interest or is unable to effectively serve the beneficiary. We propose to prescribe this right consistent with current VA policy, which, in all cases, requires VA to consider the beneficiary's stated preference for a fiduciary appointment. It would also allow a beneficiary to request supervised direct payments of his or her VA benefits after the removal of a fiduciary, which would be one of the rights afforded under proposed § 13.30.

Proposed paragraph (b)(10) would prescribe that a beneficiary has the right to receive his or her VA benefits directly without VA supervision if removed from the fiduciary program, or receive benefits directly with VA supervision if the beneficiary demonstrates the ability to manage his or her VA benefits through supervised direct payment (proposed § 13.110), or VA otherwise determines that the beneficiary no longer requires fiduciary services (proposed § 13.500).

Proposed paragraph (b)(11) would provide that a beneficiary has the right to be represented by a VA-accredited attorney, claims agent, or representative of a VA-recognized veterans service organization.

**13.40 Representation of beneficiaries in the fiduciary program**

Under 38 U.S.C. chapter 59, Congress limited representation in the preparation, presentation, and prosecution of claims before VA to VA-recognized veterans service organizations and VA-accredited attorneys and claims agents. *See* 38 U.S.C. 5901, 5902, and 5904. VA implemented this authority in 38 CFR 14.626 through 14.637, which address recognition and accreditation procedures, standards of conduct for individuals providing representation before VA, limitations on fees, and disciplinary matters. It is reasonable to impose the same limitations on representation before VA in fiduciary matters.

We propose in § 13.40 that the provisions of 38 CFR 14.626 through 14.629 and 14.631 through 14.637 are generally applicable to representation before VA in fiduciary matters. We would exclude the application of § 14.630, which authorizes non-accredited representation in claims for VA benefits. We intend to ensure that the vulnerable beneficiaries who are in the fiduciary program have the assistance of qualified accredited representatives. We also propose to remove any ambiguity that might be created by the references to ''claims'' in the part 14 regulations as applied to fiduciary matters, which are not claims for benefits. We would remove this ambiguity by specifying in proposed paragraph (b)(1) that the terms ''claim'' and ''claimant'' in § 14.632 include a fiduciary matter before VA and a beneficiary in the fiduciary program, respectively. Regarding fees, we propose that the provisions of 38 CFR 14.636 that reference past-due benefits, use the amount of past-due benefits to calculate a permissible fee, or authorize the direct payment of fees by VA out of withheld past-due benefits are not applicable in fiduciary matters. This proposal is based upon the fact that fiduciary matters do not concern the award of past-due benefits. At the time of a fiduciary appointment, VA has already awarded benefits to the beneficiary, and any

representation provided by an accredited attorney or claims agent would relate only to the fiduciary appointment decision or decision to pay benefits directly with VA supervision.

**13.50 Suspension of benefits**

In 38 U.S.C. 5502(a)(1), Congress authorized payment of benefits to a fiduciary on behalf of a beneficiary if VA determines that such payment would serve the interest of the beneficiary. However, Congress also recognized that VA would encounter situations in which it is necessary to suspend payment of benefits to a fiduciary and take appropriate action to ensure continuity of benefits. In section 5502(b), Congress authorized VA to suspend payment of benefits to any fiduciary who neglects or refuses to comply with VA accounting requirements.

In section 5502(d), Congress also authorized VA to pay benefits to certain other individuals in any case in which VA suspends benefit payments to a fiduciary. In such cases, Congress prescribed that benefits not paid to those individuals may be ''held in the Treasury to the credit of such beneficiary'' and authorized disbursement of such held funds ''under the order and in the discretion of the Secretary for the benefit of such beneficiary or the beneficiary's dependents.'' 38 U.S.C. 5502(d). Congress prescribed similar authority in 38 U.S.C. 5504 regarding administration of trust funds. That statute, which generally pertains to the personal funds of patients and other trust funds established by VA, authorizes the transfer of such funds into ''deposit fund accounts with the United States Treasury'' and provides that ''such balances and deposits shall thereupon be available for disbursement for properly authorized purposes.''

VA implemented these provisions in various regulations, all of which interpret VA's authority as allowing suspension of benefit payments and appropriate VA action to ensure continuity of benefits for VA's most vulnerable beneficiaries. *See* current 38 CFR 13.61 (payments to chief officers of institutions), 13.72 (release of funds from personal funds of patients), and 13.73 (transfer of funds from funds due incompetent beneficiaries). We interpret VA's current statutory authority and VA's current regulations as authorizing suspension of benefit payments and appropriate action by VA to ensure continuity of benefit payments if a beneficiary has an immediate need for disbursement of funds and it is not possible to appoint a temporary or permanent fiduciary in time to address that need. Accordingly, we propose a new regulation, § 13.50, which would clearly prescribe VA's authority to suspend benefit payments and take appropriate action on behalf of a beneficiary, provided that such action serves the beneficiary's interest.

In proposed paragraph (a), we would state that, notwithstanding any rights afforded to a beneficiary under proposed § 13.30, the Hub Manager may temporarily suspend payments of a beneficiary's VA benefits and hold such benefits in the United States Treasury to the credit of the beneficiary, or take any other action the Hub Manager deems appropriate to prevent exploitation of the beneficiary's VA benefits or ensure that the beneficiary's needs are being met. We intend that this regulation would implement VA's authority under the above-referenced statutes to suspend benefit payments and act in the beneficiary's interest in the rare case where independent VA action is necessary. However, we would limit the Hub Manager's discretion to use this regulation as prescribed in paragraphs (a)(1) and (2).

Based upon VA's experience in administering the program, we have determined that there are generally two situations in which VA action under this proposed regulation would be necessary. First, in some cases, a beneficiary or the beneficiary's accredited representative, attorney, or claims agent may withhold cooperation in the fiduciary appointment process and thus risk suspension of benefits. In these instances, VA has an obligation to ensure that the beneficiary's or the beneficiary's dependents' needs are being met, to include payment of recurring bills, such as mortgages. Second, VA occasionally removes a fiduciary for one of the reasons prescribed in proposed § 13.500(b), such as fiduciary misuse of benefits, and is unable to appoint a successor fiduciary before the beneficiary has an immediate need for disbursement of funds. Under these two situations only, proposed paragraph (b) would authorize the VA Regional Office Director who has jurisdiction over the fiduciary hub or regional office involved to order disbursement of funds in the beneficiary's and the beneficiary's dependents' interests.

In light of the temporary fiduciary appointment authority in proposed § 13.100(h) and the removal and withdrawal provisions in proposed §§ 13.500 and 13.510, we anticipate that this proposed regulation would be reserved for rare cases in which VA has no option but to take appropriate independent action.

**13.100 Fiduciary appointments**

Under 38 U.S.C. 5502(a)(1), VA is authorized to appoint a fiduciary on behalf of a beneficiary when VA determines that ''the interest of the beneficiary would be served.'' Under this authority, before VA decides to pay benefits to a fiduciary, VA considers whether VA benefits can be paid directly to the beneficiary with temporary and limited VA supervision. VA may also appoint a temporary fiduciary under 38 U.S.C. 5502(d) and 5507(d) if the circumstances require a temporary appointment. With respect to fiduciary appointments, VA must conduct the investigation prescribed by Congress in 38 U.S.C. 5507, which includes conducting a face-to-face interview with the proposed fiduciary to the extent practicable.

VA implemented its authority under section 5502 in current 38 CFR 13.55. While § 13.55 authorizes the Veterans Service Center Manager to select and appoint the individual or entity best suited to receive VA benefits in a fiduciary capacity on behalf of a beneficiary, it does not fully implement section 5502. Specifically, it does not prescribe the obligations in initial appointments, to include VA's order of preference that must be considered in selecting a fiduciary to ensure that the appropriate fiduciary is appointed for a beneficiary. Further, the current regulation was promulgated in 1975, long before Congress added section 5507 regarding the investigation required to appoint a fiduciary. Also, the current regulation does not provide notice of current VA policy and procedures.

We therefore propose a new § 13.100, which would prescribe the Hub Manager's obligations in the appointment of a fiduciary. This proposed regulation would also prescribe the order of preference the Hub Manager must consider when appointing a fiduciary, the legal requirements regarding investigation and qualification of a fiduciary, rules governing expedited and temporary fiduciary appointments, and rules governing disclosure of information by fiduciaries to the beneficiaries they serve. This proposed regulation is necessary to fully inform beneficiaries and fiduciaries of VA's interpretation of current law and the procedures for appointing fiduciaries.

In proposed paragraph (a), we would authorize the Hub Manager to appoint a fiduciary for beneficiaries in the fiduciary program. Paragraph (a) would generally require appointment of a

fiduciary for beneficiaries who are the subject of a VA rating or court order regarding inability to manage financial affairs and for beneficiaries who are under 18 years of age. Proposed paragraph (b) would prescribe the exceptions to the authority granted under proposed paragraph (a). We would clarify that VA will not appoint fiduciaries for (1) beneficiaries who qualify under proposed § 13.110 for supervised direct payment or (2) beneficiaries who (i) have not reached age 18 but (ii) serve in the military, were discharged from military service, or qualify for VA survivors' benefits as a surviving spouse, and (iii) have not been rated by VA as unable to manage VA benefits and have not been determined by a court to be unable to manage financial affairs. The provisions of proposed paragraphs (i), (ii) and (iii) restate or clarify current provisions. We do not intend a substantive change.

Current 38 CFR 3.855 prescribes that VA will continue benefit payments directly to a beneficiary pending appointment of a fiduciary. VA has interpreted this provision to mean that beneficiaries are entitled to direct payment of recurring monthly benefits while VA processes a fiduciary appointment. However, VA withholds any retroactive benefit payment until a fiduciary has been appointed and, if applicable, the fiduciary has obtained a surety bond. This long-standing policy protects any large, one-time benefit payment that the beneficiary may need for future care and services and that VA would not be able to reissue under 38 U.S.C. 6107 if it were made directly to the beneficiary prior to a fiduciary appointment. We propose to remove current § 3.855 and replace it with proposed paragraph (c), in which we would provide clear notice that the Hub Manager will withhold such payments until a fiduciary has been appointed.

Proposed paragraph (d) would prescribe the obligations of the Hub Manager in initially appointing a fiduciary to act on behalf of a beneficiary. We would essentially restate the statutory language and require every effort to appoint a fiduciary that would best serve the interest of a beneficiary. In achieving this objective, we propose, consistent with section 5507 and current VA practice, to require a field examination prior to appointing a fiduciary, which would include a ''face-to-face'' meeting with the beneficiary at the beneficiary's residence to the extent practicable, and the investigation of the proposed fiduciary prescribed in proposed paragraph (f). Proposed paragraph (d) would also implement section 5502(a)(1) by requiring the Hub Manager to consider, based upon the field examination, whether the beneficiary is able to manage his or her VA benefits with limited and temporary supervision by VA. See proposed 38 CFR 13.110 regarding supervised direct payment.

Proposed paragraph (d) would also require the Hub Manager to consider whether the beneficiary's circumstances require appointment of a temporary fiduciary under proposed paragraph (h). Finally, proposed paragraph (d) would require the Hub Manager to consider the number of beneficiaries the proposed fiduciary already serves and whether the fiduciary would be able to meet the responsibilities of a fiduciary prescribed in proposed 38 CFR 13.140 in all appointments, if the Hub Manager appointed the fiduciary. We intend that the Hub Manager would limit the number of beneficiaries a fiduciary may reasonably serve.

In proposed paragraph (e), we would prescribe the order of preference the Hub Manager must consider in appointing a fiduciary. We interpret section 5502(a) to authorize a paid fiduciary only if VA cannot appoint a relative or other fiduciary who would be willing to serve without a fee. We therefore propose the order of preference in proposed paragraphs (e)(1) through (10), beginning with the beneficiary's preference and progressing to the most restrictive and least desirable options. Consistent with our interpretation of current law and VA policy, VA will consider appointment of paid fiduciaries, including fiduciaries who are also appointed by a court, only when no other appropriate person or entity is willing to serve without a fee. VA does not favor diverting VA benefits to individuals or entities who will profit from beneficiaries' disabilities.

Proposed paragraph (f) would implement 38 U.S.C. 5507 and would prescribe the investigation VA must conduct of a prospective fiduciary to receive benefits payments for a beneficiary under section 5502(a)(1). We would generally restate the provisions in section 5507 but propose to require that the Hub Manager must obtain and review a credit report on the proposed fiduciary that was issued by a credit reporting agency no more than 30 days prior to the date of the proposed appointment. We intend that appointment of fiduciaries would be based upon the best available and most relevant information. We would also require that a proposed fiduciary must provide proof of identity and relationship to the beneficiary, but not require an investigation of a proposed fiduciary that is an entity, such as the trust department of a bank that provides fiduciary services. We interpret the specific investigation requirements in section 5507, such as the criminal history and credit check, as applying only to individuals. We would also delegate to the Hub Manager the authority to again conduct all or part of the investigation prescribed in paragraph (f) after the initial appointment of the fiduciary. We interpret the authority delegated by Congress in section 5507 as including the authority to monitor fiduciaries' qualifications to ensure that they remain fit for service and that there is no current bar to service under proposed § 13.130.

Proposed paragraph (g) would implement section 5507(c) and would prescribe the requirements for expedited appointments under section 5502(a)(1). We would restate the provisions of section 5507(c) and authorize the Hub Manager to waive the face-to-face interview, criminal background check, and credit report requirements for a proposed fiduciary who is (1) the parent (natural, adopted, or step-parent) of a minor beneficiary; or (2) the spouse of a beneficiary; or the proposed fiduciary is being considered to manage annual VA benefits that do not exceed $3,600, as adjusted pursuant to 38 U.S.C. 5312.

Proposed paragraph (h) would implement section 5507(d) and would prescribe the circumstances under which a temporary fiduciary may be appointed. In accordance with the provisions of section 5507(d), the period for which a Hub Manager could appoint a temporary fiduciary would not exceed 120 days, and a temporary fiduciary may be appointed if a beneficiary is appealing a VA rating that the beneficiary cannot manage his or her own VA benefits. Also consistent with 5502(d), we propose to authorize appointment of a temporary fiduciary when VA has removed a fiduciary for the reasons prescribed in proposed § 13.500, cannot expedite the appointment of a successor fiduciary, and the beneficiary has an immediate need for fiduciary services. Consistent with VA's authority under section 5502 to act in the interest of beneficiaries, we also propose to authorize a temporary fiduciary appointment in any other case in which the Hub Manager determines that it is necessary to protect a beneficiary's assets.

In proposed paragraph (h)(2), to ensure that an entity or individual who serves as a temporary fiduciary meets the qualification requirements under section 5507, we would limit appointment of temporary fiduciaries to individuals and entities that already

meet the qualification criteria for appointment and are performing satisfactorily as a fiduciary for at least one other VA beneficiary for whom the fiduciary has submitted an annual accounting that VA has approved. This provision would ensure that VA expeditiously appoints a qualified fiduciary under these rare circumstances who can temporarily meet the beneficiary's immediate needs.

Proposed paragraph (i) would require every proposed fiduciary who is an individual to provide the Hub Manager a written authorization for VA to disclose information about the proposed fiduciary to the beneficiary. Any individual who refuses to provide the authorization would not be eligible to serve as a fiduciary for a beneficiary. *See* proposed paragraph (c) of § 13.130 regarding bars to serving as a fiduciary. Under *Freeman* v. *Shinseki,* a beneficiary has a right to appeal VA's fiduciary appointment decisions. As described below in this preamble, we would extend *a* beneficiary's right to appeal to certain other VA decisions made in the fiduciary program. See proposed 38 CFR 13.600 regarding appeals. These decisions must provide the beneficiary the bases for VA's decision, to include any information regarding the disqualification of the proposed fiduciary. For example, during the course of the investigation required by section 5507, VA might discover that the proposed fiduciary has a disqualifying criminal conviction or a poor credit history. Without the authorization required in proposed § 13.100(i), application of the Privacy Act might prevent VA from providing the beneficiary meaningful notice regarding the bases for VA's appointment of a fiduciary other than the one with a criminal history or poor credit history.

The same concern exists during VA's processing of an appeal to the Board of Veterans' Appeals. Under 38 U.S.C. 7105(d), upon receipt of a notice of disagreement regarding a fiduciary appointment decision, VA must issue a statement of the case summarizing the pertinent evidence, citing the pertinent laws and regulations, and discussing how the law and regulations affect VA's decision. The purpose of this statement is to assist the beneficiary in making a decision regarding appeal and preparing the appeal for review by the Board of Veterans' Appeals. The statement might be viewed as inadequate for the purpose it serves if VA cannot fully discuss the bases for its decision.

Accordingly, to ensure the transparency that beneficiaries need to perfect an appeal or understand the bases for a VA decision regarding a fiduciary matter, we propose to require a proposed fiduciary who is an individual to provide the Hub Manager a written authorization for VA to disclose to the beneficiary information regarding any fiduciary matter that may be appealed described in proposed paragraph (i)(1). The Hub Manager would provide the proposed fiduciary notice regarding the purpose of the authorization and the potential use of disclosed information by the beneficiary in seeking review of VA decisions. Under proposed paragraph (i)(3), the Hub Manager would terminate consideration of a proposed fiduciary if the individual refuses to provide the required authorization.

**13.110 Supervised direct payment**

In 38 U.S.C. 5502(a)(1), Congress authorized VA to pay benefits directly to a beneficiary, regardless of any legal disability on the beneficiary's part, if VA determines that direct payment to that beneficiary will serve his or her interest. Congress did not address the scope of direct payment to a beneficiary who was initially rated as being unable to manage his or her VA benefits, but later, through supervised direct payment, demonstrated the ability to independently manage those benefits.

VA implemented its authority under section 5502(a)(1) in current 38 CFR 13.56 regarding supervised direct payment. Under § 13.56, VA may pay benefits directly to a beneficiary rated as being unable to manage his or her VA benefits ''in such amount as [VA] determines the [beneficiary] is able to manage with continuing supervision by [VA], provided a fiduciary is not otherwise required.'' If the amount paid under direct supervision is less than the full benefit entitlement, such partial payment cannot exceed 1 year for a beneficiary who is successfully managing his or her financial affairs.

We have determined that current § 13.56 does not fully implement section 5502(a)(1) or current VA policy regarding supervised direct payment to beneficiaries in the fiduciary program. We note that while the current regulation allows direct payment of benefits, it is unclear as to how such payments will be accomplished while VA provides continued supervision. The current regulation is silent as to what continued supervision entails or whether such supervision must continue despite evidence that the beneficiary can actually manage his or her VA benefits. Furthermore, current language in the regulation which provides that VA may pay the beneficiary ''in such amount as [VA] determines the [beneficiary] is able to manage'' is not a clear substantive rule. Therefore, we propose a new § 13.110, which would clearly prescribe the roles of both VA and the beneficiary during the supervised direct payment period, with the objective of having the beneficiary independently managing his or her benefits without VA supervision at a later date, and without having a fiduciary appointed.

In proposed paragraph (a), we would authorize the Hub Manager to pay benefits directly to an adult beneficiary. Consistent with current VA policy and section 5502(a), the Hub Manager would determine, based upon a field examination, whether the beneficiary can manage his or her VA benefits with limited and temporary VA supervision. A beneficiary would also be allowed to request supervised direct payment of his or her VA benefits following the removal of a fiduciary as prescribed in proposed § 13.500. We would prescribe the types of information that the Hub Manager would consider in determining whether a beneficiary can manage his or her VA benefits with limited and temporary supervision. Such information would include the beneficiary's awareness of his or her financial obligations and ability to meet those obligations through appropriate fund management, while still conserving excess funds. The Hub Manager would have authority to consider any other information relevant to the beneficiary's ability to manage his or her VA benefits.

Proposed paragraph (b) would prescribe the limited and temporary supervision provided by VA to a beneficiary who the Hub Manager determines is eligible for supervised direct pay. This supervision would consist of budgeting assistance and assistance in creating a fund usage report, with the intent being that supervised direct payment would include instruction and monitoring components. Finally, the supervision prescribed by proposed § 13.110(b) would include periodic reviews of the beneficiary's fund usage reports by fiduciary hub personnel. We have determined that this limited supervision would strike the proper balance between VA supervision and independent fund management by the beneficiary.

Current § 13.56 does not address whether a beneficiary who has been rated as being unable to manage his or her VA benefits may nonetheless establish such ability through supervised direct payment. We propose to address this gap in proposed paragraph (c), which would require the

Hub Manager to reassess the beneficiary's ability at or before the end of the first 12-month period of supervised direct pay. Such reassessment would be based upon the results of a field examination, the factors in proposed paragraph (a), and the results of the limited supervision prescribed in proposed paragraph (b). If the Hub Manager determines that the beneficiary has demonstrated the ability to manage his or her own VA benefits without further supervision, the Hub Manager would be required to report that determination to the rating authority for application of 38 CFR 3.353(b)(3) regarding reevaluation of ability to manage VA benefits and § 3.353(d) regarding the presumption of ability to manage VA benefits without restriction. The Hub Manager would have authority to extend supervised direct payment for an additional period up to 12 months but would otherwise be required to appoint a fiduciary for any beneficiary who does not demonstrate the requisite ability to manage one's own VA benefits. The decision as to whether to extend supervised direct payment for not longer than one additional 12-month period or appoint a fiduciary would be based on a field examination and factors such as whether the beneficiary is aware of his or her monthly income and fixed monthly expenses and has the ability to allocate appropriate funds, pay monthly bills in a timely manner, and conserve excess funds.

In our view, proposed § 13.110 would be a significant reform which would allow beneficiaries who were initially rated as being unable to manage their VA benefits to achieve the same level of financial independence as other beneficiaries with similar disabilities.

**13.120 Field examinations**

Under 38 U.S.C. 5502(a), VA may pay benefits directly to a beneficiary who has been rated by VA as being unable to manage his or her VA benefits or may pay benefits to a fiduciary on behalf of such a beneficiary, when VA determines that doing so would serve the beneficiary's interest. With respect to fiduciary appointments, VA must conduct the investigation prescribed by Congress in 38 U.S.C. 5507 and thereafter conduct sufficient oversight to determine whether fiduciaries are properly providing services for beneficiaries. Such oversight may include the periodic onsite reviews of certain fiduciaries under the authority granted in 38 U.S.C. 5508 or the monitoring or investigation regarding misappropriation or misuse of benefits required by 38 U.S.C. 6101, 6106, and 6107. Congress did not specifically address how VA should conduct the various activities required for proper administration of the fiduciary program. However, in 38 U.S.C. 5711(a), Congress authorized VA to, among other things, ''[m]ake investigations and examine witnesses upon any matter within the jurisdiction of the Department.''

Current 38 CFR 13.2(a) regarding the authority to conduct field examinations restates the authority granted by Congress in section 5711(a). Current paragraph (b) then prescribes the scope of field examinations in very general terms. It states that field examinations include but are not limited to matters related to administration of estates and the well-being of beneficiaries. Certain field examination provisions are in VA's 38 CFR part 3 adjudication regulations, rather than in the current part 13 fiduciary regulations where the reader might expect to find them. Specifically, upon a rating that a beneficiary cannot manage his or her VA benefits, current 38 CFR 3.353(b)(2) authorizes the Service Center Manager to ''develop information as to the beneficiary's social, economic and industrial adjustment'' and appoint a fiduciary.

We have determined that current § 13.2 lacks clarity regarding the purpose and scope of field examinations in the fiduciary program. VA promulgated the current regulation before the enactment of sections 5507, 5508, 6106, and 6107, and thus it does not reflect current law and VA policy. Accordingly, we propose to replace current § 13.2 with proposed § 13.120 as described below.

In proposed paragraph (a), we would define ''field examination'' and authorize the Hub Manager with jurisdiction over a fiduciary matter to order a field examination in connection with that matter. The term ''field examination'' would describe the broad scope of duties performed by VA's current field examiners, who generally live near the beneficiaries they serve and are responsible for checking beneficiary needs, beneficiary well-being, and fiduciary qualifications and performance. In this regard, field examinations are a critical component of the fiduciary program, under which VA oversees vulnerable beneficiaries and appoints and oversees fiduciaries for those beneficiaries.

Proposed paragraph (b) would prescribe the scope of field examinations. As noted above, under current § 3.353(b)(2), assessment of the beneficiary is one component of a field examination. Further, section 5507(a)(1) prescribes ''an inquiry or investigation by [VA] of the fitness of that person to serve as fiduciary for that beneficiary,'' which we interpret to mean that Congress intended that VA would conduct any necessary investigations, visits, or other inquiries to confirm the qualifications of any person seeking to provide fiduciary services for a VA beneficiary prior to appointment. Paragraph (b) would list the scope of a field examiner's duties under current VA policies and procedures. In listing the scope of these duties, we do not intend a substantive change and instead intend to clarify the purpose of field examinations and the authority of field examiners who conduct them.

Proposed paragraph (c) would provide the reasons for which a Hub Manager may order a field examination. Consistent with the primary purposes for field examinations, which are to ensure the well-being of beneficiaries and protect a beneficiary's VA benefit funds through the oversight of beneficiaries in the program and the appointment and oversight of fiduciaries, the Hub Manager would have authority to order a field examination at any time for those purposes. Again, VA does not intend any substantive change in proposing to expressly prescribe the circumstances under which VA would conduct a field examination. Our intent is to clarify current practice and provide clear notice regarding our field examination activities in the fiduciary program.

**13.130 Bars to serving as a fiduciary**

In establishing the fiduciary program, Congress intended that VA would take appropriate action to ensure that only qualified individuals and entities provide fiduciary services for beneficiaries. In 38 U.S.C. 5502(a)(1), Congress authorized payment of benefits to a fiduciary on behalf of a beneficiary if VA determines that such payment would serve the interest of the beneficiary. In section 5502(b), Congress authorized VA to appear in court regarding a fiduciary if the fiduciary ''is not properly executing or has not properly executed the duties of the trust of such fiduciary'' and suspend payments to any fiduciary who fails to properly submit an accounting to VA. Finally, under 38 U.S.C. 5507, VA must conduct an investigation regarding a proposed fiduciary before appointing the individual to serve as a fiduciary. Among other things, this investigation must include an inquiry regarding the proposed fiduciary's criminal and credit history. 38 U.S.C. 5507(a)(1)(C) and (b). Appointment of a fiduciary must be based, in addition to that investigation, on ''adequate evidence that certification of that person as fiduciary for that

beneficiary is in the interest of such beneficiary.'' 38 U.S.C. 5507(a)(2). We interpret these provisions to mean that certain individuals should not be considered qualified for purposes of acting as a fiduciary for a beneficiary.

Although VA's current regulations prescribe the appointment of a fiduciary if VA determines that such appointment is in the interest of the beneficiary, they do not contain any provisions establishing clear qualification standards for proposed or currently serving fiduciaries. Specifically, VA does not currently have a regulation that lists the circumstances under which VA would not consider an individual or entity for appointment or continuation of service. We have determined that such a regulation is necessary to ensure consistency in the more than 30,000 initial fiduciary appointments that VA conducts annually and to ensure that VA's fiduciary personnel appoint only the best qualified individuals or entities to manage the funds of VA's most vulnerable beneficiaries. Further, it is VA's obligation in its oversight role to remove any fiduciary who no longer meets the requirements for appointment. Without a clear standard regarding the circumstances that would bar appointment or continuation of service, we could not consistently conduct oversight and beneficiaries and fiduciaries would not have adequate notice of VA's interpretation of governing law. Accordingly, we propose to add a new § 13.130 regarding bars to serving as a fiduciary.

Proposed paragraph (a)(1) would bar the appointment or further service of any person or entity that misused or misappropriated VA benefits while serving as a beneficiary's fiduciary. Paragraph (a) would continue current VA policy, under which VA does not reappoint any individual or entity that has misused or misappropriated beneficiary funds. We interpret VA's authority under 38 U.S.C. chapters 55 and 61 as establishing an obligation to eliminate as much as possible the risk of exploitation of beneficiary funds. We could not meet this obligation if we reappointed or continued the service of a person who has engaged in such exploitation.

Proposed paragraph (a)(2)(i) would prescribe the general rule that a felony conviction is a bar to appointment or continuation of service as a fiduciary for the 10-year period following the conviction, provided that the conviction is not for one of the offenses listed in proposed paragraph (a)(2)(ii). A felony conviction for one of the offenses in paragraph (a)(2)(ii), which generally concern fraud, financial crimes, or the abuse or neglect of another person, would be a permanent bar to serving as a fiduciary. Under section 5507(b), Congress authorized VA to appoint a convicted felon ''only if [VA] finds that the person is an appropriate person to act as fiduciary for the beneficiary concerned under the circumstances.'' This proposed rule is not inconsistent with that limitation on VA's appointment authority.

In section 5502, Congress authorized VA to appoint a fiduciary for a beneficiary only if it appears to VA that it would serve the beneficiary's interest. We have determined that there is no circumstance under which it would serve a vulnerable beneficiary's interest to have VA benefits managed by a felon convicted for one of the offenses listed in proposed paragraph (a)(2)(ii). To do otherwise would call into question the integrity of the fiduciary program. Accordingly, we propose to authorize the Hub Manager to appoint a person who has been convicted of a felony offense other than the proscribed offenses listed under paragraph (a)(2)(ii) only if the Hub Manager determines that there is no other person or entity willing and qualified to serve, there is no risk to the beneficiary, and such appointment is in the beneficiary's interest.

Proposed paragraph (b) would prescribe other bars to an individual serving as a fiduciary. Paragraph (b)(1) would bar appointment or continuation as a fiduciary, if the individual being considered refuses or neglects to authorize VA to disclose information regarding the individual to the beneficiary the individual wishes to serve. Under *Freeman* v. *Shinseki,* a beneficiary has a right to appeal VA's fiduciary appointment decisions. In these proposed regulations, we propose to acknowledge the right to appeal certain other VA decisions made in the fiduciary program. *See* proposed 38 CFR 13.600 regarding appeals. We described our basis for requiring each proposed fiduciary to provide VA an authorization for VA disclosure of information to the beneficiary in the supplementary information for proposed § 13.100(i).

Proposed paragraphs (b)(2) through (4) would bar appointment or continuation of service as a fiduciary if the individual does not have the current capacity to provide fiduciary services for a beneficiary. Paragraph (b)(2) would bar appointment or continuation of service of any individual who is unable to manage his or her own Federal or State benefits and is in a Federal or State agency's fiduciary or representative payment program. Paragraph (b)(3) would bar appointment or continuation of service if a court with jurisdiction has adjudicated the individual as being unable to manage his or her own financial affairs. Finally, paragraph (b)(4) would bar appointment or continuation of service if the proposed fiduciary is incarcerated in a Federal, State, local, or other penal institution or correctional facility, sentenced to home confinement, released from incarceration to a half-way house, or on house arrest or in custody in any facility awaiting trial on criminal charges. Such incarceration or custody would make the proposed fiduciary effectively unavailable for purposes of fulfilling the obligations of a fiduciary.

Proposed paragraph (b)(5) would bar appointment or continuation of service as a fiduciary if the individual has felony criminal charges pending. Although a fiduciary or proposed fiduciary who has been charged with a felony might ultimately be acquitted or found not guilty and at that time qualify for appointment, we have determined that it would be inconsistent with our obligation to protect vulnerable beneficiaries in the fiduciary program to allow such individuals to provide fiduciary services to beneficiaries while the charges are pending. Also, a person who is on trial for a felony offense or who is preparing for such a trial would not, in our view, be able to properly attend to the needs of VA beneficiaries. However, upon request of a beneficiary, we would remove the bar and consider the individual for appointment if he or she is acquitted or found not guilty of the charges. We propose in paragraph (b)(6) that being under 18 years of age bars being appointed as a fiduciary because it would be unreasonable to appoint as a fiduciary a person who is deemed unable to manage his or her own VA benefits. Last, we propose in paragraph (b)(7) that any knowing violation or refusal to comply with the regulations governing service as a fiduciary would also be a bar.

**13.140 Responsibilities of fiduciaries**

Sections 5502 and 5507 require VA to consider whether payment of benefits to a fiduciary is in a beneficiary's interest. We interpret this authority as authorizing VA to remove any fiduciary who is not meeting the fiduciary's responsibilities to a beneficiary and thus not acting in the beneficiary's interest. However, current regulations do not clearly prescribe those responsibilities.

Current 38 CFR 13.100(a) regarding supervision of VA-appointed fiduciaries authorizes VA to require an accounting from, or terminate the appointment of,

a VA-appointed fiduciary when the Veterans Service Center Manager ''deems it necessary for the protection of the beneficiary's interests.'' However, it is unclear when such action might be necessary, and there is no notice to fiduciaries or beneficiaries regarding VA's expectations. Current paragraph (b) authorizes any necessary informal action regarding court-appointed fiduciaries to ensure that ''benefits are prudently administered and adequately protected.'' Current paragraphs (c) regarding unsatisfactory conditions and (d) regarding misappropriation, embezzlement, or violation of Federal statutes generally track the language of sections 5502(b) and 6101 and authorize suspension of benefits and referral to the VA Regional Counsel if the fiduciary has performed inadequately. These provisions do not prescribe any meaningful standards, which might instruct fiduciaries and beneficiaries regarding VA's expectations or the grounds for further VA action to suspend payment of benefits, remove the fiduciary, or appoint a successor fiduciary. Nor do they establish binding obligations that have the force and effect of law for VA, beneficiaries, or fiduciaries. Accordingly, we propose to clearly prescribe the responsibilities of VA-appointed fiduciaries in a new § 13.140 as described below.

In proposed paragraph (a), we would prescribe the core requirements for all fiduciaries, which are to monitor the well-being of the beneficiaries they serve and to disburse funds according to beneficiary needs. It is our intent to change the culture in the fiduciary program to ensure that it is the fiduciary that determines the beneficiary's needs and whether disbursement of funds to address those needs is in the beneficiary's interest. VA is not the fiduciary for the beneficiary and must defer to the fiduciary consistent with VA regulations. However, we also intend to change the culture in the program to the extent that fiduciaries are unnecessarily conserving beneficiaries' funds. We are concerned that some elderly beneficiaries are dying with a large amount of funds under management by a fiduciary that could have been used during the beneficiary's life to improve his or her standard of living. To address this concern, we propose to prescribe in paragraph (a) that a fiduciary must disburse or otherwise manage funds according to the best interests of the beneficiary and the beneficiary's dependents and ''in light of the beneficiary's unique circumstances, needs, desires, beliefs, and values.''

Furthermore, under 38 U.S.C. 5502(a)(1), Congress authorized payments of VA benefits to a fiduciary on behalf of a beneficiary if it appears to VA that such payment would serve the interest of the beneficiary. Under this authority, it is VA's obligation to oversee the fiduciaries it appoints to manage VA benefit funds on behalf of beneficiaries. Although Congress did not expressly prescribe in section 5502 protection of beneficiaries' private information, such protection is inherent in the obligation of a fiduciary to act in good faith and in the interest of the beneficiary. We have determined that it would be inconsistent with a fiduciary's position of trust to permit the fiduciary to use inadequate information protection measures. The fiduciary's failure to protect the information would put the beneficiary at risk of identity theft, misappropriation of funds, or other harm. Accordingly, we propose to prescribe in paragraph (a)(2) the minimum requirements for protection of beneficiaries' private information. In proposing to prescribe these requirements, we do not intend to impose onerous security requirements upon fiduciaries, most of whom are beneficiaries' family members. Rather, we intend that fiduciaries will take the reasonable precautions that every person should take when maintaining his or her private information in paper or electronic records to prevent identity theft and unauthorized access. In proposing these requirements, we do not intend to supersede State law or other professional industry standards, under which a fiduciary may have additional requirements that exceed the minimum standard proposed by VA.

Consistent with VA's oversight of beneficiaries obligation under 38 U.S.C. 5502(a)(1), paragraph (a)(2) would require a fiduciary, if VA removes the fiduciary under § 13.500 or the fiduciary withdraws under § 13.510, to keep all records relating to the management of the beneficiary's VA benefit funds for 2 years after the date of removal or withdrawal. VA needs this requirement to facilitate any inquiry regarding a fiduciary's past services and the proper management of funds and to effectively oversee beneficiaries if a fiduciary is removed or withdraws.

In proposed paragraph (b), we would prescribe the fiduciary's financial responsibilities. This paragraph generally references the requirements of other regulations in part 13 to provide clear notice to fiduciaries regarding their financial obligations. Fiduciaries would be required to use funds in the interest of beneficiaries and their dependents, protect funds from loss, maintain separate accounts, determine and pay just debts, provide the beneficiary information regarding VA benefit funds under management, protect funds from the claims of creditors, and provide beneficiaries a copy of any VA-approved annual accounting. In particular, proposed paragraph (b)(8) would prescribe the requirements for a fiduciary's best-interest determination regarding VA benefit funds under management. We would prescribe that beneficiaries in the fiduciary program are entitled to the same standard of living as a beneficiary with comparable resources who is not in the program, and that the fiduciary program is not for the purpose of preserving funds ''for the beneficiary's heirs or disbursing funds according to the fiduciary's own beliefs, values, preferences, and interests.'' We intend that these provisions will have a positive effect on the well-being of beneficiaries in the program by proscribing unreasonable conservation of funds.

Proposed paragraph (c) would prescribe fiduciaries' non-financial responsibilities. These responsibilities generally concern a fiduciary's obligation to monitor the beneficiary's well-being and report any concerns to appropriate authorities, including any legal guardian for the beneficiary. It would also reinforce VA's view that a fiduciary must maintain regular contact with a beneficiary and be responsive to beneficiary requests. Without such contact, a fiduciary could not reasonably determine whether a beneficiary's needs are being met by the fiduciary's disbursement of funds.

Proposed paragraph (d) would prescribe fiduciaries' responsibilities to VA under its oversight function. This paragraph would generally prescribe fiduciary compliance with VA's part 13 fiduciary regulations, such as the proposed accounting and face-to-face interview requirements. It would also require fiduciaries to keep VA apprised of any change in the beneficiary's circumstances which might adversely impact the beneficiary's well-being. VA needs this information for purposes of coordinating a proper response to the beneficiary's benefit or other needs, to include referral to the Veterans Health Administration or other public or private agencies for delivery of services.

**13.200 Fiduciary accounts**

In section 5502(a)(1), Congress authorized VA to pay benefits to a VA-appointed fiduciary for the use and benefit of the beneficiary, and in section 5509(a), Congress authorized VA to require fiduciaries to file reports or

accountings regarding the management of funds by the fiduciary on behalf of the beneficiary. Under 38 U.S.C. 5711, VA has authority to require the production of any documentation or other evidence and to conduct investigations relating to any matter under VA's jurisdiction. However, Congress has not prescribed the types of accounts that VA-appointed fiduciaries must establish for purposes of managing beneficiary funds and complying with annual accounting requirements.

Although current regulations prescribe the payment of benefits to certain individuals or entities on behalf of a beneficiary who cannot manage his or her VA benefits and address certain fund-management matters, no current regulation prescribes the requirements for fiduciary accounts. We propose to prescribe those requirements in § 13.200 as described below.

Proposed paragraph (a) would require a fiduciary to establish a separate Federally-insured account, if VA benefit funds under management qualify for such deposit insurance, in a Federally-insured financial institution for each beneficiary whom the fiduciary serves. However, it would not prohibit establishment of multiple accounts for the same beneficiary if the fiduciary deems it necessary for proper management of beneficiary funds. It would prohibit the commingling of beneficiary funds with the fiduciary's or any other beneficiary's funds at any time, prescribe direct deposit of VA benefits, and prescribe a standard for identifying ownership of the account and the fiduciary's relationship with the beneficiary. We intend that these account-establishment requirements will assist VA in overseeing fiduciaries, specifically with respect to auditing fiduciary accountings under proposed § 13.280, and make it harder for fiduciaries to conceal the misuse of benefits in pooled accounts or through transfer of beneficiary funds between accounts.

Proposed paragraph (b) would exempt VA-appointed spouses, State or local Government entities, institutions in which beneficiaries receive care or that have custody of beneficiaries, nursing homes, and a trust company or a bank with trust powers organized under the laws of the United States or a state from this separate account requirement prescribed in proposed paragraph (a). Regarding spouses, it is VA's policy to minimize the Government's intrusion into the marital relationship and avoid dictating requirements for property that is jointly owned by a beneficiary and spouse. The listed organizations would be exempt from the requirement because VA's experience in administering the program indicates that the burden of establishing separate accounts would outweigh by far the risk of fund exploitation.

**13.210 Fiduciary investments**

In 38 U.S.C. 5502(a), Congress authorized VA to pay benefits to a fiduciary on behalf of a beneficiary if it appears to VA that it would serve the beneficiary's interest. However, Congress did not prescribe how fiduciaries should manage beneficiary funds. VA filled this gap in the legislation in current 38 CFR 13.103 regarding investments by ''Federal'' fiduciaries and current 38 CFR 13.106 regarding investments by ''court-appointed'' fiduciaries. Current § 13.103(a) prescribes the types of investments that fiduciaries may use, specifically United States savings bonds or interest or dividend-paying accounts in State or Federally-insured institutions. Paragraph (a) also prescribes exceptions for fiduciaries who are spouses or chief officers of institutions. Current paragraph (b) prescribes specific ''registration'' requirements for authorized investments, to include the beneficiary's name and Social Security number, the fiduciary's name, and specific language regarding ''custodianship by designation of the Department of Veterans Affairs.'' Paragraph (c) authorizes fiduciaries to purchase pre-need burial plans.

Current § 13.106 provides a general policy statement regarding prudent investment by fiduciaries. It also states that it is the Veterans Service Center Manager's responsibility to review and determine the legality of investments by court-appointed fiduciaries, and prescribes referral to the VA Regional Counsel for action regarding investments that appear to be inconsistent with VA policy.

As noted in this preamble, we propose to discontinue the distinction between ''Federal'' fiduciaries and ''court-appointed'' fiduciaries, and instead refer only to ''fiduciary'' or ''fiduciaries'' in VA's part 13 fiduciary regulations. It is VA's long-standing interpretation of current law and its practice to appoint and conduct oversight regarding all individuals and entities who provide fiduciary services for beneficiaries. Therefore, the proposed rules would be uniform for all fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary. We intend to apply this approach to our regulation regarding fiduciary investments effective with investments acquired after the effective date of the final rule. We propose to remove current §§ 13.103 and 13.106 and replace them with a new § 13.210 as described below.

Proposed paragraph (a) would prescribe the general rule that a fiduciary must conserve or invest any funds under management that the beneficiary or the beneficiary's dependents do not immediately need for maintenance, reasonably foreseeable expenses, or reasonable improvements in the beneficiary's and the beneficiary's dependents' standard of living. We would clarify that the limited purpose of conservation of beneficiary funds is to provide the fiduciary the means to address unforeseen circumstances or plan for future care needs in light of the beneficiary's circumstances and disabilities. We would prohibit the conservation of funds based upon the interests of the beneficiary's heirs or according to the fiduciary's own belief, values, preferences, and interests. Our intent in proposing these rules is to change the culture in the fiduciary program, to the extent it still exists, under which a fiduciary may accumulate an extraordinary amount of funds in a beneficiary's account which the beneficiary is not able to use in his or her lifetime. Under current VA policy, the purpose of the fiduciary program is to provide beneficiaries and their dependents the best possible standard of living that funds under management will reasonably allow. A beneficiary in the fiduciary program should be allowed the same standard of living as a beneficiary with comparable resources who is not in the fiduciary program. Finally, we note that the fiduciary program is not an estate planning program for a beneficiary's heirs. We propose to expressly prohibit the management of funds for that purpose.

Proposed paragraph (b) would restate without substantive change the provisions of current regulations requiring prudent investment and generally limiting investments to Federally-insured interest or dividend-paying accounts. It would also restate the current ''registration'' requirements. However, in administering the program, we have learned that some institutions will not permit the establishment of accounts using the exact language prescribed in current § 13.103. Accordingly, we propose to prescribe only that the account must be clearly titled in the beneficiary's and fiduciary's names and identify the fiduciary relationship.

Proposed paragraph (c) would restate without substantive change the exceptions in current regulations for

fiduciaries who are spouses or chief officers of institutions.

**13.220 Fiduciary fees**

In 38 U.S.C. 5502(a)(2), in cases in which VA determines that a commission is necessary to obtain a fiduciary in the best interests of a beneficiary, Congress authorized ''a reasonable commission for fiduciary services rendered'' to be paid from the beneficiary's VA funds, but such commissions for any year may not exceed 4 percent of the beneficiary's monetary VA benefits paid to the fiduciary during the year. VA implemented this authority in current 38 CFR 13.64 regarding fiduciary commissions. Section 13.64 authorizes the Veterans Service Center Manager to determine when it is necessary to authorize a commission, tracks the language of section 5502(a)(2) regarding the maximum commission that may be deducted from a beneficiary's estate, and requires the Veterans Service Center Manager to furnish appropriate notice to beneficiaries regarding such deductions. It also prohibits commissions for beneficiaries' dependents or other close relatives of beneficiaries acting as fiduciary.

We have determined that § 13.64 is inconsistent with current VA policy and does not provide clear rules regarding the circumstances under which VA may authorize a fiduciary commission or the limitations on such commissions. In particular, the current rule does not address whether a commission may be computed based upon retroactive, lump-sum, or other one-time benefit payments to fiduciaries. Nor does it address computation based upon surplus funds maintained by the fiduciary in the beneficiary's account or funds transferred to the fiduciary by a predecessor fiduciary for the beneficiary. Finally, the current rule does not address the circumstances under which there would be a bar to deducting a commission for a given month. Accordingly, we propose to replace current § 13.64 with proposed § 13.220 as described below.

We propose to discontinue use of the term ''commission'' in VA's part 13 fiduciary regulations and instead use the term ''fee'' or ''fees'' when referring to the payment made from a beneficiary's VA funds to a fiduciary for fiduciary services. This is not a substantive change; it is for the limited purpose of simplifying our regulations through the use of common terms and plain language.

In proposed paragraph (a), we would authorize the Hub Manager with jurisdiction over the appointment to determine whether a fee is necessary in a particular case. Consistent with current VA policy, the Hub Manager would appoint a paid fiduciary as a last resort and only if the Hub Manager determines that such appointment would serve the beneficiary's interest and that no other person or entity is qualified and willing to serve without a fee. Consistent with section 5502(a)(2) as interpreted by current § 13.64, proposed paragraph (a) would prohibit fees for dependents or relatives of the beneficiary, or any other person who will receive any other compensation of any kind for providing fiduciary services for the beneficiary. We do not intend a substantive change in paragraph (a) but note that the current regulation is unclear to the extent that it refers to ''close'' relatives. We propose to clarify that the bar applies to the beneficiary's ''relatives'' and define the term in proposed § 13.20.

Proposed paragraph (b) would prescribe the limitations applicable to fiduciary fees. We interpret ''a reasonable commission [not to exceed 4 percent of monetary benefits] for fiduciary services rendered'' in section 5502(a)(2) to mean that Congress intended the 4-percent ceiling to permit a moderate fee to be paid on a periodic basis from an ongoing award and that the fee would bear a relation to the amount of benefits being received on an ongoing basis. To read the statute otherwise would permit a fiduciary to receive a windfall fee in a particular year that bears no relation to what the fiduciary could receive in other years or what other fiduciaries are receiving for providing comparable services to other beneficiaries. Further, a fee computed on the basis of a retroactive award would bear little relation to the ''services rendered'' by the fiduciary, which would generally be the same from year to year, regardless of whether the beneficiary happened to receive a lump-sum payment in a particular year. We also note that VA generally awards entitlement to retroactive benefits to a beneficiary before the appointment of a fiduciary, but pays the retroactive benefits following the appointment of a fiduciary. Allowing a fiduciary to deduct up to 4 percent of such an award simply because the funds are transferred to the fiduciary and deposited in a fiduciary account would amount to unjust enrichment of the fiduciary at the beneficiary's expense and with no fiduciary services rendered by the fiduciary.

Consistent with our interpretation of section 5502(a)(2), proposed paragraph (b)(1) would define ''reasonable monthly fee'' to mean a monetary amount authorized by the Hub Manager that does not exceed 4 percent of the beneficiary's monthly VA benefits. Upon authorization, the fiduciary would have permission to deduct the fee from the beneficiary's account for each month in which the fiduciary is eligible for a fee under paragraph (b)(2). As a general rule, eligibility would exist in each month in which the fiduciary receives a benefit payment on behalf of the beneficiary and provides fiduciary services.

Proposed paragraph (b)(3) would prescribe limitations on the computation of fees. In proposed paragraph (b)(3)(i), we would bar the computation of a fee upon one-time, retroactive, or lump-sum benefit payments. As described above, this rule is consistent with the plain language of section 5502(a)(2), which authorizes VA to allow a reasonable fee for ''fiduciary services rendered.'' Allowing fees on these types of payments would amount to paying a fiduciary for services the fiduciary did not provide to the beneficiary.

Proposed paragraph (b)(3)(ii) would prohibit computing a fee upon any funds conserved by the fiduciary in the beneficiary's account under proposed § 13.200 or invested by the fiduciary under proposed § 13.210, to include any interest income and return on investment derived from any account. Any funds conserved do not constitute a running monthly benefit award upon which a fiduciary may calculate a fee. As noted above, we interpret section 5502(a)(2) to mean that the total fee payable to a fiduciary for all fiduciary services rendered, including the management of conserved funds, is a percentage of the monthly benefit payments made.

In proposed paragraph (b)(3)(iii) we would prohibit computing a fee upon any funds transferred to the fiduciary by a prior fiduciary. Again, consistent with section 5502(a)(2), this would ensure that fiduciaries are allowed fees from beneficiary accounts only for fiduciary services rendered.

Proposed paragraph (b)(4)(i) would restate and implement 38 U.S.C. 6106, which prohibits a fiduciary from collecting a fee for any month for which VA or a court with jurisdiction determines that the fiduciary misused benefits. The statute also authorizes VA to treat any fees collected by a fiduciary during a month in which VA or a court finds that the fiduciary misused benefits as being misused benefits. In addition, we propose to prohibit fees for any month in which VA or a court with jurisdiction determines that a fiduciary

has misappropriated benefits, as defined in 38 U.S.C. 6101.

Proposed paragraph (b)(4)(ii) would clarify that the Hub Manager may retroactively authorize a fee for a month in which the beneficiary did not receive a benefit payment if VA later issues a payment for that month and the fiduciary continued to provide fiduciary services. Consistent with the provisions of this proposed regulation on payment of fees to fiduciaries, paragraph (b)(4)(ii) would ensure that fiduciaries are paid for the services they provide to beneficiaries during a temporary suspension of benefits.

**13.230 Protection of beneficiary funds**

Under 38 U.S.C. 5507(a)(3), ''[a]ny certification of a person for payment of benefits of a beneficiary to that person as such beneficiary's fiduciary . . . shall be made on the basis of,'' among other things, ''the furnishing of any bond that may be required by [VA].'' Section 5507(a)(3) essentially codified a VA preexisting regulation regarding surety bonds, current 38 CFR 13.105.

Current § 13.105 authorizes the Veterans Service Center Manager to require a fiduciary to furnish a surety bond in an amount sufficient to protect the interest of the beneficiary. It also authorizes the Veterans Service Center Manager to require an ''agreement in lieu of a surety bond or additional surety bond'' in cases where the fiduciary has deposited beneficiary funds in an account with a State- or Federally-insured institution. Finally, it authorizes the Veterans Service Center Manager to take necessary action to protect beneficiary funds when a surety company ceases to do business in a State, to include referring matters to the VA Regional Counsel with jurisdiction.

We have determined that current § 13.105 uses unclear terminology and is inconsistent with current VA policy. Further, we note that Veterans Service Center Managers have discretion to require a bond under the current regulation, but there are no criteria to guide them in exercising that discretion. Finally, current § 13.105 is silent regarding who must bear the expense of obtaining a bond for fund protection purposes. Accordingly, we propose to replace current § 13.105 with proposed § 13.230 as described below.

Proposed paragraph (a) would state the general rule that a fiduciary must within 60 days of appointment furnish to the fiduciary hub a surety bond conditioned upon faithful discharge of all of the responsibilities of a fiduciary if the VA benefit funds that are due and to be paid will exceed $25,000. We note that VA generally awards entitlement to retroactive benefits to a beneficiary before the appointment of a fiduciary but withholds payment until the appointment is complete and the fiduciary obtains a surety bond. It would prohibit the payment of any retroactive, one-time, or other pending lump-sum benefit amount to the fiduciary on behalf of the beneficiary until the fiduciary has furnished the prescribed bond. Our intent is to require certain fiduciaries who manage accumulated funds to obtain additional protection of those funds on behalf of their beneficiaries before receiving large, lump-sum benefit payments. While it would be impossible to determine the exact amount of accumulated benefits at which a beneficiary might be significantly more at risk of fund exploitation by a fiduciary, we propose to use $25,000 as the threshold because, based upon our experience in administering the program, we have determined that the cost of obtaining a bond for smaller amounts of accumulated funds under management would outweigh any benefit to the beneficiary. For the same reasons, proposed paragraph (b) would apply this rule to a fiduciary who is not initially required to obtain a bond but later accumulates funds on behalf of a beneficiary that exceed the $25,000 threshold.

Proposed paragraph (c) would prescribe several exceptions to the general rule regarding surety bonds in proposed paragraphs (a) and (b). We propose to limit these exceptions because a proposed fiduciary's ability to obtain a surety bond is an important, additional screening tool for VA. If a proposed fiduciary cannot obtain a bond based upon a bonding company's assessment of risk, VA should weigh that information in deciding whether to continue the appointment or appoint a successor fiduciary. First, we would not require a surety bond from a VA-appointed trust company or bank that has adequate protection of funds under management such as an umbrella bond or insurance required under Federal or state law. Second, consistent with VA's long-standing policy of requiring less intrusive oversight of spouse fiduciaries, we would not require spouses to obtain a surety bond.

It has been VA's practice to occasionally allow a fiduciary, generally a family member or other close acquaintance of the beneficiary, to enter into a restricted withdrawal agreement with the beneficiary and VA regarding accumulated funds under management in lieu of obtaining a surety bond. However, we have determined that the use of restricted withdrawal agreements is generally inconsistent with VA policy regarding the role of VA and fiduciaries in the fiduciary program. In our view, it is the fiduciary's obligation to make best-interest determinations regarding beneficiary funds under management. The use of a restricted withdrawal agreement may improperly insert VA into matters reserved for fiduciaries. Nevertheless, we have determined to use restricted withdrawal agreements for fiduciaries in locations where obtaining an adequate surety bond is not practicable. Under proposed paragraph (c), the Hub Manager would have discretion to waive the bond requirement and enter into a restricted withdrawal agreement regarding accumulated funds in cases where the location of the fiduciary precludes obtaining adequate bonding. Currently, adequate bonding may not be available in Puerto Rico, other territories of the United States, and the Philippines.

Under proposed paragraph (c)(2), the Hub Manager would be authorized to require a bond at any time, without regard to the amount of funds under management, if the Hub Manager determines that special circumstances indicate that obtaining a bond would be in the beneficiary's interest. Among other things, such circumstances would include a marginal credit report regarding the fiduciary or a fiduciary's misdemeanor criminal conviction for any criminal offense listed in proposed § 13.130(a)(2)(ii) regarding bars to serving as a fiduciary.

Proposed paragraph (d) would prescribe the requirements for a bond. This paragraph would generally restate and clarify the provisions of current § 13.105 without substantive change but would add a new rule regarding adjustment of bonds. We propose to require the fiduciary to adjust the bond to account for significant changes in amount of funds managed to ensure adequate protection of funds under management and in some cases to save the beneficiary the cost of unnecessary fund protection. The fiduciary would be required to make such an adjustment any time the funds under management increase or decrease by 20 percent or more. We propose 20 percent because our experience in administering the program indicates that a smaller fluctuation in funds under management might require frequent adjustments with only minimal added protection or cost savings for beneficiaries.

Proposed paragraph (e) would require that the fiduciary must submit proof of adequate bonding with each annual accounting and at any other time the Hub Manager requests proof. This requirement, which is not in the current

regulation, would facilitate VA's oversight regarding the fund protection requirements prescribed in proposed § 13.230.

Proposed paragraph (f) would provide notice regarding joint and several liability of sureties and fiduciaries for any misappropriation or misuse of beneficiary funds by fiduciaries, and that VA may collect on the bond regardless of any prior VA reissuance of benefits under proposed § 13.410. These provisions are consistent with current policy and the protection generally afforded by surety bonds. However, we propose to expressly state the policy and scope of bond protection in our regulations for purposes of notice.

Under 38 U.S.C. 5507(a)(3), VA's certification of a prospective fiduciary as a fiduciary ''shall be made on the basis of . . . the furnishing of any bond that may be required by the Secretary.'' Congress did not address whether the beneficiary or the fiduciary must pay for the bond. However, we interpret the requirement to mean that the certification of any person as a fiduciary must be based in part upon the proposed fiduciary's ability to qualify for and purchase a bond. In this regard, the requirement is a screening tool for VA to use in confirming an appointment decision before releasing a lump-sum, retroactive payment to a fiduciary. If a fiduciary cannot obtain a bond because the bonding company considers the risk of fund exploitation too high, VA should not appoint the prospective fiduciary and appoint an individual or entity who can obtain the necessary fund protection. Proposed paragraph (g) would clarify that the fiduciary may deduct the cost of a surety bond from the VA benefit funds under management by the fiduciary for the beneficiary.

Regarding payment from beneficiary funds, we have determined that requiring fiduciaries to bear the cost of a surety bond would create a disincentive for both volunteer and paid fiduciaries, and would significantly impair VA's ability to find qualified fiduciaries for the beneficiaries who need them. Approximately 90,000 of the current 95,000 fiduciaries in VA's program have a one-on-one relationship with the beneficiary. Most of these fiduciaries are family members, friends, and other individuals who have expressed a willingness to serve an individual beneficiary without charge. Even in paid fiduciary cases, which currently comprise less than 10 percent of all beneficiaries in the program, Congress has limited fiduciary fees to 4 percent or less of the beneficiary's annual benefit payments, and under current VA policy a Hub Manager may not authorize calculation of a fee based upon a retroactive, lump-sum, or other one-time payment of benefits to the beneficiary. Under these circumstances, a fiduciary might be required to incur significant out-of-pocket expenses to provide fiduciary services.

As a general rule, bonding companies charge approximately $100 annually for every $10,000 under management by a fiduciary. This means that the annual out-of-pocket expense for a volunteer family member fiduciary who manages $100,000 in accumulated VA funds for a beneficiary would be $1,000 if VA determined that the fiduciary must pay for the bond. In a paid fiduciary case, assume that the beneficiary has $100,000 in accumulated VA benefit funds under management for the beneficiary and receives a $1,500 monthly VA benefit payment. The fiduciary's maximum monthly 4-percent fee would be $60 or $720 annually, while the fiduciary would incur a $1,000 annual surety bond expense. In this case, the fiduciary will incur a loss of $280 per year. Therefore, it would not be reasonable for VA to require the fiduciary to bear the cost of a surety bond, which would essentially eliminate any incentive for serving vulnerable veterans and their survivors.

For the above reasons, it is VA's long-standing policy to require fiduciaries to purchase a surety bond and permit them to use beneficiary funds to pay the expense. Given the nature of the fiduciary program and the statutory context in which Congress enacted section 5507, we believe that Congress intended a continuation of this policy. In addition, we note that deducting bond expenses from beneficiary funds would be consistent with the protection of funds in guardianships under State and uniform laws. *See, e.g.,* Fla. Stat. § 744.641 (2012); Ga. Code Ann. § 29–7–15 (2012); Mo. Rev. Stat. § 475.100 (2012); N.J. Stat. Ann. § 3B:13–17 (2012); N.C. Gen. Stat. § 34–12 (2012); Wis. Stat. § 54.852 (2012); Unif. Guardianship and Protective Proceedings Act § 416 cmt. (1997); Unif. Veterans' Guardianship Act § 35.78 (1937).

**13.240 Funds of beneficiaries less than 18 years old**

Under 38 U.S.C. 5502(a)(1), VA has authority to pay benefits to a fiduciary on behalf of a beneficiary who is a minor. VA implemented this authority in current 38 CFR 13.101, which generally prescribes that such payments should be used for the minor's benefit and only to the extent that the person or persons responsible for the minor's needs are unable to provide for them. The current regulation prescribes one exception for VA education benefits, which the fiduciary may disburse without regard to the ability of responsible persons to provide for the minor's needs.

We propose to replace current § 13.101 with proposed § 13.240 without making any substantive change. We would make only minor plain language changes and reorganize the regulation text.

**13.250 Funds of deceased beneficiaries**

Under 38 U.S.C. 5502(e), ''[a]ny funds in the hands of a fiduciary . . . derived from benefits payable under laws administered by [VA], which under the law of the State wherein the beneficiary had last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such fiduciary.'' In section 5502(e), Congress also authorized fiduciaries to deduct from the funds under management the cost of determining whether such escheat to the State would occur under State law.

VA implemented this authority in current 38 CFR 13.110(a), which restates the provisions of section 5502(e). Current paragraph (b) requires fiduciaries to account for and turn over to VA the personal property owned by a veteran who dies intestate and without heirs while receiving care in a VA facility. Current paragraph (c) requires the submission of a report to the VA Regional Counsel with jurisdiction if a fiduciary refuses to comply with the requirements of § 13.110.

We have determined that current § 13.110 does not provide clear rules for fiduciaries to close out the accounts of deceased beneficiaries. It does not provide time limits for the return of funds to VA or prescribe final accounting rules, and clarity is needed regarding the property in the possession of a fiduciary that must be returned to VA. Accordingly, we propose to remove current § 13.110 and replace it with proposed § 13.250 as described below.

Section 5502(e) is applicable to ''funds in the hands of'' a fiduciary which are ''derived from [VA] benefits.'' We interpret this language in section 5502(e) to mean VA benefit funds under management by the fiduciary for the beneficiary, as defined in proposed § 13.20, on the date of the beneficiary's death. In proposed paragraph (a), we would essentially restate section 5502(e) and require the return of VA benefit funds under management by a fiduciary to VA when a beneficiary for whom the fiduciary provides fiduciary services dies without a valid will and without

heirs if such funds would escheat to the State under State law. For purposes of plain language, we replace the word ''escheat'' with ''be forfeited.''

Proposed paragraph (b) would prescribe the circumstances under which a fiduciary must submit a final accounting to VA. We propose to require a final accounting in cases where the fiduciary determines that the VA benefit funds under management by the fiduciary would be forfeited to a State and thus must be returned to VA under proposed paragraph (a). In this situation, VA needs to confirm that the fiduciary properly managed funds after the beneficiary's death and returned all funds under management to the Government. We also propose to require a final accounting in any case in which the fiduciary was required to submit an annual accounting under proposed § 13.280 prior to the beneficiary's death regardless of whether funds under management would be forfeited to a State. This final accounting is necessary for purposes of VA's oversight of fiduciaries, to include detecting misuse of benefits.

Under section 5502(e), the fiduciary for a deceased beneficiary may deduct ''legal expenses of any administration necessary to determine that an escheat is in order.'' Proposed paragraph (c) would restate this provision and clarify that the fiduciary may deduct a reasonable fee or pay a reasonable charge from the beneficiary's account to cover the expense of determining whether forfeiture to a State would occur. We recognize that a fiduciary may have the authority under State law or pursuant to State licensure to make this decision without referring the matter. However, upon the death of the beneficiary, a paid fiduciary's authority to collect a fee for fiduciary services under proposed § 13.220 expires. In such cases, we interpret section 5502(e) as authorizing the fiduciary to deduct a reasonable fee for separate services associated with determining whether forfeiture would occur. We also interpret section 5502(e) as authorizing the fiduciary to incur a reasonable third-party fee for determining whether forfeiture would occur, and to pay that expense from the deceased beneficiary's account. For purposes of paragraph (c), we propose to define ''reasonable fee,'' whether charged by the fiduciary or a third party, as an amount customarily charged by persons authorized to do such work, such as attorneys or other professionals, in the State where the deceased beneficiary resided.

Proposed paragraph (d) would clarify that in all cases in which the deceased beneficiary has a valid will or heirs, such that the VA benefit funds under management by the fiduciary will not be forfeited to a State, the fiduciary must hold the funds in trust for the beneficiary's estate. In these cases, the fiduciary's responsibilities to the deceased beneficiary's estate are defined by applicable State law.

**13.260 Personal funds of patients**

Under 38 U.S.C. 5502(d), Congress prescribed the procedure for VA distribution of funds held in trust for a veteran in a personal funds of patients account at a VA facility upon the veteran's death. Congress decided that VA should not pay such funds to the deceased veteran's personal representative, but should instead pay them to certain individuals in the order of preference prescribed by Congress. These are the ''surviving spouse, the children (without regard to age or marital status) in equal parts, and the dependent parents of such veteran, in equal parts.'' Congress further prescribed that any balance remaining in the account after VA's attempt to distribute it according to the statute must be deposited to the credit of the applicable VA appropriation, except that VA has authority to reimburse a person who bore the expenses of last sickness or burial of the veteran for such expenses. Any disbursement of funds according to the priority established by Congress or for expenses related to the veteran's last sickness or burial must be based upon a claim filed with VA within 5 years after the veteran's death. This 5-year limitation period may be tolled based upon an eligible person being under legal disability at the time of the veteran's death.

VA's current part 13 fiduciary regulations do not address the distribution of funds under section 5502(d). However, we propose to restate the statutory requirements in proposed § 13.260 without substantive change but reorganized to make them easier to read and understand.

**13.270 Creditors' claims**

Under 38 U.S.C. 5301(a)(1), VA benefits generally cannot be assigned and are exempt from taxation and the claims of creditors. They are also not ''liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'' The exemptions in section 5301 do not apply to debts owed to the United States arising in a VA benefits program or to the use of benefits for the repayment of loans made to beneficiaries.

VA provides fiduciaries notice of these exemptions in current § 13.111, which restates the generally applicable statutory provisions, advises fiduciaries to invoke the exemptions where applicable, and prescribes referral to the VA Regional Counsel if a fiduciary does not properly invoke them. We propose to restate the current regulation without substantive change in proposed § 13.270.

**13.280 Accountings**

Under 38 U.S.C. 5509(a), VA has authority to require fiduciaries to file accountings regarding funds under management. Such accounting may include disclosure of ''any additional financial information concerning the beneficiary (except for information that is not available to the fiduciary).'' 38 U.S.C. 5502(b). Under 38 U.S.C. 6101(b), the willful neglect or refusal to file proper accountings ''shall be taken to be sufficient evidence prima facie of . . . embezzlement or misappropriation.''

VA implemented the authority to require submission of accountings in current 38 CFR 13.102, 13.104 and 13.107. Current § 13.102(a) requires the fiduciaries of certain veterans to provide VA an accounting when requested. Current § 13.104 requires fiduciaries who are also court-appointed to arrange for the provision to VA of copies of their State-court-prescribed accountings. It also exempts, in the Veterans Service Center Manager's discretion, fiduciaries and beneficiaries who permanently reside in a jurisdiction other than the United States, the Commonwealth of Puerto Rico, or the Republic of the Philippines, if the fiduciary appointment occurred in the foreign jurisdiction. Current § 13.107 requires the chief officer of a non-Federal institution appointed as fiduciary for a beneficiary to render to VA an accounting if the Service Center Manager requests one.

We have determined that §§ 13.102, 13.104, and 13.107 do not provide clear rules for fiduciaries and do not reflect current VA policy and procedures. Furthermore, section 6101 regarding willful neglect or refusal to file accountings has not been implemented in VA's part 13 fiduciary regulations. Therefore, to provide clear, comprehensive notice regarding VA's accounting policy and procedures and interpretation of current law, we propose to combine the fiduciary accounting requirements into one proposed rule, § 13.280, as described below.

In proposed paragraph (a), we would prescribe the general rule for accountings, under which each fiduciary who meets any of the criteria in paragraphs (a)(1) through (3) would

be required to provide VA an annual accounting regarding funds under management for a beneficiary. Under current policy, VA does not require an accounting from every fiduciary. This policy recognizes the nature of the VA fiduciary program, in which most fiduciaries are volunteer family members or friends who have a one-on-one relationship with the beneficiary, and that in many cases such fiduciaries manage only small benefit amounts or disburse all the beneficiary's monthly benefits for the beneficiary's care. Further, the submission and auditing of accountings in every case in which a beneficiary has a family member fiduciary would be unduly intrusive if VA knows that there is very little risk of exploitation of funds. Current policy also recognizes, based upon VA's experience in administering the program, that the burden of preparing, submitting, and auditing accountings outweighs any oversight benefit for many beneficiaries and VA. Accordingly, we propose to continue to generally require accountings only when the amount of VA benefit funds under management by the fiduciary exceeds $10,000, the fiduciary receives a fee deducted from the beneficiary's account under proposed § 13.220, or the beneficiary is being paid monthly benefits in an amount equal to or greater than the rate for service-connected disability rated totally disabling. Under this policy, VA currently audits more than 30,000 accountings each year.

Proposed paragraph (b) would define *accounting* to mean the fiduciary's written report of his or her management of the beneficiary's income and accumulated funds. We would further prescribe that an accounting pertains to all activity in the beneficiary's accounts, regardless of the source of income. While VA's authority is limited to appointing fiduciaries for purposes of managing VA benefits, for accounting purposes, Congress has authorized VA to request information regarding all activity in a beneficiary's account. It would be very difficult to detect misuse of benefits, if VA were required to limit its audit to activity related only to income and expenditures actually derived from VA benefits. Instead, consistent with our authority and current practice, we would prescribe the scope of an accounting, including a beginning and ending inventory or account balance, in proposed paragraphs (b)(1) through (6).

In proposed paragraph (c) we would prescribe the procedures for submitting an annual accounting. As a general rule, accountings would be due not later than 30 days after the end of the accounting period prescribed by the Hub Manager. Consistent with current VA policy, proposed paragraph (d) would prescribe exceptions to the general accounting rules. First, no spouse would be required to submit an annual accounting. It is VA's long-standing policy to avoid undue intrusion in the relationship between a beneficiary and the beneficiary's spouse. We propose to continue that policy. Second, we would not require the chief officer of a Federal institution to account because such officers generally do not disburse funds, disburse only small fund amounts for the beneficiary's personal use, or disburse funds according to the discretion delegated to the Secretary of Veterans Affairs by law. Third, we would not require an accounting from the chief officer of a non-VA institution when the cost of the monthly care and maintenance of the beneficiary in the institution exceeds the beneficiary's monthly benefit and the beneficiary's funds under management by the fiduciary do not exceed $10,000. Finally, we would restate the provisions of current § 13.104, which exempt certain foreign fiduciaries, without substantive change.

Proposed paragraph (e) would implement section 6101(b), under which the willful neglect or refusal to comply with the accounting requirements prescribed by VA is prima facie evidence of embezzlement or misappropriation of benefits. We propose to restate the statutory provision and provide notice that such evidence is grounds for starting a VA misuse investigation under proposed § 13.400.

**13.300 Onsite reviews**

Under 38 U.S.C. 5508, VA must conduct periodic onsite reviews of any fiduciary who is located in the United States and serving more than 20 beneficiaries and who has total VA funds under management for beneficiaries in excess of $50,000, as adjusted under 38 U.S.C. 5312. The purpose of section 5508 is to create a mechanism by which the Secretary can fulfill his statutory oversight responsibility. Section 5312 prescribes an increase in the payment rates and dollar limitations applicable to certain need-based VA benefits whenever there is an increase in benefit amounts payable under title II of the Social Security Act. In section 5508, Congress also authorized VA to conduct onsite reviews of fiduciaries under other circumstances as VA deems appropriate, regardless of the number of beneficiaries served by the fiduciary or the amount of funds under management for beneficiaries. The plain language of section 5508, ''[i]n addition to such other reviews of fiduciaries as the Secretary may otherwise conduct,'' indicates that VA may conduct onsite reviews of fiduciaries as necessary to ensure the well-being of beneficiaries or prevent exploitation of beneficiary funds.

VA implemented section 5508 based upon the statutory requirements but has since determined that regulations are necessary to remove ambiguity regarding the $50,000 threshold for mandatory onsite reviews, provide VA's interpretation of current law, and prescribe the scope of onsite reviews. Accordingly, we propose to add a new § 13.300 regarding onsite reviews as described below.

Proposed paragraph (a) would require the Hub Manager to conduct periodic, scheduled onsite reviews of certain fiduciaries. Proposed paragraph (a) would prescribe routine, periodic onsite reviews for all fiduciaries that meet the requirements of section 5508 as interpreted by VA in this proposed rule. Although section 5508 refers to a ''fiduciary serving in that capacity with respect to more than 20 beneficiaries,'' we propose to require a periodic onsite review if a ''fiduciary serves 20 or more beneficiaries.'' This difference from the statutory reference is authorized by section 5508's reference to ''such other reviews of fiduciaries as the Secretary may otherwise conduct.'' We interpret ''total annual amount of such benefits exceeds $50,000'' to mean the total amount of recurring monthly VA benefits paid to the fiduciary for all of the beneficiaries served by the fiduciary during a year. To read the statute otherwise might result in VA providing onsite reviews of fiduciaries based solely on a beneficiary's receipt of a retroactive, lump-sum, or one-time benefit payment. In our view, Congress intended that VA would conduct onsite reviews of fiduciaries who manage recurring monthly benefit payments that exceed the statutory threshold during a given year. We would not prescribe in the regulation the applicable monetary threshold for periodic onsite reviews, which, based upon the application of section 5312, would soon be out of date and require amendment. The current threshold for periodic onsite reviews is available on VA's Web site at *http://www.benefits.va.gov/fiduciary/fiduciary.asp.* Proposed paragraph (a)(3) would prescribe procedures for providing the fiduciary notice of the date for which VA has scheduled a periodic onsite review and the documents that VA will inspect.

Although Congress required ''periodic'' onsite reviews in section 5508, it did not specify the length of the period. However, we interpret section 5508 to mean that Congress intended a regular schedule of reviews, such that each fiduciary that meets the requirements for the reviews receives a visit from VA auditors according to the schedule. Based upon our experience in administering the program and conducting such reviews in conjunction with other oversight activities, we propose to require a periodic onsite review of every fiduciary that meets the requirements of paragraph (a)(1) triennially. We have determined that this schedule is feasible with current resources and is a reasonable interpretation of Congress's intent that we enhance oversight of certain fiduciaries who serve multiple beneficiaries.

Consistent with our interpretation of section 5508, proposed paragraph (b) would authorize the Hub Manager to conduct unscheduled onsite reviews, without regard to the number of beneficiaries served by the fiduciary or the amount of funds under management by the fiduciary, if the circumstances meet any one of the criteria in proposed paragraphs (b)(1) through (4). Such unscheduled onsite reviews are necessary to immediately respond to information indicating that the well-being of a beneficiary may be in jeopardy or that exploitation of beneficiary funds has occurred or may occur. Accordingly, we propose to authorize such unscheduled reviews if VA receives from any source credible information that a fiduciary has misused or is misusing VA benefits, the fiduciary has failed to file a required accounting not later than 120 days after the end of the accounting period, VA receives credible information that the fiduciary is not adequately performing the responsibilities of a fiduciary under proposed § 13.140, or the Hub Manager determines that an unscheduled onsite review is necessary to ensure that the fiduciary is acting in the interest of the beneficiary or beneficiaries the fiduciary serves.

Proposed paragraph (c) would prescribe the procedures for conducting onsite reviews, to include the scope of such reviews. Although VA has internal guidelines and policies regarding the scope of onsite reviews, we have determined that general rules regarding these reviews should be promulgated in regulations for purposes of enforcing compliance, limiting VA discretion, and providing legal notice. We have determined that industry standards and other agencies' practices, such as Social Security Administration's manner of conducting onsite reviews, would accomplish Congress's intent that VA enhance its oversight of certain fiduciaries. Specifically, reviewing records and conducting interviews with the beneficiary and third parties (to determine, among other things, accurate record keeping, reliable reporting, compliance with laws and regulations, and whether the beneficiary needs are met) are common oversight measures for ensuring that fiduciaries are satisfactorily performing their duties and beneficiaries are protected from misuse of their benefits by fiduciaries. Accordingly, we propose to prescribe a face-to-face meeting with the fiduciary, review of records, and interviews of other persons as determined necessary by the Hub Manager.

Proposed paragraph (c) would also prescribe the procedures for notifying fiduciaries of deficiencies. We would require the Hub Manager to provide the fiduciary a report regarding onsite review findings, including any deficiencies or request for additional information, not later than 30 days after completing the review. Unless the fiduciary establishes good cause for an extension, the fiduciary would be required to respond with information regarding correction of the deficiencies or provide requested information not later than 30 days after the date the Hub Manager mailed VA's report. Paragraph (c) would also require the Hub Manager to remove a fiduciary who does not cooperate in the onsite review process, is unable to produce required documents during the onsite review, fails to respond to a VA request for additional information or recommendation for corrective action, or is found during an onsite review to have misused benefits.

These provisions are necessary to ensure that fiduciaries have notice of VA's policies and procedures regarding onsite reviews, and to establish binding rules for VA personnel and fiduciaries. We also intend that they will promote consistency and predictability in VA's oversight activities.

**13.400 Misuse of benefits**

Under 38 U.S.C. 6106(a), a fiduciary may not collect a fee for providing fiduciary services for a beneficiary for any month for which VA or a court finds that the fiduciary misused the beneficiary's benefits. Under section 6106(b), misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of VA benefits for the ''use and benefit'' of a beneficiary and uses such payment, or any part of the payment, for a use other than the use and benefit of the beneficiary or the beneficiary's dependents. Section 6106(c) authorizes VA to prescribe the meaning of ''use and benefit'' in regulations. In 38 U.S.C. 6107, Congress authorized VA to reissue certain benefits to a beneficiary based upon a determination that the beneficiary's fiduciary misused benefits.

VA implemented the misuse provisions of section 6106 based upon the statutory language and does not currently have a regulation that prescribes binding rules for VA, beneficiaries, and fiduciaries. Consistent with current law and VA policy, we propose to implement section 6106 in a new § 13.400 as described below.

Proposed paragraph (a) would restate the statutory definition of misuse and define ''use and benefit'' as ''any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents.'' This definition would be consistent with current VA policy and would facilitate VA's identification of possible misuse. Furthermore, this definition would prevent a fiduciary from being held liable for misuse of benefits if an expenditure resulted in economic loss, but at the time of expenditure, it appeared to be reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents. In using the word ''support,'' we intend to authorize the fiduciary to take any steps the fiduciary deems necessary, given the beneficiary's VA benefit funds under management by the fiduciary and the beneficiary's circumstances, to improve the beneficiary's and the beneficiary's dependents' standard of living. A fiduciary's efforts to ensure that a beneficiary in the fiduciary program has the same standard of living as a beneficiary who is not in the program and has comparable resources would not be misuse of benefits.

Proposed paragraph (b) would prescribe the procedures for misuse determinations by VA and authorize the Hub Manager to make such determinations. The Hub Manager would be authorized to start a misuse investigation based upon receipt of credible information from any source. The results of the investigation and the Hub Manager's determination would be issued in a decision that meets the requirements in proposed paragraph (b). We propose to standardize the requirements for such determinations to ensure consistency and predictability for fiduciaries and beneficiaries.

In proposed paragraph (c), we would prescribe specific notice procedures for

misuse determinations by the Hub Manager. This notice is necessary because we have decided to continue the practice of allowing fiduciaries and beneficiaries to request reconsideration of misuse determinations, and we provide the right to appeal misuse determinations. *See* proposed 38 CFR 13.600. We propose that beneficiaries and fiduciaries may both request reconsideration of initial misuse determinations, but these requests are intended for different reasons. Beneficiaries may request reconsideration because they may have information to support an initial finding of misuse or a finding of additional misuse. Depending upon the number of beneficiaries that the fiduciary serves or any VA negligence in appointing and monitoring the fiduciary, such a beneficiary might be entitled to reissuance of benefits. On the other hand, fiduciaries may seek reconsideration after receiving notice regarding the initial misuse decision because the determination may result in a bar to future service, be the basis for the creation of a debt to the Government, or be the subject of a criminal proceeding. We propose to continue this current policy to ensure that we have sound reasons for removing a fiduciary from service for other beneficiaries. Such removals are disruptive for beneficiaries in the program and redirect limited fiduciary program recourses to successor appointments. We would not afford a fiduciary the right to appeal a misuse determination.

In spite of section 5507(d)'s reference to the appeal of a misuse determination by a fiduciary and the appointment of a temporary fiduciary during this period, we do not interpret section 5507(d) as expressing Congress' intent to authorize a right of appeal for fiduciaries. In fact, in a compromise agreement regarding the predecessor bill, the Committees intentionally omitted a provision that would have granted a right of appeal to fiduciaries accused of misuse. The Committees concluded that they needed to ''assess further the appropriateness of requiring a fiduciary accused of misuse by the Secretary to appeal such a finding in the appeals venue established for adjudicating veterans' entitlement claims.'' Thus, in our view, any ''appeal'' that a fiduciary might have pending regarding a misuse matter would likely be in a criminal proceeding.

In addition, in proposed § 13.410, we would delegate to the Director of VA's Pension and Fiduciary Service the authority for determining whether VA was negligent for purposes of reissuance of benefits. Proposed paragraph (c) would require notice of the Hub Manager's misuse determination to the Director for this purpose.

Proposed paragraph (d) would prescribe the procedure for reconsideration of the Hub Manager's misuse determination. While there is no right to act as a fiduciary for a beneficiary and VA's misuse determinations are not appealable by the fiduciary, we continue to believe that a reconsideration procedure ensures that VA has all of the information necessary to make the best possible decisions regarding misuse of benefits. Accordingly, we propose to allow fiduciaries and beneficiaries, using the procedure prescribed in proposed paragraph (d), to seek reconsideration of a Hub Manager's misuse determination. To obtain reconsideration of a Hub Manager's misuse determination, the fiduciary or the beneficiary would have to file a written request for reconsideration, not later than 30 days after the date on which the Hub Manager provides notice of his or her misuse decision under paragraph (c). Reconsideration of a misuse decision would be delegated to the VA Regional Office Director who has jurisdiction over the fiduciary hub and would be based upon a review of information of record as of the date of the Hub Manager's decision and any new information submitted with the written reconsideration request. For purposes of consistency in decision-making, proposed paragraph (d) would also prescribe the requirements for the Regional Office Director's decision and require the same notice as prescribed for the initial misuse determination.

It is current VA policy to seek the prosecution of fiduciaries who misuse VA benefits. Prosecution is a deterrent for acting fiduciaries and may provide a basis for a restitution order that will return misused benefits to the beneficiary. In proposed 13.400, we would provide a cross reference to 38 CFR 1.204, which requires VA employees to immediately refer to the VA Office of Inspector General possible criminal matters involving felonies, i.e., serious crimes, to include theft of Government funds in excess of $1,000. This regulation requires VA management officials to immediately report certain criminal matters to the Inspector General. Thus, in the fiduciary misuse context, § 1.204 requires the Hub Manager to report information regarding suspected misuse of beneficiary funds to the Office of Inspector General long before the notice prescribed in paragraph (e). We also propose to codify VA's current practice in proposed paragraph (e), under which the Regional Office Director reports final misuse determinations, whether made by the Hub Manager or the Director upon reconsideration, to the VA Office of Inspector General not later than 30 days after a final determination for evaluation by the Inspector General for further action notwithstanding the 30-day notice requirement. We also note that VA must occasionally withhold taking action regarding misuse and reissuance of benefits while the Office of Inspector General completes an investigation or while a matter is being prosecuted. However, VA has a legal obligation to reissue misused benefits in certain cases and must act promptly in restoring benefits to beneficiaries upon the completion of an Inspector General evaluation or a prosecution. Accordingly, proposed paragraph (e) would also require the Office of Inspector General to advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision or judgment.

**13.410 Reissuance and recoupment of misused benefits**

Under 38 U.S.C. 6107(a) through (c), VA has authority to reissue misused benefits when VA is negligent in administering aspects of the fiduciary program or, without regard to negligence, when the fiduciary is an entity who provides fiduciary services for one or more beneficiaries or an individual who provides fiduciary services for 10 or more beneficiaries. Section 6107(d) requires VA to make a ''good faith effort to obtain recoupment'' from fiduciaries who misuse benefits. VA implemented its authority under section 6107 based upon the statutory provisions and does not currently have a regulation governing reissuance of benefits. However, the statute does not prescribe the procedures that VA is to use in reissuance cases, the scope of VA's negligence determinations, or the extent to which VA is to seek recoupment of benefits from certain fiduciaries. Accordingly, we propose to implement section 6107 in proposed § 13.410 as described below.

Proposed paragraph (a) restates section 6107(b) without substantive change as the general rule in reissuance cases. Under this rule, which would be administered at the local level by the VA Regional Office Director who has jurisdiction over the fiduciary hub in which the misuse case arose, VA would reissue benefits if the fiduciary is an

individual who served 10 or more beneficiaries during any month in which the misuse occurred, or is a corporation or other entity serving one or more beneficiaries. Consistent with section 6107(c) and VA's policy requiring removal of fiduciaries who misuse benefits, we would clarify in proposed paragraph (a) that the Regional Office Director will reissue benefits in the amount equal to the amount of funds misused to the beneficiary's successor fiduciary.

Proposed paragraph (b) implements the provisions of section 6107(a) regarding reissuance of benefits based upon a determination that VA negligence resulted in misuse of benefits. The proposed rule is intended to make clear that the relevant statutory and regulatory provisions are applicable in cases of misuse by an individual fiduciary who has funds under management for fewer than 10 beneficiaries during any month in which misuse occurred. One of the criteria in section 6107(a) for reissuance of benefits based upon a negligence determination is that ''actual [VA] negligence is shown.'' We interpret this provision to mean that Congress did not intend to limit the criteria for reissuance of benefits based upon negligence to the circumstances in section 6107(a)(2)(A) and (B) regarding review of accountings and misuse allegations. Rather, Congress intended to authorize VA to reissue benefits in any case in which VA negligence proximately caused misuse. We propose to define ''actual negligence'' using a common legal definition of ''negligence'' and prescribe the criteria for making such a determination.

We have determined that VA should not prescribe local administration of reissuance of benefits under section 6107(a). Program integrity requires that someone other than the Regional Office Director or Hub Manager determine whether VA's field fiduciary personnel were negligent in administering the program. Accordingly, in proposed paragraph (b), we would require the Hub Manager to refer all final misuse determinations that meet the criteria in section 6107(a) to the Director of the Pension and Fiduciary Service for a negligence determination. The Regional Office Director would be required to reissue benefits if the Pension and Fiduciary Service Director determines that VA negligence caused the misuse.

Proposed paragraph (c) would implement section 6107(d), which requires VA to ''make a good faith effort to obtain recoupment'' of misused benefits from the fiduciary in any case in which VA reissues benefits. Congress did not address how VA would accomplish such recoupment of benefits. We do not interpret section 6107(d) as limiting VA's authority under 38 U.S.C. chapters 55 and 61 to generally make a good faith effort to recoup benefits in all cases of misuse, particularly in cases where VA is not authorized to reissue benefits. Accordingly, the introductory text in proposed paragraph (c) would prescribe the general rule that VA will make a good faith effort to recoup benefits from the fiduciary in every misuse case. In proposed paragraph (c)(1), we would define ''good faith effort'' to mean that the Hub Manager will attempt to recoup benefits from the surety company if a bond was in place. If a bond was not in place, the Hub Manager will request the creation of a debt to the United States in the amount of any misused benefits, and coordinate further recoupment or debt collection action with the appropriate Federal and State agencies. Consistent with VA's current policy of removing fiduciaries who misuse benefits, proposed paragraph (c)(2) would prescribe repayment of any recovered benefits to the beneficiary's successor fiduciary after deducting any amount reissued under proposed paragraph (a) or (b).

Proposed paragraph (d) would prescribe written notice to the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent regarding any matter governed by proposed § 13.410.

Although VA does not have authority to reissue benefits to all beneficiaries who are victims of misuse, we intend that proposed § 13.410 would implement the broadest possible interpretation of current law, such that every beneficiary who qualifies has the benefit of reissuance or recoupment procedures.

**13.500 Removal of fiduciaries**

Under 38 U.S.C. 5502(a)(1), when a fiduciary is acting in such a number of cases that the fiduciary is not able to properly perform the responsibilities of a fiduciary for each beneficiary, VA may ''refuse to make future payments in such cases.'' Also, under section 5502(b), VA may suspend payments to any fiduciary who does not comply with VA's accounting requirements or ''who shall neglect or refuse to administer the estate according to law.'' Congress otherwise delegated authority to VA to determine the circumstances under which it would be appropriate to remove a fiduciary. VA implemented this authority in current 38 CFR 13.100, which generally prescribes that the Veterans Service Center Manager may remove a fiduciary and appoint a successor fiduciary when it is in the beneficiary's interest. Current § 13.100(b) distinguishes fiduciaries who are also appointed by the court by requiring that the Service Center Manager will ''take such informal action as may be necessary'' to meet the needs of the beneficiary.

We have determined that current § 13.100 does not provide clear notice regarding all of the circumstances under which VA will remove a fiduciary. Further, as noted in this preamble, VA appoints and oversees all fiduciaries, regardless of whether the fiduciary is also appointed by a court. In attempting to distinguish between ''Federal'' fiduciaries and VA-appointed fiduciaries who are also appointed by a court, the current regulations needlessly add complexity and ambiguity for users. As noted above in this preamble, we propose to generally refer to ''fiduciaries'' and apply our proposed rules uniformly to all fiduciaries. For these reasons, we propose to remove current § 13.100 and replace it with proposed § 13.500 as described below.

In proposed § 13.500(a), we would authorize the Hub Manager to remove a fiduciary. The regulation would then be organized to provide notice regarding the reasons for removal that may be attributed to the beneficiary or the fiduciary, followed by applicable removal procedures. We do not intend any substantive change by listing in one section the reasons and procedures for removal. Our intent is to provide beneficiaries and fiduciaries notice regarding the grounds for removal and references to the regulations that contain substantive provisions or additional procedures.

Proposed paragraph (a)(1), regarding beneficiary reasons for removal, would authorize removal if the beneficiary is subsequently rated as being able to manage his or her own VA benefits, requests appointment of a successor fiduciary, requests supervised direct payment of his or her VA benefits under proposed § 13.110, or dies while receiving fiduciary services.

Proposed paragraph (a)(2), regarding fiduciary reasons for removal, would authorize removal when further service is barred or the fiduciary is not adequately performing the responsibilities of a fiduciary. These reasons, listed under proposed paragraph (a)(2)(i) through (viii) include, among other things, the fiduciary's failure to follow accounting requirements, misuse of benefits, failure to obtain a surety bond, or inability to continue the management of beneficiary funds.

Current § 13.100 does not prescribe the procedures for removal of a fiduciary. This has led to inconsistency in the manner in which VA ensures that beneficiary needs are being met during the removal of a fiduciary and appointment of a successor fiduciary. To ensure consistency in VA's removal actions and continuity of service for beneficiaries, proposed paragraph (b)(1) would require the Hub Manager to provide the fiduciary and the beneficiary written notice of the removal and to instruct the fiduciary regarding the fiduciary's responsibilities prior to transfer of funds to a successor. In proposed paragraph (b)(2), we would require the fiduciary to continue as fiduciary for the beneficiary until the Hub Manager instructs the fiduciary to transfer funds to the successor fiduciary. Finally, we would generally require the removed fiduciary to submit a final accounting to the fiduciary hub not later than 30 days after the date on which the fiduciary transferred funds to the successor.

We intend that the provisions of proposed § 13.500 would provide clear notice regarding the grounds for removal and the procedures for transitioning to a successor fiduciary.

**13.510 Fiduciary Withdrawals**

In administering the fiduciary program, we have encountered cases in which a fiduciary chooses to withdraw from service for a beneficiary and discontinues such service with very little notice to VA or the beneficiary. In these circumstances, VA may be unable to expeditiously appoint a successor fiduciary and arrange for transfer of accumulated funds, which could harm the beneficiary to the extent that a fiduciary is not available to meet immediate needs or ensure payment of recurring bills. While Congress gave VA broad authority to appoint and remove fiduciaries, it did not address whether a fiduciary may withdraw from service for a beneficiary at any time without regard to the impact on the beneficiary. Current VA regulations also do not address the circumstances under which a fiduciary may withdraw from service or the procedures for such withdrawal. We interpret VA's authority under 38 U.S.C. chapters 55 and 61 as also authorizing VA to establish withdrawal procedures for fiduciaries to ensure continuity of service. Accordingly, we propose to add a new § 13.510 as described below.

Proposed paragraph (a) would prescribe the general rule that a fiduciary may not voluntarily withdraw from service for a beneficiary until the fiduciary receives notice from the Hub Manager regarding transfer of the beneficiary's funds to a successor fiduciary. The Hub Manager would provide such notice after having arranged for transfer of VA benefit funds under management by the fiduciary and the establishment of recurring payments to a successor fiduciary. While we recognize that there is no right to act as a fiduciary for a beneficiary and that VA cannot force an individual or entity to provide fiduciary services, VA has authority under our interpretation of current law to require individuals and entities that choose to provide fiduciary services to continue those services until VA appoints a successor. An alternative interpretation, under which a fiduciary may withdraw at any time and without regard to VA's appointment of a successor, would be unreasonable because it would jeopardize the well-being of the beneficiaries whom Congress sought to protect when it created the fiduciary program. Nonetheless, we recognize that there may be circumstances under which a fiduciary would need to withdraw as quickly as possible. We therefore propose to establish a withdrawal procedure that requires the Hub Manager to expeditiously process a withdrawal request.

Proposed paragraph (b) would prescribe the applicable withdrawal procedure. We would require the fiduciary to provide the Hub Manager written notice of the fiduciary's intent to withdraw as fiduciary for a beneficiary. To facilitate the appointment of a successor and ensure continuity of service for the beneficiary, we would require the fiduciary to describe the reasons for withdrawal and to continue service until the Hub Manager arranges for transfer of services to a successor fiduciary. Not later than 30 days after transferring the beneficiary's funds to the successor, the former fiduciary would be required to submit a final accounting to the fiduciary hub. The 30-day requirement is consistent with the current practice for submission of annual accountings and would ensure the timely transfer of funds to the successor fiduciary for the benefit of a beneficiary whose basic needs may depend on the services of a fiduciary.

To protect the interests of fiduciaries seeking to withdraw, proposed paragraph (b)(2) would require the Hub Manager to make a reasonable effort under the circumstances to expedite the appointment of a successor fiduciary. In our view, this ''under the circumstances'' determination would require a case-by-case analysis. For example, a corporate fiduciary that serves many beneficiaries might not be able to withdraw as quickly as a family member fiduciary who serves only one beneficiary and who will be replaced by another family member. We would prescribe criteria for the Hub Manager to use in determining the extent to which the processing of a withdrawal request must be expedited, including the fiduciary's stated reasons for the withdrawal request, the number of beneficiaries affected, the relationship between the fiduciary and the affected beneficiary or beneficiaries, and whether expedited withdrawal is necessary to protect the interests of the beneficiary or beneficiaries.

Proposed paragraph (c) would require the Hub Manager to provide the beneficiary or beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of the withdrawal request and the procedures for appointment of a successor fiduciary.

**13.600 Appeals**

In *Freeman* v. *Shinseki,* the Veterans Court held that a beneficiary may appeal VA's fiduciary appointment decisions to the Board of Veterans' Appeals (Board) and, consequently, to the Veterans Court and the U.S. Court of Appeals for the Federal Circuit. Although a fiduciary appointment decision is not a decision on a claim for benefits, the Veterans Court concluded that a fiduciary appointment decision is made under a law that affects the provision of benefits, which places it within the Board's jurisdiction.

Prior to the Veterans Court's decision, VA's longstanding interpretation of the law was that fiduciary appointments are committed to the Secretary of Veterans Affairs' discretion by law and could not be appealed. VA policy recognized that beneficiaries rated by VA as being unable to manage their own VA benefits had already been afforded the right of appeal regarding that rating. It also recognized that affording an additional right of appeal regarding the individual or entity best suited to handle financial matters for the beneficiary would be inconsistent with the fact that the beneficiary had already been found incapable of managing financial matters. Accordingly, VA did not promulgate regulations regarding appeals in fiduciary appointments prior to the *Freeman* decision. We propose to implement the court's decision in § 13.600 regarding appeals as described below.

The introductory text to proposed § 13.600 would prescribe the general rule that fiduciary matters are committed to the Secretary of Veterans Affairs' discretion by law and cannot be

appealed to the Board or any court. Consistent with VA's interpretation of the *Freeman* decision, the exceptions to this general rule would be prescribed in proposed paragraph (a).

Although the court's holding in *Freeman* was limited to fiduciary appointments under section 5502, we interpret it to mean that there is a right to appeal any fiduciary decision that is made under a law that affects the provision of benefits to veterans or to the dependents or survivors of veterans. Accordingly, we propose to extend this right to removal decisions. We also propose to permit appeals of VA's reissuance-of-benefits decisions under proposed § 13.410. Thus, any decision that VA will not reissue benefits, regardless of the bases for that decision, could be appealed by the beneficiary to the Board. However, a finding of misuse is a prerequisite to reissuance of benefits under proposed § 13.410, and a finding that VA negligence caused fiduciary misuse of benefits is an additional prerequisite for reissuance of benefits under proposed § 13.410(b). For these reasons, proposed paragraphs (a)(1) through (5) would list the various appointment, removal, misuse, and negligence decisions that may be appealed by beneficiaries in the fiduciary program.

Proposed paragraph (b)(1) would prescribe that VA decisions regarding fiduciary matters are final, subject only to the beneficiary's right of appeal as further prescribed in section 13.600. We would also prescribe that the record regarding these final decisions will close on the date the decision is made. As noted in this preamble, decisions on fiduciary matters are not decisions on claims for benefits and would not be afforded the same procedures as prescribed by VA for benefit claims under 38 CFR part 3. We intend that appeals in fiduciary matters would be processed expeditiously to avoid delaying VA's effort to resolve the beneficiary's disagreement with an appointment or issue a statement of the case or certify an appeal to the Board.

Except as prescribed in proposed paragraph (b)(1), VA's appeal regulations in 38 CFR parts 19 and 20 would be applicable to the appeals authorized in this regulation. We would provide notice regarding the applicability of these provisions in proposed paragraph (b)(2). Although we would close the record regarding appealable decisions under paragraph (b)(1), we would clarify that such action would not limit the Board's authority to remand a matter to the Hub Manager, Regional Office Director, or Director of the Pension and Fiduciary Service under 38 CFR 19.9 for any action necessary for an appellate decision or the issuance of a supplemental statement of the case under 38 CFR 19.31(b)(2), (b)(3), or (c).

**Paperwork Reduction Act**

This proposed rule contains provisions constituting collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), at 38 CFR 13.30, 13.140, 13.230, 13.280 and 13.600.

The information collection requirements for §§ 13.280 and 13.600 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB Control Nos. 2900–0017 and 2900–0085. The proposed rule at §§ 13.30, 13.140, and 13.230 contains collections of information that require approval by OMB. The collection required by § 13.30, while implicit in the plan of collection approved by OMB control number 2900–0017, would now become an explicit requirement under the proposed rule. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking to OMB for review. OMB assigns a control number for each collection of information it approves. VA 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. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to: Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave, NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026 (this is not a toll-free number); or email comments through *www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AO53.''

OMB is required to make a decision concerning the collections of information contained in this proposed 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. This does not affect the deadline for the public to comment on the proposed rule. VA requests comments by the public on proposed collections of information in—

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

The collection of information contained in 38 CFR 13.30, 13.140, and 13.230 is described immediately following this paragraph, under their respective titles.

*Title:* Beneficiary rights.

*Summary of collection of information:* Under proposed 38 CFR 13.30(b)(6), a beneficiary has the right to obtain from his or her fiduciary a copy of the fiduciary's VA-approved annual accounting. Although the collection requirement of the annual accounting itself is already authorized under OMB Control No. 2900–0017, the proposed rule would make explicit the fiduciary's duty to provide a copy of such accounting to the beneficiary upon request. A fiduciary could provide this copy to the beneficiary by mail, email, or in person. The required form is authorized under OMB Control No. 2900–0017.

*Description of the need for information and proposed use of information:* This information is needed for purposes of keeping the beneficiary informed as to the status of his or her VA benefit funds under management.

*Description of likely respondents:* Fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary.

*Estimated number of respondents per year:* 33,000.

*Estimated frequency of responses:* Once per year.

*Estimated total annual reporting and recordkeeping burden:* 5,550 additional hours.

*Title:* Responsibilities of fiduciaries.

*Summary of collection of information:* Under proposed 38 CFR 13.140, a

fiduciary is required to keep VA apprised of any change in the beneficiary's circumstances which might adversely impact the beneficiary's well-being. A fiduciary could report any change telephonically or in writing. No form is required for the submission of this information.

*Description of the need for information and proposed use of information:* This information is needed for purposes of coordinating a proper response to the beneficiary's benefit or other needs, to include referral to the Veterans Health Administration or other public or private agencies for delivery of services.

*Description of likely respondents:* Fiduciaries appointed by VA to manage VA benefit payments on behalf of a beneficiary.

*Estimated number of respondents per year:* 37,500.

*Estimated frequency of responses:* Once per year.

*Estimated total annual reporting and recordkeeping burden:* 1,875 additional hours.

*Title:* Protection of beneficiary funds.

*Summary of collection of information:* Under proposed 38 CFR 13.230, a fiduciary is required to submit proof of adequate bonding with each annual accounting and at any other time the Hub Manager requests such proof. The proof could be a copy of the bond certificate or the contractual agreement between the fiduciary and the bonding company. No form is required.

*Description of the need for information and proposed use of information:* The information is needed to facilitate VA's oversight regarding the funds under management protection requirements prescribed in proposed § 13.230.

*Description of likely respondents:* Certain fiduciaries appointed by VA who manage VA benefit funds in excess of $25,000.

*Estimated number of respondents per year:* 10,000.

*Estimated frequency of responses:* Once per year.

*Estimated total annual reporting and recordkeeping burden:* 167 additional hours.

**Regulatory Flexibility Act**

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The proposed rule would primarily affect individual beneficiaries and fiduciaries. It would not cause a significant economic impact on fiduciaries since VA generally appoints individual family members, friends, or caretakers, who provide fiduciary services for beneficiaries. Further, only a small portion of the business of entities that provide fiduciary services concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

**Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance program number and title for this proposed rule are as follows: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

**Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on May 20, 2013 for publication.

**List of Subjects**

*38 CFR part 3*

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, and Vietnam.

*38 CFR part 13*

Surety bonds, Trusts and trustees, and Veterans.

Dated: December 12, 2013.

**Robert C. McFetridge,**

*Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, VA proposes to amend 38 CFR parts 3 and 13 to read as follows:

## PART 3—ADJUDICATION

### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

**§ 3.353 [Amended]**

■ 2. Amend § 3.353 by:

■ a. In paragraph (b)(1), removing ''§ 13.56'' and adding, in its place, ''§ 13.110''.

■ b. In paragraph (b)(2), removing ''§ 13.55'', ''§ 13.56'', and ''§ 13.57'' and adding, in each place, ''§ 13.100''.

**§ 3.401 [Amended]**

■ 3. Amend § 3.401 by removing and reserving paragraph (d).

■ 4. In § 3.403, revise the paragraph heading for paragraph (a)(2) to read as follows:

**§ 3.403 Children.**

(a) * * *

(2) *Majority (§ 13.100).* * * *

* * * * *

■ 5. In § 3.452, revise the CROSS REFERENCES immediately after paragraph (d) to read as follows:

**§ 3.452 Situations when benefits may be apportioned.**

* * * * *

CROSS REFERENCES: Disappearance of veteran. See § 3.656. Reduction because of hospitalization. See 3.551. Penal institutions. See § 3.666.

**§ 3.500 [Amended]**

■ 6. In § 3.500, remove and reserve paragraphs (l) and (m).

**§ 3. 501 [Amended]**

■ 7. In § 3.501, remove and reserve paragraph (j) and remove paragraph (n).

§§ 3.850 through 3.857 [Removed]

■ 8. Remove §§ 3.850 through 3.857 and the undesignated center heading ''INCOMPETENTS, GUARDIANSHIP AND INSTITUTIONAL AWARDS'' immediately preceding § 3.850.

■ 9. Part 13 is revised to read as follows:

## PART 13—FIDUCIARY ACTIVITIES

Sec.
13.10 Purpose and applicability of other regulations.
13.20 Definitions.
13.30 Beneficiary rights.
13.40 Representation of beneficiaries in the fiduciary program.
13.50 Suspension of benefits.
13.100 Fiduciary appointments.
13.110 Supervised direct payment.
13.120 Field examinations.
13.130 Bars to serving as a fiduciary.
13.140 Responsibilities of fiduciaries.
13.200 Fiduciary accounts.
13.210 Fiduciary investments.
13.220 Fiduciary fees.
13.230 Protection of beneficiary funds.
13.240 Funds of beneficiaries less than 18 years old.
13.250 Funds of deceased beneficiaries.
13.260 Personal funds of patients.
13.270 Creditors' claims.
13.280 Accountings.
13.300 Onsite reviews.
13.400 Misuse of benefits.
13.410 Reissuance and recoupment of misused benefits.
13.500 Removal of fiduciaries.
13.510 Fiduciary withdrawals.
13.600 Appeals.

**Authority:** 38 U.S.C. 501, 5502, 5506–5510, 6101, 6106–6108, and as noted in specific sections.

**§ 13.10 Purpose and applicability of other regulations.**

(a) *Purpose.* The regulations in this part implement the Department of Veterans Affairs (VA) fiduciary program, which is authorized by 38 U.S.C. chapters 55 and 61. The purpose of the fiduciary program is to protect certain VA beneficiaries who, as a result of injury, disease, or infirmities of advanced age, or by reason of being less than 18 years of age, cannot manage their VA benefits. Under this program, VA oversees these vulnerable beneficiaries to ensure their well-being, and appoints and oversees fiduciaries who manage these beneficiaries' benefits.

(b) *Applicability of other regulations.* Fiduciary matters arise after VA has determined that a beneficiary is entitled to benefits, and decisions on fiduciary matters are not decisions on claims for VA benefits. Accordingly, VA's regulations governing the adjudication of claims for benefits, *see* 38 CFR part 3, do not apply to fiduciary matters unless VA has prescribed applicability in this part.

(Authority: 38 U.S.C. 501)

**§ 13.20 Definitions.**

The following definitions apply to this part:

*Dependent* means a beneficiary's spouse as defined by this section, a beneficiary's child as defined by § 3.57 of this chapter, or a beneficiary's parent as defined by § 3.59 of this chapter, who does not have an income sufficient for reasonable maintenance and who obtains support for such maintenance from the beneficiary.

*Fiduciary* means an individual or entity appointed by VA to receive VA benefits on behalf of a beneficiary for the use and benefit of the beneficiary and the beneficiary's dependents.

*Hub Manager* means the individual who has authority to oversee the activities of a VA Fiduciary Hub or the Veterans Service Center Manager of the VA Manila Regional Office.

*In the fiduciary program* means, with respect to a beneficiary, that the beneficiary:

(i) Has been rated by VA as incapable of managing his or her own VA benefits as a result of injury, disease, or the infirmities of advanced age;

(ii) Has been determined by a court with jurisdiction as being unable to manage his or her own financial affairs; or

(iii) Is less than 18 years of age.

*Rating authority* means VA employees who have authority under § 3.353 of this chapter to determine whether a beneficiary can manage his or her VA benefits.

*Relative* means a person who is an adopted child or is related to a beneficiary by blood or marriage.

*Restricted withdrawal agreement* means a written contract between VA, a fiduciary, and a financial institution in which the fiduciary has VA benefit funds under management for a beneficiary, under which certain funds cannot be withdrawn without the consent of the Hub Manager.

*Spouse* means a husband or wife whose marriage, including ''common law'' marriage and same-sex marriage, meets the requirements of 38 U.S.C. § 103(c).

*VA benefit funds under management* means the combined value of the VA funds maintained in a fiduciary account or accounts managed by a fiduciary for a beneficiary under § 13.200 and any VA funds invested by the fiduciary for the beneficiary under § 13.210, to include any interest income and return on investment derived from any account.

(Authority: 38 U.S.C. 501)

**§ 13.30 Beneficiary rights.**

Except as prescribed in this part, a beneficiary in the fiduciary program is entitled to the same rights afforded any other VA beneficiary.

(a) *General policy.* Generally, a beneficiary has the right to manage his or her own VA benefits. However, due to a beneficiary's injury, disease, or infirmities of advanced age or by reason of being less than 18 years of age, VA may determine that the beneficiary is unable to manage his or her benefits without VA supervision or the assistance of a fiduciary. Or a court with jurisdiction might determine that a beneficiary is unable to manage his or her financial affairs. Under any of these circumstances, VA will apply the provisions of this part to ensure that VA benefits are being used to maintain the well-being of the beneficiary and the beneficiary's dependents.

(b) *Specific rights.* The rights of beneficiaries in the fiduciary program include, but are not limited to, the right to:

(1) Receive direct payment of recurring monthly benefits until VA appoints a fiduciary if the beneficiary is 18 years of age or older;

(2) Receive notice regarding VA's appointment of a fiduciary or any other decision on a fiduciary matter that affects VA's provision of benefits to the beneficiary;

(3) Appeal to the Board of Veterans' Appeals VA's appointment of a fiduciary;

(4) Be informed of the fiduciary's name, telephone number, mailing address, and email address;

(5) Contact his or her fiduciary and request a disbursement of funds for current or foreseeable needs or consideration for payment of previously incurred expenses, account balance information, or other information or assistance consistent with the responsibilities of the fiduciary prescribed in § 13.140;

(6) Obtain from his or her fiduciary a copy of the fiduciary's VA-approved annual accounting;

(7) Have VA reissue benefits misused by a fiduciary if VA is negligent in appointing or overseeing the fiduciary or if the fiduciary who misused the benefits meets the criteria prescribed in § 13.410;

(8) Appeal to the Board of Veterans' Appeals VA's determination regarding its own negligence in misuse and reissuance of benefits matters;

(9) Submit to VA a reasonable request for appointment of a successor fiduciary. For purposes of this paragraph, *reasonable request* means a good faith effort to seek replacement of a fiduciary, if:

(i) The beneficiary's current fiduciary receives a fee deducted from the beneficiary's account under § 13.220 and the beneficiary requests an unpaid volunteer fiduciary who ranks higher in the order of preference under § 13.100(e);

(ii) The beneficiary requests removal of his or her fiduciary under § 13.500(a)(1)(iii) and supervised direct payment of benefits under § 13.110; or

(iii) The beneficiary provides credible information that the current fiduciary is not acting in the beneficiary's interest or is unable to effectively serve the beneficiary due to a personality conflict or disagreement and VA is not able to obtain resolution;

(10)(i) Be removed from the fiduciary program and receive direct payment of benefits without VA supervision provided that the beneficiary:

(A) Is rated by VA as able to manage his or her own benefits; or

(B) Is determined by a court with jurisdiction as able to manage his or her financial affairs; or

(C) Attains the age of 18 years;

(ii) Have a fiduciary removed and receive direct payment of benefits with VA supervision as prescribed in § 13.110 regarding supervised direct payment and § 13.500 regarding removal of fiduciaries generally, provided that the beneficiary establishes the ability to manage his or her own benefits with limited and temporary VA supervision; and

(11) Be represented by a VA-accredited attorney, claims agent, or representative of a VA-recognized veterans service organization. This includes the right to have a representative present during a field examination and the right to be represented in the appeal of a fiduciary matter under § 13.600.

(Authority: 38 U.S.C. 501)

**§ 13.40 Representation of beneficiaries in the fiduciary program.**

The provisions of 38 CFR 14.626 through 14.629 and 14.631 through 14.637 regarding accreditation and representation of VA claimants and beneficiaries in proceedings before VA are applicable to representation of beneficiaries before VA in fiduciary matters governed by this part.

(a) *Accreditation.* Only VA-accredited attorneys, claims agents, and accredited representatives of VA-recognized veterans service organizations who have complied with the power-of-attorney requirements in § 14.631 of this chapter may represent beneficiaries before VA in fiduciary matters.

(b) *Standards of conduct.* Accredited individuals who represent beneficiaries in fiduciary matters must comply with the general and specific standards of conduct prescribed in § 14.632(a) through (c) of this chapter, and attorneys must also comply with the standards prescribed in § 14.632(d). For purposes of this section:

(1) A fiduciary matter is not a claim for VA benefits. However, the term *claimant* in § 14.632 of this chapter includes VA beneficiaries who are in the fiduciary program, and the term *claim* in § 14.632 includes a fiduciary matter that is pending before VA.

(2) The provisions of § 14.632(c)(7) through (9) of this chapter mean that an accredited individual representing a beneficiary in a fiduciary matter may not:

(i) Delay or refuse to cooperate in the processing of a fiduciary appointment or any other fiduciary matter, including but not limited to a field examination prescribed by § 13.120 and the investigation of a proposed fiduciary prescribed by § 13.100;

(ii) Mislead, threaten, coerce, or deceive a beneficiary in the fiduciary program or a proposed or current fiduciary regarding payment of benefits or the rights of beneficiaries in the fiduciary program; or

(iii) Engage in, or counsel or advise a beneficiary or proposed or current fiduciary to engage in, acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA.

(3) The Hub Manager will submit a written report regarding an alleged violation of the standards of conduct prescribed in this section to the VA Assistant General Counsel who administers the accreditation program for a determination regarding further action, including suspension or cancellation of accreditation under § 14.633 of this chapter, and notification to any agency, court, or bar to which the attorney, agent, or representative is admitted to practice.

(c) *Fees.* Except as prescribed in paragraphs (c)(1)(i) through (iii) of this section, an accredited attorney or claims agent may charge a reasonable fixed or hourly fee for representation services provided to a beneficiary in a fiduciary matter, provided that the fee meets the requirements of § 14.636 of this chapter.

(1) The following provisions of § 14.636 of this chapter do not apply in fiduciary matters:

(i) Fees under § 14.636(e) of this chapter, to the extent that the regulation authorizes a fee based on a percentage of benefits recovered;

(ii) The presumptions prescribed by § 14.636(f) of this chapter based upon a percentage of a past-due benefit amount. In fiduciary matters, the reasonableness of a fixed or hourly-rate fee will be determined based upon application of the reasonableness factors prescribed in § 14.636(e); and

(iii) Direct payment of fees by VA out of past-due benefits under § 14.636(g)(2) and (h) of this chapter.

(2) An accredited attorney or claims agent who wishes to charge a fee for representing a beneficiary in a fiduciary matter must comply with the fee agreement filing requirement prescribed in § 14.636(g)(3) of this chapter.

(3) VA, the beneficiary, or the beneficiary's fiduciary may challenge the reasonableness of a fee charged by an accredited attorney or claims agent using the procedures prescribed in § 14.636(i) of this chapter.

(Authority: 38 U.S.C. 501, chapter 59)

**§ 13.50 Suspension of benefits.**

(a) Notwithstanding the beneficiary rights prescribed in § 13.30, the Hub Manager will temporarily suspend payment of benefits and hold such benefits in the U.S. Treasury to the credit of the beneficiary or take other action that the Hub Manager deems appropriate to prevent exploitation of VA benefit funds or to ensure that the beneficiary's needs are being met, if:

(1) The beneficiary or the beneficiary's attorney, claims agent, or

representative withholds cooperation in any of the appointment and oversight procedures prescribed in this part; or

(2) VA removes the beneficiary's fiduciary for any reason prescribed in § 13.500(b) and is unable to appoint a successor fiduciary before the beneficiary has an immediate need for disbursement of funds.

(b) All or any part of the funds held in the U.S. Treasury to the beneficiary's credit under paragraph (a) of this section will be disbursed under the order and in the discretion of the VA Regional Office Director who has jurisdiction over the fiduciary hub or regional office for the benefit of the beneficiary or the beneficiary's dependents.

(Authority: 38 U.S.C. 501, 512, 5502, 5504)

**§ 13.100 Fiduciary appointments.**

(a) *Authority.* Except as prescribed in paragraph (b) of this section, the Hub Manager will appoint a fiduciary for a beneficiary who:

(1) Has been rated by VA as being unable to manage his or her VA benefits,

(2) Has been determined by a court with jurisdiction as being unable to manage his or her financial affairs, or

(3) Has not reached age 18.

(b) *Exceptions.* The Hub Manager will not appoint a fiduciary for a beneficiary who:

(1) Is eligible for supervised direct payment under § 13.110, or

(2) Is not a beneficiary described in paragraph (a)(1) or (a)(2) of this section and has not reached age 18, and

(i) Is serving in the Armed Forces of the United States,

(ii) Has been discharged from service in the Armed Forces of the United States, or

(iii) Qualifies for survivors' benefits as a surviving spouse.

(c) *Retroactive benefit payments.* The Hub Manager will withhold any retroactive, one-time, or other lump-sum benefit payment awarded to a beneficiary described in paragraph (a) of this section until the Hub Manager has appointed a fiduciary for the beneficiary and, if applicable, the fiduciary has obtained a surety bond under § 13.230.

(d) *Initial appointment.* In appointing a fiduciary, the Hub Manager will make every effort to appoint the person, agency, organization, or institution that will best serve the interest of the beneficiary. The Hub Manager will consider the results of a field examination, which will include a face-to-face meeting with the beneficiary and the beneficiary's dependents at their residence when practicable, and will conduct the investigation prescribed in paragraph (f) of this section. The Hub Manager will also consider whether:

(1) VA benefits can be paid directly to the beneficiary with limited and temporary supervision by VA, as prescribed in § 13.110;

(2) The circumstances require appointment of a temporary fiduciary under paragraph (h) of this section; and

(3) The proposed fiduciary is complying with the responsibilities of a fiduciary prescribed in § 13.140 with respect to all beneficiaries in the fiduciary program currently being served by the proposed fiduciary and whether the proposed fiduciary can handle an additional appointment without degrading service for any other beneficiary.

(e) *Order of preference in appointing a fiduciary.* The Hub Manager will consider individuals and entities for appointment in the following order of preference, provided that the proposed fiduciary is qualified and willing to serve and the appointment would serve the beneficiary's interest:

(1) The preference stated by the beneficiary in the fiduciary program, if the beneficiary has the capacity to state such a preference. If the beneficiary has a legal guardian appointed to handle the beneficiary's affairs, the Hub Manager will presume that the beneficiary does not have the capacity to state a preference and will consider individuals and entities in the order of preference prescribed in paragraphs (e)(2) through (10) of this section;

(2) The beneficiary's spouse;

(3) A relative who has care or custody of the beneficiary or his or her funds;

(4) Any other relative of the beneficiary;

(5) Any friend, acquaintance, or other person who is willing to serve as fiduciary for the beneficiary without a fee;

(6) The chief officer of a public or private institution in which the beneficiary receives care or which has custody of the beneficiary;

(7) The bonded officer of an Indian reservation, if applicable;

(8) An individual or entity who has been appointed by a court with jurisdiction to handle the beneficiary's affairs;

(9) An individual or entity who is not willing to serve without a fee; or

(10) A temporary fiduciary, if necessary.

(f) *Investigation of a proposed fiduciary.* Except as prescribed in paragraph (f)(3) of this section, before appointing a fiduciary for a beneficiary in the fiduciary program, the Hub Manager will conduct an investigation regarding the proposed fiduciary's qualifications.

(1) The investigation will include:

(i) To the extent practicable, a face-to-face interview of the proposed fiduciary;

(ii) A review of a credit report on the proposed fiduciary issued by a credit reporting agency no more than 30 days prior to the date of the proposed appointment;

(iii) A criminal background check to determine whether the proposed fiduciary has been convicted of any offense which would be a bar to serving as a fiduciary under § 13.130 or which the Hub Manager may consider and weigh under the totality of the circumstances regarding the proposed fiduciary's qualifications;

(iv) Obtaining proof of the proposed fiduciary's identity and relationship to the beneficiary, if any; and

(v) A determination regarding the need for surety bond under § 13.230 and the proposed fiduciary's ability to obtain such a bond.

(2) The Hub Manager may, at any time after the initial appointment of the fiduciary for a beneficiary, repeat all or part of the investigation prescribed by paragraph (f)(1) of this section to ensure that the fiduciary continues to meet the qualifications for service and there is no current bar to service under § 13.130.

(3) VA will not conduct the investigation prescribed by paragraph (f) of this section if the proposed fiduciary is an entity, such as the trust department of a bank that provides fiduciary services.

(g) *Expedited appointment.* The Hub Manager may waive the requirements of paragraphs (f)(1)(i) through (iii) of this section and expedite the appointment of a proposed fiduciary if the Hub Manager determines that an expedited appointment would be in the beneficiary's interest and:

(1) The proposed fiduciary is:

(i) The beneficiary's parent (natural, adopted, or step-parent) and the beneficiary is less than 18 years old, or

(ii) The beneficiary's spouse; or

(2) The annual amount of VA benefits the proposed fiduciary would manage for the beneficiary does not exceed the amount specified in 38 U.S.C. 5507(c)(2)(D), as adjusted by VA pursuant to 38 U.S.C. 5312.

(h) *Temporary fiduciary appointments.* (1) The Hub Manager may appoint a temporary fiduciary for a period not to exceed 120 days in any of the following circumstances:

(i) The beneficiary is appealing a VA rating that the beneficiary cannot manage his or her own VA benefits;

(ii) VA has removed a fiduciary for cause under § 13.500 and cannot

expedite the appointment of a successor fiduciary, and the beneficiary has an immediate need for fiduciary services; or

(iii) The Hub Manager determines that the beneficiary has an immediate need for fiduciary services and it would not be in the beneficiary's or the beneficiary's dependents' interest to pay benefits to the beneficiary until a fiduciary is appointed.

(2) Any temporary fiduciary appointed under this paragraph (h) must be:

(i) An individual or entity that has already been subject to the procedures for appointment in paragraphs (d) and (f) of this section, and

(ii) Performing satisfactorily as a fiduciary for at least one other VA beneficiary for whom the fiduciary has submitted an annual accounting that VA has approved.

(i) *Authorization for disclosure of information.* The Hub Manager will:

(1) Obtain from every proposed fiduciary who is an individual a written authorization for VA to disclose to the beneficiary information regarding any fiduciary matter that may be appealed under § 13.600, including but not limited to the fiduciary's qualifications for appointment under § 13.100 or misuse of benefits under § 13.400. Such disclosures may occur in VA's correspondence with the beneficiary, in a VA fiduciary appointment or misuse of benefits decision, in a statement of the case for purposes of appeal under § 13.600, or upon request by the beneficiary, the beneficiary's guardian, or the beneficiary's accredited attorney, claims agent, or representative;

(2) Notify the proposed fiduciary that the disclosed information may be used by the beneficiary in appealing a VA appointment or misuse decision to the Board of Veterans' Appeals under § 13.600; and

(3) Terminate consideration of a proposed fiduciary if the individual refuses to provide the authorization prescribed in paragraph (i)(1) of this section. Such refusal is a bar to serving as a fiduciary for a beneficiary under § 13.130(b).

(Authority: 38 U.S.C. 501, 5502, 5506, 5507)

**§ 13.110 Supervised direct payment.**

(a) *Authority.* The Hub Manager may authorize the payment of VA benefits directly to an adult beneficiary in the fiduciary program 18 years of age or older if the Hub Manager determines, based upon a field examination, that the beneficiary can manage his or her VA benefits with limited and temporary VA supervision. In making this determination, the Hub Manager will consider:

(1) Whether the beneficiary is aware of his or her monthly income;

(2) Whether the beneficiary is aware of his or her fixed monthly expenses such as rent, mortgage, utilities, clothing, food, and medical bills;

(3) The beneficiary's ability to:

(i) Allocate appropriate funds to fixed monthly expenses and discretionary items;

(ii) Pay monthly bills in a timely manner; and

(iii) Conserve excess funds; and

(4) Any other information that demonstrates the beneficiary's actual ability to manage his or her VA benefits with limited VA supervision.

(b) *Supervision.* The limited and temporary supervision of beneficiaries receiving direct payment under paragraph (a) of this section will consist of:

(1) Assistance in the development of a budget regarding the beneficiary's income and expenses,

(2) Assistance with creating a fund usage report to aid the beneficiary in tracking his or her income and expenses, and

(3) Periodic reviews of the beneficiary's fund usage report, as required by the Hub Manager.

(c) *Reassessment.* The Hub Manager will reassess the beneficiary's ability to manage his or her VA benefits at or before the end of the first 12-month period of supervision. Based upon a field examination, an evaluation of the factors listed in paragraph (a) of this section, and the results of the supervision prescribed in paragraph (b) of this section, the Hub Manager will determine whether the beneficiary can manage his or her benefits without VA supervision.

(1) If the beneficiary demonstrates the ability to manage his or her VA benefits without supervision, the Hub Manager will prepare a report that summarizes the findings and refer the matter with a recommendation and supporting evidence to the rating authority for application of § 3.353(b)(3) of this chapter regarding reevaluation of ability to manage VA benefits and § 3.353(d) of this chapter regarding the presumption of ability to manage VA benefits without restriction.

(2) If the beneficiary does not demonstrate the ability to manage his or her VA benefits without VA supervision, the Hub Manager will:

(i) Appoint a fiduciary, or

(ii) Continue supervised direct payment for not longer than one additional 12-month period based upon evidence that additional supervision might assist the beneficiary in developing the ability to manage his or her own VA benefits. At the conclusion of the additional period of supervised direct payment, the Hub Manager will conduct the reassessment prescribed by paragraph (c) of this section and either recommend reevaluation under paragraph (c)(1) of this section or appoint a fiduciary under paragraph (c)(2)(i) of this section.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.120 Field examinations.**

(a) *Authority.* The Hub Manager will order a field examination regarding fiduciary matters within the Hub Manager's jurisdiction for any of the reasons prescribed in paragraph (c) of this section. For purposes of this section, *field examination* means the inquiry, investigation, or monitoring activity conducted by designated fiduciary hub or other qualified VA personnel who are authorized to:

(1) Interview beneficiaries, dependents, and other interested persons regarding fiduciary matters;

(2) Interview proposed fiduciaries and current fiduciaries regarding their qualifications, performance, or compliance with VA regulations;

(3) Conduct investigations and examine witnesses regarding any fiduciary matter;

(4) Take affidavits;

(5) Administer oaths and affirmations;

(6) Certify copies of public or private documents; and

(7) Aid claimants and beneficiaries in the preparation of claims for VA benefits or other fiduciary or claim-related material.

(b) *Scope of field examinations.* Field examinations may include, but are not limited to:

(1) Assessing a beneficiary's and the beneficiary's dependents' welfare and physical and mental well-being, environmental and social conditions, and overall financial situation, based upon visiting the beneficiary's current residence and conducting a face-to-face interview of the beneficiary and the beneficiary's dependents, when practicable;

(2) Assessing the beneficiary's ability to manage his or her own VA benefits with only limited VA supervision (see § 13.110 regarding supervised direct payment);

(3) Collecting and reviewing financial documentation, including income and expenditure information;

(4) Providing any necessary assistance to the beneficiary with issues affecting current or additional VA benefits, claims, and non-VA matters that may affect or conflict with VA benefits;

(5) Making appropriate referrals in cases of actual or suspected physical or mental abuse, neglect, or other harm to a beneficiary;

(6) Investigating, when necessary, allegations that a beneficiary's fiduciary has engaged in misconduct or misused VA benefits to include but not limited to allegations regarding:

(i) Theft or misappropriation of funds,

(ii) Failure to comply with the responsibilities of a fiduciary as prescribed in § 13.140,

(iii) Other allegations of inappropriate fund management by a fiduciary, and

(iv) Other special circumstances which require a visit with or onsite review of the fiduciary, such as a change in an award of benefits or benefit status, or non-fiduciary program matters.

(c) *Reasons for conducting field examinations.* A Hub Manager will order a field examination to:

(1) Determine whether benefits should be paid directly to a beneficiary under § 13.110 or to a fiduciary appointed for the beneficiary under § 13.100;

(2) Determine whether benefit payments should continue to be made directly to a beneficiary under § 13.110 or to a fiduciary on behalf of a beneficiary; or

(3) Ensure the well-being of a beneficiary in the fiduciary program or to protect a beneficiary's VA benefit funds.

(Authority: U.S.C. 501, 512, 5502, 5506, 5507, 5711)

**§ 13.130 Bars to serving as a fiduciary.**

(a) An individual or entity may not serve as a fiduciary for a VA beneficiary if the individual or entity:

(1) Misused or misappropriated a beneficiary's VA benefits while serving as the beneficiary's fiduciary;

(2) Has been convicted of a felony offense. For purposes of this paragraph, *felony offense* means a criminal offense for which the minimum period of imprisonment is 1 year or more, regardless of the actual sentence imposed or the actual time served. However, such conviction is not a bar to serving as a fiduciary for a beneficiary if all of the following conditions are met:

(i) The conviction occurred more than 10 years preceding the proposed date of appointment;

(ii) The conviction did not involve any of the following offenses:

(A) Fraud,

(B) Theft,

(C) Bribery,

(D) Embezzlement,

(E) Identity theft,

(F) Money laundering,

(G) Forgery,

(H) The abuse of or neglect of another person, or

(I) Any other financial crime;

(iii) There is no other person or entity who is willing and qualified to serve; and

(iv) The Hub Manager determines that the nature of the conviction is such that appointment of the individual poses no risk to the beneficiary and is in the beneficiary's interest;

(b) An individual may not serve as a fiduciary for a VA beneficiary if the individual:

(1) Refuses or neglects to provide the authorization for VA disclosure of information prescribed in § 13.100(i);

(2) Is unable to manage his or her own Federal or State benefits and is in a Federal or State agency's fiduciary, representative payment, or similar program;

(3) Has been adjudicated by a court with jurisdiction as being unable to manage his or her own financial affairs;

(4) Is incarcerated in a Federal, State, local, or other penal institution or correctional facility, sentenced to home confinement, released from incarceration to a half-way house, or on house arrest or in custody in any facility awaiting trial on pending criminal charges;

(5) Has felony charges pending;

(6) Is under 18 years of age; or

(7) Knowingly violates or refuses to comply with the regulations in this part.

(Authority: 38 U.S.C. 501, 5502, 5506, 5507, 6101, 6106.)

**§ 13.140 Responsibilities of fiduciaries.**

Any individual or entity appointed by VA as a fiduciary to receive VA benefit payments on behalf of a beneficiary in the fiduciary program must fulfill certain responsibilities associated with the services of a fiduciary. These responsibilities include:

(a) *General.* (1) Fiduciaries appointed by VA to manage the VA funds of a beneficiary are also responsible for monitoring the beneficiary's well-being and using available funds to ensure that the beneficiary's needs are met. In all cases, the fiduciary must disburse or otherwise manage funds according to the best interests of the beneficiary and the beneficiary's dependents and in light of the beneficiary's unique circumstances, needs, desires, beliefs, and values.

(2) The fiduciary must take all reasonable precautions to protect the beneficiary's private information contained in the fiduciary's paper and electronic records.

(i) For purposes of this section:

(A) *Reasonable precautions* means protecting against any unauthorized access to or use of the beneficiary's private information that may result in substantial harm or inconvenience to the beneficiary; and

(B) *Private information* means a beneficiary's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such beneficiary: VA claim number, Social Security number, date of birth, address, driver's license number or State-issued identification card number, or financial account number or credit card or debit card number, with or without any required security code, access code, personal identification number, or password, that would permit access to the beneficiary's account.

(ii) At a minimum, fiduciaries must place reasonable restrictions upon access to paper records containing the beneficiary's private information, including storage of such records in locked facilities, storage areas, or containers.

(iii) For electronic records containing the beneficiary's private information, the fiduciary must:

(A) Use unique identifications and passwords, which are not vendor-supplied default identifications and passwords, for computer, network, or online site access that are reasonably designed to maintain the security of the beneficiary's information and the fiduciary's financial transactions;

(B) Control access to data security passwords to ensure that such passwords are kept in a location and format that do not compromise the security of the beneficiary's private information; and

(C) For records containing private information on a computer system that is connected to the Internet, keep reasonably up-to-date firewall and virus protection and operating system security patches to maintain the integrity of the beneficiary's private information and prevent unauthorized disclosure. For purposes of this section, a system is reasonably updated if the fiduciary installs software updates immediately upon release by the original equipment or software manufacturer, uses internet browser security settings suitable for transmission of private information, and maintains password-protected wireless connections or other networks;

(iv) The fiduciary must keep all paper and electronic records relating to the fiduciary's management of VA benefit funds for the beneficiary for the duration of service as fiduciary for the beneficiary and for a minimum of 2 years from the date that VA removes the fiduciary under § 13.500 or from the

date that the fiduciary withdraws as fiduciary for the beneficiary under § 13.510.

(b) *Financial responsibilities.* The fiduciary's primary financial responsibilities include, but are not limited to:

(1) The use of the beneficiary's VA benefit funds under management only for the care, support, education, health, and welfare of the beneficiary and his or her dependents. Except as authorized under § 13.220 regarding fiduciary fees, a fiduciary may not derive a personal financial benefit from management or use of the beneficiary's funds;

(2) Protection of the beneficiary's VA benefits from loss or diversion;

(3) Except as prescribed in § 13.200 regarding fiduciary accounts, maintenance of separate financial accounts to prevent commingling of the beneficiary's funds with the fiduciary's own funds or the funds of any other beneficiary for whom the fiduciary has funds under management;

(4) Determination of the beneficiary's just debts. For purposes of this section, *just debts* means the beneficiary's legitimate, legally enforceable debts;

(5) Timely payment of the beneficiary's just debts, provided that the fiduciary has VA benefit funds under management for the beneficiary to cover such debts;

(6) Providing the beneficiary with information regarding VA benefit funds under management for the beneficiary, including fund usage, upon request;

(7) Providing the beneficiary with a copy of the annual accounting approved by VA under § 13.280;

(8) Ensuring that any best-interest determination regarding the use of funds is consistent with VA policy, which recognizes that beneficiaries in the fiduciary program are entitled to the same standard of living as any other beneficiary with the same or similar financial resources, and that the fiduciary program is not for the purpose of preserving funds for the beneficiary's heirs or disbursing funds according to the fiduciary's own beliefs, values, preferences, and interests; and

(9) Protecting the beneficiary's funds from the claims of creditors as described in § 13.270 of this section.

(c) *Non-financial responsibilities.* The fiduciary's primary non-financial responsibilities include, but are not limited to:

(1) Contacting social workers or mental health professionals regarding the beneficiary, when necessary;

(2) To the extent possible, ensuring the beneficiary receives appropriate medical care;

(3) Correcting any discord or uncomfortable living or other situations when possible;

(4) Acknowledging and addressing any complaints or concerns of the beneficiary to the best of the fiduciary's ability;

(5) Reporting to the appropriate authorities, including any legal guardian, any type of known or suspected abuse of the beneficiary;

(6) Maintaining contact with the beneficiary for purposes of assessing the beneficiary's capabilities, limitations, needs, and opportunities; and

(7) Being responsive to the beneficiary and ensuring the beneficiary and his or her legal guardian have the fiduciary's current contact information.

(d) *The fiduciary's responsibilities to VA.* Any fiduciary who has VA benefit funds under management on behalf of a beneficiary in the fiduciary program must:

(1) If the fiduciary is also appointed by a court, annually provide to the fiduciary hub with jurisdiction a certified copy of the accounting provided to the court or facilitate the hub's receipt of such an accounting;

(2) Notify the fiduciary hub regarding any change in the beneficiary's circumstances, to include the beneficiary's relocation, the beneficiary's serious illness, or any other significant change in the beneficiary's circumstances which might adversely impact the beneficiary's well-being;

(3) Provide documentation or verification of any records concerning the beneficiary or matters relating to the fiduciary's responsibilities within 30 days of a VA request, unless otherwise directed by the Hub Manager;

(4) When necessary, appear before VA for face-to-face meetings; and

(5) Comply with the policies and procedures prescribed in this part.

(Authority: 38 U.S.C. 501, 512, 5502, 5507, 5509, 5711)

**§ 13.200 Fiduciary accounts.**

Except as prescribed in paragraph (b) of this section, any fiduciary appointed by VA to receive payments on behalf of a beneficiary must deposit the beneficiary's VA benefits in a fiduciary account that meets the requirements prescribed in paragraph (a) of this section.

(a) *Separate accounts.* Except as prescribed in paragraph (b) of this section, a fiduciary must establish and maintain a separate financial institution account(s) for each VA beneficiary that the fiduciary serves. The fiduciary must not commingle a beneficiary's funds with the fiduciary's funds or any other beneficiary's funds, either upon or after receipt. The account must be:

(1) Established for direct deposit of VA benefits,

(2) Established in a Federally-insured financial institution, and in Federally-insured accounts when funds qualify for such deposit insurance, and

(3) Titled in the beneficiary's and fiduciary's names and note the existence of the fiduciary relationship.

(b) *Exceptions.* The general rule prescribed in paragraph (a) of this section regarding establishment and maintenance of separate accounts does not apply to the following fiduciaries:

(1) The beneficiary's spouse,

(2) State or local Government entities,

(3) Institutions, such as public or private medical care facilities, nursing homes, or other residential care facilities, when an annual accounting is not required. *See* § 13.280 regarding accounting requirements, or

(4) A trust company or a bank with trust powers organized under the laws of the United States or a state.

(Authority: U.S.C. 501, 5502, 5509, 5711)

**§ 13.210 Fiduciary investments.**

(a) *General.* A fiduciary must conserve or invest any VA benefits that the fiduciary receives on behalf of a beneficiary, whether such benefits are in the form of recurring monthly payments or a one-time payment, if the beneficiary or the beneficiary's dependents do not need the benefits for current maintenance, reasonably foreseeable expenses, or reasonable improvements in the beneficiary's and the beneficiary's dependents' standard of living. Conservation of beneficiary funds is for the purpose of addressing unforeseen circumstances or planning for future care needs given the beneficiary's disabilities, circumstances, and eligibility for care furnished by the Government at Government expense. Fiduciaries will not conserve VA benefit funds under management for a beneficiary based upon the interests of the beneficiary's heirs or according to the fiduciary's own beliefs, values, preferences, and interests.

(b) *Types of investments.* An investment must be prudent and in the best interest of the beneficiary. Authorized investments include United States savings bonds or interest or dividend-paying accounts insured under Federal law. Any such investment must be clearly titled in the beneficiary's and fiduciary's names and identify the fiduciary relationship.

(c) *Exceptions.* The general rules regarding investment of VA benefits do not apply to the following fiduciaries:

(1) The beneficiary's spouse, and

(2) The chief officer of an institution in which the beneficiary is being furnished hospital treatment or institutional, nursing, or domiciliary care. VA benefits paid to the chief officer may not be invested.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.220 Fiduciary fees.**

(a) *Authority.* The Hub Manager with jurisdiction over a fiduciary appointment may determine whether a fee is necessary to obtain the services of a fiduciary. A fee is necessary only if no other person or entity is qualified and willing to serve without a fee and the beneficiary's interests would be served by the appointment of a qualified paid fiduciary. The Hub Manager will not authorize a fee if the fiduciary:

(1) Is a spouse, dependent, or other relative of the beneficiary; or

(2) Will receive any other form of payment in connection with providing fiduciary services for the beneficiary.

(b) *Limitation on fees.* The Hub Manager will authorize a fiduciary to whom a fee is payable under paragraph (a) of this section to deduct from the beneficiary's account a reasonable monthly fee for fiduciary services rendered.

(1) For purposes of this section, *reasonable monthly fee* means a monetary amount that is authorized by the Hub Manager and does not exceed 4 percent of the monthly VA benefit paid to the fiduciary on behalf of the beneficiary for a month in which the fiduciary is eligible under paragraph (b)(2) of this section to collect a fee.

(2) A monthly fee may be collected for any month during which the fiduciary:

(i) Provides fiduciary services on behalf of the beneficiary,

(ii) Receives a recurring VA benefit payment for the beneficiary, and

(iii) Is authorized by the Hub Manager to receive a fee for fiduciary services.

(3) Fees may not be computed based upon:

(i) Any one-time, retroactive, or lump-sum payment made to the fiduciary on behalf of the beneficiary;

(ii) Any funds conserved by the fiduciary for the beneficiary in the beneficiary's account under § 13.200 or invested by the fiduciary for the beneficiary under § 13.210, to include any interest income and return on investment derived from any account; or

(iii) Any funds transferred to the fiduciary by a prior fiduciary for the beneficiary, or from the personal funds of patients or any other source.

(4) The Hub Manager will not authorize a fee for any month for which:

(i) VA or a court with jurisdiction determines that the fiduciary misused or misappropriated benefits, or

(ii) The beneficiary does not receive a VA benefit payment. However, the Hub Manager may authorize a fee for a month in which the beneficiary did not receive a benefit payment if VA later issues benefits for that month and the fiduciary:

(A) Receives VA approval to collect a fee for the month for which payment was made,

(B) Provided fiduciary services during the month for which payment was made, and

(C) Was the beneficiary's fiduciary when VA made the retroactive payment.

(Authority: 38 U.S.C. 501, 5502, 6101, 6106)

**§ 13.230 Protection of beneficiary funds.**

(a) *General.* Except as prescribed in paragraph (c) of this section, within 60 days of appointment, the fiduciary must furnish to the fiduciary hub with jurisdiction a corporate surety bond that is conditioned upon faithful discharge of all of the responsibilities of a fiduciary prescribed in § 13.140 and meets the requirements of paragraph (d) of this section, if the VA benefit funds that are due and to be paid for the beneficiary will exceed $25,000 at the time of appointment. The Hub Manager will not authorize the release of a retroactive, one-time, or other pending lump-sum benefit payment to the fiduciary until the fiduciary has furnished the bond prescribed by this section.

(b) *Accumulated funds.* The provisions of paragraph (a) of this section which require a fiduciary to furnish a surety bond apply in any case in which the accumulation over time of VA benefit funds under management by a fiduciary for a beneficiary exceeds $25,000. Except as prescribed in paragraph (c) of this section, within 60 days of accumulated funds exceeding the prescribed threshold, the fiduciary will furnish to the fiduciary hub a bond that meets the requirements of paragraph (d) of this section.

(c) *Exceptions.* (1) The provisions of paragraphs (a) and (b) of this section do not apply to:

(i) A fiduciary that is a trust company or a bank with trust powers organized under the laws of the United States or a State;

(ii) A fiduciary who is the beneficiary's spouse; or

(iii) A fiduciary in the Commonwealth of Puerto Rico, Guam, or another territory of the United States, or in the Republic of the Philippines, who has entered into a restricted withdrawal agreement in lieu of a surety bond.

(2) The Hub Manager may, at any time, require the fiduciary to obtain a bond described in paragraph (a) of this section and meeting the requirements of paragraph (d) of this section, without regard to the amount of VA benefit funds under management by the fiduciary for the beneficiary, if special circumstances indicate that obtaining a bond would be in the beneficiary's interest. Such special circumstances may include but are not limited to:

(i) A marginal credit report for the fiduciary; or

(ii) A fiduciary's misdemeanor criminal conviction either before or after appointment for any offense listed in § 13.130(a)(2)(ii);

(d) *Bond requirements.* A bond furnished by a fiduciary under paragraph (a) or (b) of this section must meet the following requirements:

(1) The bond must be a corporate surety bond in an amount sufficient to cover the value of the VA benefit funds under management by the fiduciary for the beneficiary.

(2) After furnishing the prescribed bond to the fiduciary hub, the fiduciary must:

(i) Adjust the bond amount to account for any increase or decrease of more than 20 percent in the VA benefit funds under management by the fiduciary for the beneficiary, and

(ii) Furnish proof of the adjustment to the fiduciary hub not later than 60 days after a change in circumstance described in paragraph (d)(2)(i) of this section.

(3) The bond furnished by the fiduciary must also:

(i) Identify the fiduciary, the beneficiary, and the bonding company; and

(ii) Contain a statement that the bond is payable to the Secretary of Veterans Affairs.

(e) *Periodic proof of bond.* A fiduciary must furnish proof of adequate bonding:

(1) With each annual accounting prescribed by § 13.280, and

(2) At any other time the Hub Manager with jurisdiction requests proof.

(f) *Liability.* (1) Except as otherwise provided by the terms of the bond, the surety and the fiduciary guaranteed by the surety are jointly and severally liable for any misappropriation or misuse of VA benefits by the fiduciary.

(2) VA may collect on the bond regardless of any prior reissuance of benefits by VA under § 13.410 and until liability under the terms of the bond is exhausted.

(g) *Bond expenses.* (1) *Authority.* The fiduciary may deduct from the beneficiary's account any expense related to obtaining, maintaining, or

adjusting a bond prescribed by this section.

(2) *Notice.* The Hub Manager will provide the beneficiary written notice regarding any bond furnished at the beneficiary's expense under paragraph (a), (b), or (c)(2) of this section or adjusted under paragraph (d)(2) of this section.

(Authority: 38 U.S.C. 501, 5502, 5507)

**§ 13.240 Funds of beneficiaries less than 18 years old.**

(a) *General.* Except as prescribed in paragraph (b) of this section, a fiduciary who receives VA benefits on behalf of a beneficiary who is less than 18 years old may use the benefits only for the use and benefit of that beneficiary and only if the fiduciary first determines that the person or persons who have custody of the beneficiary and are responsible for the beneficiary's needs are unable to provide for those needs.

(b) *Education benefits.* A fiduciary who receives VA education benefits on behalf of a beneficiary who is less than 18 years old may use the benefits for the beneficiary's education regardless of the ability of the person or persons who have custody of the beneficiary to pay for the beneficiary's education.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.250 Funds of deceased beneficiaries.**

(a) *General.* When a beneficiary who has a fiduciary dies without leaving a valid will and without heirs, all VA benefit funds under management by the fiduciary for the deceased beneficiary on the date of death, less any deductions authorized by paragraph (c) of this section, must be returned to VA if such funds would be forfeited to a State.

(b) *Accountings.* Upon the death of a beneficiary described in paragraph (a) for whom the fiduciary must return to VA all benefit funds under management, less any deductions authorized under paragraph (c) of this section, or upon the death of any beneficiary for whom a fiduciary was required to submit an annual accounting to VA under § 13.280, the fiduciary must submit a final accounting to the fiduciary hub with jurisdiction within 90 days of the beneficiary's death.

(c) *Expenses.* The fiduciary may deduct a reasonable fee from the deceased beneficiary's account for purposes of determining whether the beneficiary's funds under management would be forfeited to a State under State law or whether the deceased beneficiary left a valid will or is survived by heirs. For the purpose of this section, *reasonable fee* means an amount customarily charged by attorneys or other professionals authorized to do such work in the State where the deceased beneficiary had his or her permanent place of residence.

(d) *Estate matters.* Upon the death of a beneficiary who has a valid will or heirs, the fiduciary must hold the remaining funds under management in trust for the deceased beneficiary's estate until the will is probated or heirs are ascertained, and disburse the funds according to applicable State law.

(Authority: U.S.C. 501, 5502)

**§ 13.260 Personal funds of patients.**

(a) *Distribution of funds.* Benefits deposited by VA in the personal funds of patients account for a veteran who was rated by VA as being unable to manage his or her VA benefits and who died leaving an account balance are payable to an eligible person. For purposes of this section, *eligible person* means an individual living at the time the account balance is distributed in the following order of preference:

(1) The deceased veteran's spouse, as defined by § 3.1000(d)(1) of this chapter;

(2) The veteran's children (in equal shares), as defined by § 3.57 of this chapter, but without regard to age or marital status; or

(3) The veteran's dependent parents (in equal shares) or surviving parent, as defined by § 3.59 of this chapter, provided that the parents were or parent was dependent within the meaning of § 3.250 of this chapter on the date of the veteran's death.

(4) Any balance remaining in the personal funds of patients account which cannot be distributed in accordance with paragraphs (a)(1) through (3) of this section will be used by VA to reimburse anyone who bore the expense of the veteran's last sickness or the veteran's burial or will be deposited to the credit of the applicable current VA appropriation.

(b) *Application.* A person who seeks distribution of a deceased veteran's funds from the personal funds of patients account under paragraph (a) of this section must file an application with VA not later than 5 years after the veteran's death. If any person who seeks such distribution is under a legal disability that prevents him or her from filing an application at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.270 Creditors' claims.**

Under 38 U.S.C. 5301(a)(1), VA benefit payments are exempt, both before and after receipt by the beneficiary, from the claims of creditors and taxation. The fiduciary should invoke this defense in applicable circumstances. If the fiduciary does not do so, the Hub Manager may refer the matter to the Regional Counsel for evaluation and appropriate legal action.

(Authority: 38 U.S.C. 501, 512, 5301)

**§ 13.280 Accountings.**

(a) *General.* Except as prescribed in paragraph (d) of this section, a fiduciary for a beneficiary must submit to the fiduciary hub with jurisdiction an annual accounting regarding the VA benefit funds under management by the fiduciary for the beneficiary if:

(1) The amount of VA benefit funds under management for the beneficiary exceeds $10,000;

(2) The fiduciary deducts a fee authorized under § 13.220 from the beneficiary's account; or

(3) The beneficiary is being paid VA compensation benefits at a total disability rating (100 percent), whether schedular, extra-schedular, or based on individual unemployability.

(b) *Scope of accounting.* For purposes of this section, *accounting* means the fiduciary's written report regarding the income and funds under management by the fiduciary for the beneficiary during the accounting period prescribed by the Hub Manager. The accounting prescribed by this section pertains to all activity in the beneficiary's accounts, regardless of the source of funds maintained in those accounts. An accounting consists of:

(1) A beginning inventory or account balance,

(2) An itemization of income,

(3) An itemization of expenses,

(4) An ending inventory or account balance,

(5) Copies of financial institution documents reflecting receipts, expenditures, and beginning and ending balances, and

(6) Receipts, when required by the Hub Manager.

(c) *Submission requirements.* Fiduciaries must submit annual accountings to the fiduciary hub as follows:

(1) The fiduciary must submit accountings on the appropriate VA form not later than 30 days after the end of the accounting period prescribed by the Hub Manager.

(2) The fiduciary must submit a corrected or supplemental accounting not later than 14 days after the date of VA notice of an accounting discrepancy.

(d) *Exceptions.* The provisions of this section that generally require the submission of an annual accounting do not apply to a fiduciary who is:

(1) The beneficiary's spouse;

(2) A chief officer of a Federal institution;

(3) A chief officer of a non-VA facility receiving benefits for a beneficiary institutionalized in the facility and:

(i) The beneficiary's monthly care, maintenance, and personal use expenses equal or exceed the amount of the beneficiary's monthly VA benefit; and

(ii) The amount of VA benefit funds under management by the fiduciary does not exceed $10,000; or

(4) A fiduciary who receives benefits on behalf of a beneficiary, both of whom permanently reside outside of the United States, the Commonwealth of Puerto Rico, or the Republic of the Philippines, and the fiduciary was appointed in such jurisdiction.

(e) *Failure to comply with accounting requirements.* The Hub Manager will treat any willful neglect or refusal to file proper accountings as prima facie evidence of embezzlement or misappropriation of VA benefits. Such evidence is grounds for starting a misuse investigation under § 13.400.

(Authority: 38 U.S.C. 501, 5502, 5509, 6101)

(The Office of Management and Budget has approved the information collection requirements in this part under control number 2900–0017)

**§ 13.300 Onsite reviews.**

(a) *Periodic onsite reviews.* (1) The Hub Manager will conduct a periodic, scheduled, onsite review of any fiduciary in the United States, whether the fiduciary is an individual or an entity, if:

(i) The fiduciary serves 20 or more beneficiaries, and

(ii) The total annual amount of recurring VA benefits paid to the fiduciary for such beneficiaries exceeds the threshold established in 38 U.S.C. 5508 as adjusted by VA under 38 U.S.C. 5312.

(2) The Hub Manager must complete at least one periodic onsite review triennially if the fiduciary meets the requirements of paragraph (a)(1) of this section.

(3) VA will provide the fiduciary with written notice of the periodic onsite review at least 30 days before the scheduled review date. The notice will:

(i) Inform the fiduciary of the pending review and the fiduciary's obligation under this part to cooperate in the onsite review process, and

(ii) Request that the fiduciary make available for review all relevant records, including but not limited to case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine that the fiduciary has been acting in the best interest of VA beneficiaries and meeting the responsibilities of fiduciaries prescribed in § 13.140.

(b) *Unscheduled onsite reviews.* The Hub Manager may conduct unscheduled onsite reviews of any fiduciary, regardless of the number of beneficiaries served by the fiduciary or the total amount of VA benefit funds under management by the fiduciary, if:

(1) VA receives from any source credible information that the fiduciary has misused or is misusing VA benefits;

(2) The fiduciary's annual accounting is seriously delinquent. For purposes of this section, *seriously delinquent* means the fiduciary failed to submit the required accounting not later than 120 days after the ending date of the annual accounting period;

(3) VA receives from any source credible information that the fiduciary is not adequately performing the responsibilities of a fiduciary prescribed in § 13.140; or

(4) The Hub Manager determines that an unscheduled onsite review is necessary to ensure that the fiduciary is acting in the interest of the beneficiary or beneficiaries served by the fiduciary.

(c) *Procedures.* (1) Onsite reviews will consist of the following:

(i) A face-to-face meeting with the fiduciary. In the case of a fiduciary that is an entity, the face-to-face meeting will be with a representative of the entity;

(ii) A review of all relevant records maintained by the fiduciary, including but not limited to case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine whether the fiduciary has been acting in the interest of VA beneficiaries; and

(iii) Interviews of beneficiaries, the fiduciary's employees, and other individuals as determined necessary by the Hub Manager.

(2) Not later than 30 days after completing a periodic or unscheduled onsite review, the Hub Manager will provide the fiduciary a written report of VA's findings, recommendations for correction of deficiencies, requests for additional information, and notice of VA's intent regarding further action.

(3) Unless good cause for an extension is shown, not later than 30 days after the date that VA mails the report prescribed by paragraph (d)(2) of this section, the fiduciary must submit to the fiduciary hub a response to any VA request for additional information or recommendation for corrective action.

(4) The Hub Manager will remove the fiduciary for all VA beneficiaries whom the fiduciary serves if the fiduciary:

(i) Refuses to cooperate with VA during a periodic or unscheduled onsite review,

(ii) Is unable to produce necessary records,

(iii) Fails to respond to a VA request for additional information or recommendation for corrective action, or

(iv) Is found during an onsite review to have misused VA benefits.

(Authority: 38 U.S.C. 501, 5508)

**§ 13.400 Misuse of benefits.**

(a) *Definition of misuse.* Misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of benefits for the use and benefit of a beneficiary and the beneficiary's dependents, if any, and uses any part of such payment for a use other than the use and benefit of the beneficiary or the beneficiary's dependents. For the purpose of this section, *use and benefit* means any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents. Such expenditures may include the fiduciary's efforts to improve the beneficiary's standard of living under rules prescribed in this part.

(b) *Misuse determinations.* Upon receipt of credible information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager will investigate the matter and issue a misuse determination in writing. This decision will:

(1) Identify the beneficiary,

(2) Identify the fiduciary,

(3) State whether the fiduciary is an individual fiduciary serving 10 or more beneficiaries or a corporation or other entity serving one or more beneficiaries,

(4) Identify the source of the information,

(5) Describe in detail the facts found as a result of the investigation,

(6) State the reasons for the Hub Manager's determination regarding whether the fiduciary misused any part of the beneficiary's benefit paid to the fiduciary, and

(7) If the Hub Manager determines that the fiduciary did misuse any part of the beneficiary's benefit, identify the months in which such misuse occurred.

(c) *Notice.* The Hub Manager will provide written notice of the misuse determination prescribed in paragraph (b) of this section, including a copy of the Hub Manager's written decision, an explanation regarding the reconsideration procedure prescribed in paragraph (d) of this section, and the beneficiary's right to appeal under § 13.600, to:

(1) The fiduciary;

(2) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agents; and

(3) The Director of the Pension and Fiduciary Service.

(d) *Finality and reconsideration of misuse determinations.* (1) The Hub Manager's misuse determination is a final decision, unless:

(i) The Hub Manager receives a written request for reconsideration from the fiduciary or the beneficiary not later than 30 days after the date that the Hub Manager mailed notice of his or her misuse determination; or

(ii) The Hub Manager receives a notice of disagreement from the beneficiary not later than 1 year after the date that the Hub Manager mailed notice of his or her misuse determination.

(2) The fiduciary or the beneficiary may submit additional information pertinent to reconsideration of the misuse determination and not previously considered by the Hub Manager, provided that the additional information is submitted with the written reconsideration request.

(3) The Hub Manager will close the record regarding reconsideration at the end of the 30-day period described in paragraph (d)(1)(i) of this section and furnish a timely request submitted by the fiduciary or the beneficiary, including any new information, to the Director of the VA Regional Office with jurisdiction over the fiduciary hub for a final decision.

(4) In making the misuse determination on reconsideration, the Regional Office Director's decision will be based upon a review of the information of record as of the date of the Hub Manager's misuse determination and any new information submitted with the request. The decision will:

(i) Identify the beneficiary,

(ii) Identify the fiduciary,

(iii) Identify the Hub Manager's prior decision,

(iv) Describe in detail the facts found as a result of the Director's review of the Hub Manager's decision and any new information submitted with the reconsideration request, and

(v) State the reasons for the Director's final decision, which may affirm, modify, or overturn the Hub Manager's decision.

(5) The Hub Manager will provide written notice of the Regional Office Director's final decision on reconsideration to:

(i) The fiduciary,

(ii) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent; and

(iii) The Director of the Pension and Fiduciary Service.

(e) *Reporting of misuse.* Except as prescribed in § 1.204 of this chapter, which requires VA management officials to promptly report possible criminal matters involving felonies to the VA Office of Inspector General, reporting of misuse cases will occur as follows: (1) Not later than 30 days after a final determination is made under paragraph (d) of this section that a fiduciary has misused VA benefits, the Director of the VA Regional Office who has jurisdiction over the fiduciary hub will notify the VA Office of Inspector General for purposes of any further action that the Inspector General deems appropriate under separate authority.

(2) For purposes of application of § 13.410 regarding reissuance and recoupment of benefits, the Office of Inspector General will advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision is made or judgment is entered.

(Authority: 38 U.S.C. 501, 5502, 6106)

**§ 13.410 Reissuance and recoupment of misused benefits.**

(a) *General.* (1) If the Hub Manager or the Regional Office Director upon reconsideration determines that a fiduciary described in paragraph (a)(2) of this section misused any part of a beneficiary's benefit paid to the fiduciary, the Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the amount of funds misused.

(2) This paragraph (a) applies to a fiduciary that is:

(i) An individual who served 10 or more beneficiaries during any month in which misuse occurred; or

(ii) A corporation or other entity serving one or more beneficiaries.

(b) *Negligence.* In any case in which the Hub Manager or the Regional Office Director upon reconsideration determines that an individual fiduciary who served fewer than 10 beneficiaries during any month in which misuse occurred misused a beneficiary's funds under management by the fiduciary, the Hub Manager will refer the matter to the Director, Pension and Fiduciary Service, for a determination of whether VA negligence caused the misuse. The Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the amount of funds misused if the Director of the Pension and Fiduciary Service determines that VA negligence caused the misuse. The Pension and Fiduciary Service Director's negligence determination will be based upon a review of the VA information of record as of the date of the Hub Manager's or Regional Office Director's misuse determination. For purposes of this section, VA negligence causes misuse when:

(1) The Hub Manager failed to properly investigate or monitor the fiduciary;

(2) The Hub Manager failed to review the fiduciary's accounting not later than 60 days after the date on which the accounting was scheduled for review. The date that an accounting is scheduled for review is the date the fiduciary hub receives the accounting;

(3) The Hub Manager did not investigate an allegation of misuse not later than 60 days after the date that the fiduciary hub received the allegation; or

(4) Actual negligence is shown. For purposes of this section, *actual negligence* means the Hub Manager's failure to exercise toward a beneficiary in the fiduciary program the care which a reasonable or prudent person would exercise in the circumstances, or the Hub Manager's taking action that a reasonable or prudent person would not take. The Regional Office Director shall reissue benefits based on actual negligence if the Director of the Pension and Fiduciary Service determines that:

(i) The Hub Manager owed a duty to the beneficiary under this part,

(ii) The Hub Manager's action or failure to act was negligent, and

(iii) The Hub Manager's negligence proximately caused the misuse of benefits by the fiduciary. For purposes of this section, *proximate cause* means that the misuse would not have occurred but for the Hub Manager's negligence.

(c) *Recoupment of misused benefits.* In all cases in which the Hub Manager or Regional Office Director upon reconsideration determines that a fiduciary misused benefits, VA will make a good faith effort to recoup the total amount of misused benefits from the fiduciary.

(1) For purposes of this section, *good faith effort* means that the Hub Manager will:

(i) Recover any misused benefits from the surety company, if a surety bond was in place under § 13.230 regarding protection of beneficiary funds; or

(ii) In cases in which no surety bond was in place and the fiduciary does not repay all misused benefits within the time prescribed by the Hub Manager in consultation with the fiduciary:

(A) Request the creation of a debt to the United States in the amount of any misused benefits that remain unpaid; and

(B) Coordinate further recoupment action, including collection of any debt owed by the fiduciary to the United States as a result of the misuse, with the appropriate Federal and State agencies.

(2) VA will pay benefits recouped under paragraph (c) of this section to the beneficiary's successor fiduciary after deducting any amount reissued under paragraph (a) or (b) of this section.

(d) *Notice.* The Hub Manager, or in the case of a negligence determination, the Director of the Pension and Fiduciary Service, will provide the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of any decision regarding reissuance or recoupment of benefits under this section.

(Authority: 38 U.S.C. 501, 6106, 6107)

**§ 13.500 Removal of fiduciaries.**

(a) The Hub Manager may remove a fiduciary if the Hub Manager determines that fiduciary services are no longer required for a beneficiary or removal is in the beneficiary's interest. Reasons for removal include, but are not limited to:

(1) *Beneficiary reasons.* (i) A VA rating authority determines that the beneficiary can manage his or her own VA benefits without VA supervision or appointment of a fiduciary;

(ii) The beneficiary requests appointment of a successor fiduciary under § 13.100;

(iii) The beneficiary requests supervised direct payment of benefits under proposed § 13.110; or

(iv) The beneficiary dies.

(2) *Fiduciary reasons.* (i) The fiduciary's further service is barred under § 13.130;

(ii) The fiduciary fails to maintain his or her qualifications or does not adequately perform the responsibilities of a fiduciary prescribed in § 13.140;

(iii) The fiduciary fails to timely submit a complete accounting as prescribed in § 13.280;

(iv) VA or a court with jurisdiction determines that the fiduciary misused or misappropriated VA benefits;

(v) The fiduciary fails to respond to a VA request for information not later than 30 days after such request is made, unless the Hub Manager grants an extension based upon good cause shown by the fiduciary;

(vi) The fiduciary is unable or unwilling to provide the surety bond prescribed by § 13.230 or, if applicable, enter into a restricted withdrawal agreement;

(vii) The fiduciary no longer meets the requirements for appointment under § 13.100; or

(viii) The fiduciary is unable or unwilling to manage the beneficiary's benefit payments, accounts, or investments.

(b) *Procedures.* (1) If the Hub Manager determines that it is necessary to remove a fiduciary and appoint a successor fiduciary, the Hub Manager will:

(i) Provide the fiduciary and the beneficiary written notice of the removal; and

(ii) Instruct the fiduciary regarding the fiduciary's responsibilities prior to transfer of funds to a successor fiduciary or as otherwise prescribed by the Hub Manager.

(2) The fiduciary must:

(i) Continue as fiduciary for the beneficiary until the Hub Manager provides the fiduciary with the name and address of the successor fiduciary and instructions regarding the transfer of funds to the successor fiduciary; and

(ii) Not later than 30 days after transferring funds to the successor fiduciary or as otherwise instructed by the Hub Manager, provide the fiduciary hub a final accounting.

(Authority: 38 U.S.C. 501, 5502, 5507, 6106)

**§ 13.510 Fiduciary withdrawals.**

(a) *General.* A fiduciary may not withdraw as fiduciary for a beneficiary until the fiduciary receives notice from the Hub Manager regarding transfer of the beneficiary's funds to a successor fiduciary.

(b) *Voluntary withdrawal.* (1) Subject to the limitation prescribed in paragraph (a) of this section, a fiduciary who has VA benefit funds under management for a beneficiary may withdraw from the fiduciary relationship with the beneficiary at any time if the fiduciary:

(i) Provides the fiduciary hub with jurisdiction written notice of the fiduciary's intent to withdraw as fiduciary for the beneficiary;

(ii) Describes the reasons for withdrawal;

(iii) Continues as fiduciary for the beneficiary until the Hub Manager provides the fiduciary with the name and address of the successor fiduciary and instructions regarding the transfer of funds to the successor fiduciary; and

(iv) Not later than 30 days after transferring funds to the successor fiduciary or as otherwise instructed by the Hub Manager, provides the fiduciary hub with jurisdiction a final accounting.

(2) Upon receipt of the notice of intent to withdraw prescribed in paragraph (b)(1)(i) of this section, the Hub Manager will make a reasonable effort under the circumstances to expedite the appointment of a successor fiduciary. In determining the extent to which the fiduciary hub must expedite a request to withdraw, the Hub Manager will consider:

(i) The reasons for the withdrawal request provided under paragraph (b)(1)(ii) of this section;

(ii) The number of beneficiaries affected;

(iii) The relationship between the affected beneficiary or beneficiaries and the fiduciary; and

(iv) Whether expedited withdrawal is necessary to protect the interests of the beneficiary or beneficiaries.

(c) *Notice.* If a fiduciary requests to withdraw from service for a beneficiary, the Hub Manager will provide the beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent written notice of the withdrawal request and the procedures for appointment of a successor fiduciary.

(Authority: 38 U.S.C. 501, 5502)

**§ 13.600 Appeals.**

Except as prescribed in paragraph (a) of this section, VA decisions regarding fiduciary matters are committed to the Secretary of Veterans Affairs' discretion by law, as delegated to subordinate officials under this part, and cannot be appealed to the Board of Veterans' Appeals or any court.

(a) *Appealable decisions.* A beneficiary may appeal to the Board of Veterans' Appeals the following decisions:

(1) The Hub Manager's appointment of a fiduciary under § 13.100;

(2) The Hub Manager's removal of a fiduciary under § 13.500;

(3) The Hub Manager's misuse determination under § 13.400;

(4) The VA Regional Office Director's final decision upon reconsideration of a misuse determination under § 13.400(d); and

(5) The Director of the Pension and Fiduciary Service's negligence determination for purposes of reissuance of benefits under § 13.410.

(b) *Procedures.* (1) VA decisions regarding fiduciary matters are final, subject only to the right of appeal prescribed in this section. VA will close the record regarding these decisions on the date the decision is made.

(2) Except for the closure of the record prescribed in paragraph (b)(1) of this section, the initiation and processing of appeals under this section are governed by parts 19 and 20 of this chapter.

Nothing in this section will be construed to limit the Board's authority to remand a matter to the Hub Manager or the Director of the Pension and Fiduciary Service under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the Hub Manager's or Director's ability to issue a supplemental statement of the case under 38 CFR 19.31(b)(2), (b)(3), or (c).

(Authority: 38 U.S.C. 501)

(The Office of Management and Budget has approved the information collection requirements in this part under control number 2900–0085)

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Part III

## Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Geophysical Survey in the Dumont d'Urville Sea Off the Coast of East Antarctica, January to March 2013; Notice

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XC779**

### Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Geophysical Survey in the Dumont d'Urville Sea Off the Coast of East Antarctica, January to March 2013

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

**ACTION:** Notice; proposed Incidental Harassment Authorization; request for comments.

**SUMMARY:** NMFS has received an application from the National Science Foundation (NSF) Division of Polar Programs, and Antarctic Support Contract (ASC) on behalf of five research institutions: Colgate University, Columbia University, Texas A&M Research Foundation, University of South Florida, and University of Texas at Austin, for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting a low-energy marine geophysical (seismic) survey in the Dumont d'Urville Sea off the coast of East Antarctica, January to March 2014. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to NSF to incidentally harass, by Level B harassment only, 14 species of marine mammals during the specified activity.

**DATES:** Comments and information must be received no later than February 3, 2014.

**ADDRESSES:** Comments on the application should be addressed to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Goldstein@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

NSF and ASC have provided a ''Draft Initial Environmental Evaluation/Environmental Assessment to Conduct a Marine-Based Studies of the Totten Glacier System and Marine Record of Cryosphere—Ocean Dynamics'' (IEE/EA), prepared by AECOM, on behalf of NSF and ASC, which is also available at the same Internet address. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–427–8401.

**SUPPLEMENTARY INFORMATION:**

## Background

Section 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371 (a)(5)(D)), directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

## Summary of Request

On July 3, 2013, NMFS received an application from the NSF and ASC requesting that NMFS issue an IHA for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting a low-energy marine seismic survey in International Waters (i.e., high seas) and in the Southern Ocean off the coast of East Antarctica during January to March 2014. We received an addendum to the application from the NSF and ASC on December 18, 2013 which reflected updates to incidental take requests for marine mammals related to icebreaking activities.

The research would be conducted by five research institutions: Colgate University, Columbia University, Texas A&M Research Foundation, University of South Florida, and University of Texas at Austin. The NSF and ASC plans to use one source vessel, the R/VIB *Nathaniel B. Palmer* (*Palmer*), and a seismic airgun array to collect seismic data in the Southern Ocean. The vessel would be operated by ASC, which operates the United States Antarctic Program under contract to the NSF. In support of the United States Antarctic Program, the NSF and ASC plans to use conventional low-energy, seismic methodology to perform marine-based studies in the Dumont d'Urville Sea to include evaluation of geophysical and physical oceanographic features in two

areas along the coast of East Antarctica (see Figures 1, 2, and 3 of the IHA application). The primary area proposed for the study is the Totten Glacier system (preferred study area) including the Moscow University Ice Shelf along the Sabrina Coast, and a secondary area, the Mertz Glacier and Cook Ice Shelf, along the Oates Coast. In addition to the proposed operations of the seismic airgun array and hydrophone streamer, NSF and ASC intend to operate a single-beam echosounder, multi-beam echosounder, acoustic Doppler current profiler (ADCP), and sub-bottom profiler continuously throughout the survey.

Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array and from icebreaking activities may have the potential to cause a behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities, and NSF and ASC has requested an authorization to take 14 species of marine mammals by Level B harassment. Take is not expected to result from the use of the single-beam echosounder, multi-beam echosounder, ADCP, acoustic locator, and sub-bottom profiler, as the brief exposure of marine mammals to one pulse, or small numbers of signals, in this particular case is not likely to result in the harassment of marine mammals. Also, NMFS does not expect take to result from collision with the source vessel because it is a single vessel moving at a relatively slow, constant cruise speed of 5 knots [kts]; 9.3 kilometers per hour [km/hr]; 5.8 miles per hour [mph]) during seismic acquisition within the survey, for a relatively short period of time (approximately 45 operational days). It is likely that any marine mammal would be able to avoid the vessel.

**Description of the Proposed Specified Activity**

NSF and ASC propose to conduct a low-energy seismic survey in the Dumont d'Urville Sea in the Southern Ocean off the coast of East Antarctica from January to March 2014. In addition to the low-energy seismic survey, scientific activities would include conducting a bathymetric profile survey of the seafloor using transducer based instruments such as a multi-beam echosounder and sub-bottom profiler; conducting magnetometry and imaging surveys using an underwater camera assembly; collecting sediment cores and dredge sampling; and collecting water samples and conductivity (salinity), temperature, depth (CTD) and current data through the deployment and recovery of short-term (in place for approximately one month) and long-term (in place for approximately one year) instrumentation moorings, CTD equipment casts, and the use of transducer-based ADCP instruments. Sea ice conditions will dictate areas where the ship and airguns can operate. Due to dynamic ice conditions, which cannot be predicted on a local scale, it is not possible to develop tracklines a priori. The seismic survey would be conducted in one or both of the two study areas depending on the sea ice conditions; however, the preferred study area is the Totten Glacier region (see Figure 2 of the IHA application). Water depths in the survey area range from 100 to 1,000 meters (m) (328.1 to 3,280.1 feet [ft]), and possibly exceeding 1,000 m in some areas. The seismic surveys are scheduled to occur for a total of less than or equal to 300 hours at one or both of the two study areas for approximately 45 operational days in January to March 2014. The operation hours and survey length would include equipment testing, ramp-up, line changes, and repeat coverage. The long transit time between port and the study site constrains how long the ship can be in the study area and effectively limits the maximum amount of time the airguns can operate. Some minor deviation from these dates would be possible, depending on logistics and weather.

The proposed survey of Totten Glacier and Moscow University Ice Shelf along the Sabrina Coast continental shelf is designed to address several critical questions. The Totten Glacier system, which drains one-eighth of the East Antarctic Ice Sheet and contains more ice volume than the entire West Antarctic Ice Sheet, remains the single largest and least understood glacial system which possesses a potentially unsteady dynamic. If it were to melt, sea-level would rise by more than 5 m (16.4 ft) worldwide. The proposed marine studies would help to understand both the dynamics and the controls of the Totten Glacier system, and to resolve ambiguity in large ice mass dynamic behavior. This research would be accomplished via the collection of glaciological, geological, and physical oceanographic data. In order to place the modern system, as well as more recent changes to the system, into a longer-term perspective, researchers would collect and interpret marine geologic, geochemical, and geophysical records of the longer term behavior and response of this system.

The proposed research would complement fieldwork studying other Antarctic ice shelves oceanographic studies near the Antarctic Peninsula, and ongoing development of ice sheet and other ocean models. It would facilitate learning at sea and ashore by students, help to fill important spatial and temporal gaps in a sparsely sampled region of coastal Antarctica, and communicate its findings via publications and outreach. Obtaining records of currents and oceanographic properties in this region are consistent with the objectives of the Southern Ocean Observing System for climate change. The work would enhance general understanding of air-sea-ice interactions, ocean circulation, ice shelf sensitivity to climate change, and the present and future roles of East Antarctic Ice Sheet on sea level.

The Principal Investigators are Dr. Amy Leventer of Colgate University, Dr. Donald Blankenship and Dr. Sean Gulick of the University of Texas at Austin, Dr. Eugene Domack of the University of South Florida, Mr. Bruce Huber of Columbia University, and Dr. Alejandro Orsi of Texas A&M Research Foundation.

The procedures to be used for the surveys would be similar to those used during previous low-energy seismic surveys by NSF and would use conventional seismic methodology. The proposed survey will involve one source vessel, the R/V *Nathaniel B. Palmer* (*Palmer*). NSF and ASC will deploy two (each with a discharge volume of 45 cubic inch [$in^3$] with a total volume of 90 $in^3$ or each with a discharge volume of 105 $in^3$ with a total volume of 210 $in^3$) Sercel Generator Injector (GI) airgun array as an energy source at a tow depth of up to 3 m (9.8 ft) below the surface (more information on the airguns can be found in Appendix B of the IHA application). The receiving system will consist of one 100 m (328.1 ft) long, 24-channel, solid-state hydrophone streamer towed behind the vessel. As the GI airguns are towed along the survey lines, the hydrophone streamer will receive the returning acoustic signals and transfer the data to the onboard processing system. All planned seismic data acquisition activities will be conducted by technicians provided by NSF and ASC with onboard assistance by the scientists who have proposed the study. The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

The planned seismic survey (e.g., equipment testing, start-up, line changes, repeat coverage of any areas, and equipment recovery) will consist of approximately 2,800 kilometer (km) (1,511.9 nautical miles [nmi]) of transect lines (including turns) in the survey area in the Dumont d'Urville Sea of the

Southern Ocean (see Figures 1, 2, and 3 of the IHA application). In addition to the operation of the airgun array, a single-beam and multi-beam echosounder, ADCP, and a sub-bottom profiler will also likely be operated from the *Palmer* continuously throughout the cruise between the first and last survey sites. There will be additional seismic operations associated with equipment testing, ramp-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In NSF and ASC's estimated take calculations, 25% has been added for those additional operations.

TABLE 1—PROPOSED LOW-ENERGY SEISMIC SURVEY ACTIVITIES IN THE DUMONT D'URVILLE SEA OFF THE COAST OF EAST ANTARCTICA

| Survey length (km) | Cumulative duration (hr) [1] | Airgun array total volume | Time between airgun shots (distance) | Streamer length (m) |
|---|---|---|---|---|
| 2,800 (1,511.9 nmi) ..... | ≤300 | 2 × 45 in$^3$ (2 × 737 cm$^3$) or 2 × 105 in$^3$ (2 × 1,720 cm$^3$) | 5 seconds (12.5 m or 41 ft) ... | 100 (328.1 ft). |

[1] Airgun operations are planned for no more than 16 continuous hours at a time.

*Vessel Specifications*

The *Palmer,* a research vessel owned by Edison Chouest Offshore, Inc. and operated by NSF and ACS (under a long-term charter with Edison Chouest Offshore, Inc.), will tow the two GI airgun array, as well as the hydrophone streamer. When the *Palmer* is towing the airgun array and the relatively short hydrophone streamer, the turning rate of the vessel while the gear is deployed is much higher than the limit of 5 degrees per a minute for a seismic vessel towing a streamer of more typical length (much greater than 1 km [0.5 nmi]), which is approximately 20 degrees. Thus, the maneuverability of the vessel is not limited much during operations with the streamer.

The U.S.-flagged vessel has a length of 94 m (308.5 ft); a beam of 18.3 m (60 ft); a maximum draft of 6.8 m (22.5 ft); and a gross tonnage of 6,174. The ship is powered by four Caterpillar 3608 diesel engines (3,300 brake horsepower [hp] at 900 rotations per minute [rpm]) and a 1,400 hp flush-mounted, water jet azimuthing bowthruster. Electrical power is provided by four Catepillar 3512, 1,050 kiloWatt (kW) diesel generators. The *Palmer*'s operation speed during seismic acquisition is typically approximately 9.3 km/hr (5 kts) (varying between 7.4 to 11.1 km/hr [4 to 6 kts]). When not towing seismic survey gear, the *Palmer* typically cruises at 18.7 km/hr (10.1 kts) and has a maximum speed of 26.9 km/hr (14.5 kts). The *Palmer* has an operating range of approximately 27,780 km (15,000 nmi) (the distance the vessel can travel without refueling), which is approximately 70 to 75 days. The vessel can accommodate 37 scientists and 22 crew members.

The vessel also has two locations as likely observation stations from which Protected Species Observers (PSO) will watch for marine mammals before and during the proposed airgun operations on the *Palmer.* Observing stations will be at the bridge level with PSO's eye level approximately 16.5 m (54.1 ft) above sea level with an approximately 270° view around the vessel, and an aloft observation tower that is approximately 24.4 m (80.1 ft) above sea level that is protected from the weather and has an approximately 360° view around the vessel. More details of the *Palmer* can be found in the IHA application and online at: *http://www.nsf.gov/geo/plr/support/nathpalm.jsp* and *http://www.usap.gov/vesselScienceAndOperations/contentHandler.cfm?id=1561.*

*Acoustic Source Specifications*

*Seismic Airguns*

The *Palmer* will deploy an airgun array, consisting of two 45 in$^3$ or two 105 in$^3$ GI airguns as the primary energy source and a 100 m streamer containing hydrophones. The airgun array will have a supply firing pressure of 2,000 pounds per square inch (psi) and 2,200 psi when at high pressure stand-by (i.e., shut-down). The regulator is adjusted to ensure that the maximum pressure to the GI airguns is 2,000 psi, but there are times when the GI airguns may be operated at pressures as low as 1,750 to 1,800 psi Seismic pulses for the GI airguns will be emitted at intervals of approximately 5 seconds. At speeds of approximately 9.3 km/hr, the shot intervals correspond to spacing of approximately will be 12.5 m (41 ft) during the study. There would be approximately 720 shots per hour. During firing, a brief (approximately 0.03 second) pulse sound is emitted; the airguns will be silent during the intervening periods. The dominant frequency components range from two to 188 Hertz (Hz).

The GI airguns would be used in harmonic mode, that is, the volume of the injector chamber (I) of each GI airgun is equal to that of its generator chamber (G): 45 in$^3$ and 105 in$^3$ for each airgun array. Each airgun would be initially configured to a displacement volume of 45 in$^3$ for the generator and injector. The generator chamber of each GI airgun in the primary source, the one responsible for introducing the sound pulse into the ocean, is 45 in$^3$. The injector chamber injects air into the previously-generated bubble to maintain its shape, and does not introduce more sound into the water. The airguns would fire the compressed air volume in unison in a harmonic mode. In harmonic mode, the injector volume is designed to destructively interfere with the reverberations of the generator (source component). Firing the airguns in harmonic mode maximizes resolution in the data and minimizes any excess noise in the water column or data caused by the reverberations (or bubble pulses). The two GI airguns will be spaced approximately 3 or 6 m (9.8 or 19.7 ft) apart, side-by-side, between 15 and 40 m (49.2 and 131.2 ft) behind the *Palmer,* at a depth of up to 3 m during the surveys. If needed to improve penetration of the strata, the two airguns may be reconfigured to a displacement volume of 105 in$^3$ each and would still be considered a low-energy acoustic source as defined in the NSF/USGS PEIS. Therefore, there are three possible two airgun array configurations: Two 45/45 in$^3$ airguns separated by 3 m, two 45/45 in$^3$ airguns separated by 6 m, and two 105/105 in$^3$ airguns separated by 3 m. The two 45/45 in$^3$ airguns separated by 3 m layout is preferred, the two 45/45 in$^3$ separated by 6 m layout would be used in the event the middle of the three 45/45 in$^3$ airgun fails, and the two 105/105 in$^3$ airguns separated by 3 m would be used only if additional penetration is needed. To summarize, two strings of GI airguns would be available: (1) Three 45/45 in$^3$ airguns on a single string where one of these is used as a ''hot spare'' in the event of

failure of one of the other two airguns, these three GI airguns are separated by 3 m; and (2) two 105/105 in$^3$ airguns on a second string without a ''hot spare.'' The total effective volume will be 90 or 210 in$^3$. The two strings would be spaced 14 m (45.9 ft) apart, on either side of the midline of the vessel, however, only one string at a time would be used.

The Nucleus modeling software used at Lamont-Doherty Earth Observatory of Columbia University (L–DEO) does not include GI airguns as part of its airgun library, however signatures and mitigation models have been obtained for two 45 in$^3$ G airguns at 2 m tow depth and two 105 in$^3$ G airguns at 3 m tow depth that are close approximations. For the two 45 in$^3$ airgun array, the source output (downward) is 230.6 dB re: 1 μPam for 0-to-peak and 235.9 dB re: 1 μPam for peak-to-peak. For the two 105 in$^3$ airgun array, the source output (downward) is 234.4 dB re: 1 μPam 0-to-peak and 239.8 dB re: 1 μPam for peak-to-peak. These numbers were determined using the aforementioned G-airgun approximation to the GI airgun and using signatures filtered with DFS V out-256 Hz 72 dB/octave. The dominant frequency range would be 20 to 160 Hz for a pair of GI airguns towed at 3 m depth and 35 to 230 Hz for a pair of GI airguns towed at 2 m depth.

During the low-energy seismic survey, the vessel would attempt to maintain a constant cruise speed of approximately 5 knots. The airguns would operate continuously for no more than 16 hours at a time and duration of continuous operation is dependent on ice concentration. The cumulative duration of the airgun operations will not exceed 200 hrs. The relatively short, 24-channel hydrophone streamer would provide operational flexibility to allow the seismic survey to proceed along the designated cruise track with minimal interruption due to variable sea ice conditions. The design of the seismic equipment is to achieve high-resolution images of the glacial marine sequence stratigraphy with the ability to correlate to the ultra-high frequency sub-bottom profiling data and provide cross-sectional views to pair with the seafloor bathymetry. The cruise path would be designated once in the study area and would take care to avoid heavy ice conditions such as icebergs or dense areas of pack ice that could potentially damage the airguns or streamer and minimize proximity to potential marine receptors.

Weather conditions that could affect the movement of sea ice and hinder the hydrophone streamer would be closely monitored, as well as conditions that could limit visibility. If situations are encountered which pose a risk to the equipment, impede data collection, or require the vessel to stop forward progress, the seismic survey equipment would be shut-down and retrieved until conditions improve. In general, the hydrophone streamer and sources could be retrieved in less than 30 minutes.

*Metrics Used in This Document*

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 μPa, and the units for SPLs are dB re: 1 μPa. SPL (in decibels [dB]) = 20 log (pressure/reference pressure).

SPL is an instantaneous measurement and can be expressed as the peak, the peak-to-peak (p-p), or the root mean square (rms). Root mean square, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square unless otherwise noted. SPL does not take the duration of a sound into account.

*Characteristics of the Airgun Pulses*

Airguns function by venting high-pressure air into the water which creates an air bubble. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by the oscillation of the resulting air bubble. The oscillation of the air bubble transmits sounds downward through the seafloor and the amount of sound transmitted in the near horizontal directions is reduced. However, the airgun array also emits sounds that travel horizontally toward non-target areas.

The nominal downward-directed source levels of the airgun arrays used by NSF and ASC on the *Palmer* do not represent actual sound levels that can be measured at any location in the water. Rather, they represent the level that would be found 1 m (3.3 ft) from a hypothetical point source emitting the same total amount of sound as is emitted by the combined GI airguns. The actual received level at any location in the water near the GI airguns will not exceed the source level of the strongest individual source. In this case, that will be about 224.6 dB re 1 μPam peak, or 229.8 dB re 1 μPam peak-to-peak for the two 45 in$^3$ airgun array, and 228.2 dB re 1 μPam peak or 233.5 dB re 1 μPam peak-to-peak for the two 105 in$^3$ airgun array. However, the difference between rms and peak or peak-to-peak values for a given pulse depends on the frequency content and duration of the pulse, among other factors. Actual levels experienced by any organism more than 1 m from either GI airgun will be significantly lower.

Accordingly, Lamont-Doherty Earth Observatory of Columbia University (L–DEO) has predicted and modeled the received sound levels in relation to distance and direction from the two GI airgun array. A detailed description of L–DEO's modeling for this survey's marine seismic source arrays for protected species mitigation is provided in the NSF/USGS PEIS. These are the nominal source levels applicable to downward propagation. The NSF/USGS PEIS discusses the characteristics of the airgun pulses. NMFS refers the reviewers to those documents for additional information.

*Predicted Sound Levels for the Airguns*

To determine exclusion zones for the airgun array to be used in the intermediate and deep water of the Gulf of Mexico (GOM), received sound levels have been modeled by L–DEO for a number of airgun configurations, including two 45 in$^3$ and two 105 in$^3$ G airguns, in relation to distance and direction from the airguns (see Figure 2 and 3 in Attachment B of the IHA application). The model does not allow for bottom interactions, and is most directly applicable to deep water. Because the model results are for G airguns, which have more energy than GI airguns of the same size, those distances overestimate (by approximately 10%) the distances for the two 45 in$^3$ GI airguns and two 105 in$^3$ GI airguns, respectively. Although the distances are overestimated, no adjustments for this have been made to the radii distances in Table 2 (below). Based on the modeling, estimates of the maximum distances from the GI airguns where sound levels of 190, 180, and 160 dB re 1 μPa (rms) are predicted to be received in shallow, intermediate, and deep water are shown in Table 2 (see Table 1 of Attachment B of the IHA application).

Empirical data concerning the 190, 180, and 160 dB (rms) distances were acquired for various airgun arrays based on measurements during the acoustic verification studies conducted by L–DEO in the northern GOM in 2003 (Tolstoy *et al.,* 2004) and 2007 to 2008 (Tolstoy *et al.,* 2009; Diebold *et al.,* 2010). Results of the 18 and 36 airgun array are not relevant for the two GI airguns to be used in the proposed survey. The empirical data for the 6, 10, 12, and 20 airgun arrays indicate that, for deep water, the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004). Measurements were not made for the two GI airgun array in deep water; however, NSF and ASC proposes to use the buffer and exclusion zones predicted by L–DEO's model for the proposed GI airgun operations in deep water, although they are likely conservative given the empirical results for the other arrays. Using the L–DEO model, Table 2 (below) shows the distances at which three rms sound levels are expected to be received from the two GI airguns. The 180 and 190 dB re 1 μPam (rms) distances are the safety criteria for potential Level A harassment as specified by NMFS (2000) and are applicable to cetaceans and pinnipeds, respectively. If marine mammals are detected within or about to enter the appropriate exclusion zone, the airguns will be shut-down immediately.

Table 2 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the two airgun array (45 in$^3$ or 105 in$^3$) operating in shallow (less than 100 m [328 ft]), intermediate (100 to 1,000 m [328 to 3,280 ft]), and deep water (greater than 1,000 m [3,280 ft]) depths.

Table 2— Predicted and modeled (two 45 in$^3$ and two 105 in$^3$ GI airgun array) distances to which sound levels ≥190, 180 and 160 dB re: 1 μPa (rms) could be received in shallow, intermediate, and deep water during the proposed low-energy seismic survey in the Dumont d'Urville Sea of the Southern Ocean, January to March 2014.

| Source and total volume | Tow depth (m) | Water depth (m) | Predicted RMS radii distances (m) for 2 GI airgun array | | |
|---|---|---|---|---|---|
| | | | 160 dB | 180 dB | 190 dB |
| Two GI Airguns (45 in$^3$) | 3 | Shallow (<100) | 1,176 (3,858.3 ft) | 296 (971.1 ft) | 147. (482.3 ft). |
| Two GI Airguns (45 in$^3$) | 3 | Intermediate (100 to 1,000) | 600 (1,968.5 ft) | 100 (328ft) | 15. (49.2 ft). |
| Two GI Airguns (45 in$^3$) | 3 | Deep (≤1,000) | 400 (1,312.3 ft) | 100 (328 ft) | 10. (32.8 ft). |
| Two GI Airguns (105 in$^3$) | 3 | Shallow (<100) | 1,970 (6,463.3 ft) | 511 (1,676.5 ft) | 294. (964.6 ft). |
| Two GI Airguns (105 in$^3$) | 3 | Intermediate (100 to 1,000) | 1,005 (3,297.2 ft) | 100 | 30. (98.4 ft). |
| Two GI Airguns (105 in$^3$) | 3 | Deep (>1,000) | 670 (2,198.2 ft) | 100 | 20. (65.6 ft). |

NMFS expects that acoustic stimuli resulting from the proposed operation of the two GI airgun array has the potential to harass marine mammals. NMFS does not expect that the movement of the *Palmer,* during the conduct of the low-energy seismic survey, has the potential to harass marine mammals because of the relatively slow operation speed of the vessel (approximately 5 kts; 9.3 km/hr; 5.8 mph) during seismic acquisition.

*Bathymetric Survey*

Along with the low-energy airgun operations, other additional geophysical measurements would be made using swath bathymetry, backscatter sonar imagery, high-resolution sub-bottom profiling (''CHIRP''), imaging, and magnetometer instruments. In addition, several other transducer-based instruments onboard the vessel would be operated continuously during the cruise for operational and navigational purposes. Operating characteristics for the instruments to be used are described below.

Single-Beam Echosounder (Knudsen 3260)—The hull-mounted CHIRP sonar would be operated continuously during all phases of the cruise. This instrument is operated at 12 kHz for bottom-tracking purposes or at 3.5 kHz in the sub-bottom profiling mode. The sonar emits energy in a 30° beam from the bottom of the ship.

Single-Beam Echosounder (Bathy 2000)—The hull-mounted sonar characteristics of the Bathy 2000 are similar to the Knudsen 3260. Only one hull-mounted echosounder can be operated a time, and this source would be operated instead of the Knudsen 3260 only if needed (i.e., only one would be in continuous operation during the cruise).

Multi-Beam Sonar (Simrad EM120)—The hull-mounted multi-beam sonar would be operated continuously during the cruise. This instrument operates at a frequency of 12 kHz, has an estimated maximum source energy level of 242 dB re 1μPa (rms), and emits a very narrow (<2°) beam fore to aft and 150° in cross-track. The multi-beam system emits a series of nine consecutive 15 ms pulses.

Acoustic Doppler Current Profiler (ADCP Teledyne RDI VM–150)—The hull-mounted ADCP would be operated continuously throughout the cruise. The ADCP operates at a frequency of 150 kHz with an estimated acoustic output level at the source of 223.6 dB re 1μPa (rms). Sound energy from the ADCP is emitted as a 30° conically-shaped beam.

Acoustic Doppler Current Profiler (ADCP Ocean Surveyor OS–38)—The characteristics of this backup hull-mounted ADCP unit are similar to the Teledyne VM–150 and would be continuously operated.

Acoustic Locator (Pinger)—An acoustic locator (i.e., pinger) would be deployed when using the Smith-McIntyre grab sampler and multi-corer (Mega-corer) to enable these devices to be located in the event they become detached from their lines. A pinger typically operates at a frequency of 12 kHz, generates a 5 ms pulse per second, and has an acoustical output of 162 dB re 1μPa (rms). A maximum total of 30 samples would be obtained using these devices and require approximately one hour per sample; therefore, the pinger would operate for a total of 30 hours.

Passive Instruments—During the seismic survey in the Dumont d'Urville Sea, a precession magnetometer and Air-Sea gravity meter would be deployed. In addition, numerous (approximately 24) expendable bathythermograph (XBTs) probes would

also be released (and none would be recovered) over the course of the cruise to obtain temperature data necessary to calculate sound velocity profiles used by the multi-beam sonar.

*Core and Dredge Sampling*

The primary sampling goals involve the acquisition of marine sediment cores of various lengths up to 25 m (82 ft). It is anticipated that up to 65 sediment cores and grab samples and 12 rock dredge samples would be collected as summarized in Table 3 (Table 3 of the IHA application). Each core or grab sample would require approximately one hour per sample. All cores and dredges would be deployed using a steel cable/winch system.

Approximately 75 $m^2$ (807.3 $ft^2$) of seafloor would be disturbed by each of four deployments of the dredge at three different sites (resulting in a total of 900 $m^2$ [9,687.5 $ft^2$] of affected seafloor for the project). The selection of the bottom sampling locations and sampling method would be based on observations of the seafloor, subsurface reflectivity, sediment type, and accessibility due to ice and weather conditions. Bottom sampling in the Mertz Glacier area would be limited to strategically selected locations including possible re-sampling at a previous core site.

TABLE 3—PROPOSED CORING AND DREDGING ACTIVITIES IN THE DUMONT D'URVILLE SEA

| Sampling device | Number of deployments |
|---|---|
| Smith-MycIntyre grab sampler | 10 to 15. |
| Multi-corer (Mega-corer) | 10 to 15. |
| Kasten corer (regular or jumbo). | 20 to 25. |
| Jumbo piston corer | 8 to 10. |
| Box cage dredge | 10 to 12. |

Limited sampling of rock material would be conducted using a dredge that would be towed along the seafloor for short distances (approximately 50 m [164 ft]) to collect samples of bedrock and ice rafted debris. The available dredges, which have openings of 0.5 to 1.5 m (1.6 to 4.9 ft), would be deployed on rocky substrates. The locations of the proposed dredge sites are limited to the inner shelf (southern) perimeter of three areas: The Mertz Trough and two regions along the Sabrina Coast. Final selection of dredge sites will include review to ensure that the seamounts or corals in the area are avoided (AOA, 2011).

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has adopted conservation measures (i.e., 22–06, 22–07, and 22–09) to protect vulnerable marine ecosystems (VME), which include seamounts, hydrothermal vents, cold water corals, and sponge fields. The conservation measure 22–07 includes mitigation and reporting requirements if VME are encountered. The science team would follow these requirements (see Attachment C of the IHA application) if VME's are encountered while sampling the sea bottom.

In addition, a camera and towed video system would be deployed at up to 25 sites. This device would lightly touch the seafloor to establish a baseline and rise to an optimum elevation to obtain the desired images.

*Water Sampling and Current Measurements*

High-resolution conductivity, depth, and temperature (CTD) measurements would be collected to characterize the summer regional water mass stratification and circulation, and the meridional exchange of waters between the oceanic and shelf regimes. These physical measurements would involve approximately SeaBird CTD system casts including the use of a lowered ADCP (LADCP).

The LADCP would consist of two Teledyne RDI Workhorse Monitor ADCPs mounted on the CTD/rosette frame and one oriented upward and the other downward. The LADCP and frame would be raised and lowered by cable and winch. The LADCPs would operate at a frequency of 307.2 kHz, with an estimated output acoustic pressure along each 4 beams of 216.3 dB re 1μPa at 1 m. The beams are angled at 20 degrees from the centerline of the ADCP head, with a beam angle of 4 degrees for the individual beams. Typical pulse duration is 5.7 ms, with a typical repetition rate of 1.75 s. The upward and downward-looking ADCPs are operated in master-salve mode so that only one head pings at a time. The LADCP would be operated approximately one hour at every CTD/rosette station (maximum of 100 stations) for a total of 100 hours of operation.

These instruments would be used to profile the full water column for temperature, salinity (conductivity), dissolved oxygen and currents at a series of transects in the study area. Discrete water samples would be collected for salinity and dissolved oxygen to monitor CTD/rosette performance, and for oxygen isotopes to assess meltwater content. Water samples would also be collected for development and interpretation of marine sediment proxies using Niskin bottles.

Observations of the thermal structure along other portions of the cruise track would be made using an underway CTD system and XBTs while the seafloor is swath-mapped. The number and spacing of stations would be adjusted according to ocean features discovered through multi-beam swath mapping and the sea ice conditions. If portions of the study area are inaccessible to the NBP, a contingency sampling focused on the inflows of MDCW would be pursued in adjacent shelf troughs.

It is noted that underway ADCP on the *Palmer* can, under ideal conditions, obtain profiles of ocean currents to depths greater than 800 m (2,624.7 ft). On continental shelves where depths may be less than the range of the ADCP, the underway profiles cannot resolve the deepest 15% of the water column due to side lobe reflections from the bottom which contaminate the water column Doppler returns. For a depth of 800 m, expected in the MCDW, currents in the lower 120 m (393.7 ft) could not be measured by the ship ADCP; therefore, the lowered ADCP can provide accurate current profiles to within a few meters of the bottom and provide complete coverage of the velocity field at each CTD station.

*Instrumentation Moorings*

Four instrumented moorings would be deployed during the proposed cruise to measure current, temperature, and salinity (conductivity) continuously. Two of the moorings would be deployed for approximately one month (short-term moorings) and two moorings would be deployed for approximately one year (long-term moorings). The two short-term moorings and one long-term mooring would include ADCP paired with CTD recorders, and additional intermediate T (i.e., temperature) recorders. The characteristics of the ADCP units deployed on the moorings are similar to the Teledyne VM–150; the moored ADCPs operate at frequencies of 75 kHz (one unit) and 300 kHz (two units). The fourth mooring would be equipped with sediment traps, a CTD recorder and intermediate T recorders, and be deployed for approximately one year (long-term mooring). The two long-term moorings would be retrieved approximately one year later by a U.S. Arctic Program (USAP) vessel or collaborators from other countries.

Subject to sea ice conditions, these moorings would preferably be placed in front of Totten Glacier, but otherwise as close as possible inside adjacent cross-shelf troughs. If access to the inner shelf is not allowed by sea ice conditions we would attempt mooring deployments within the outer shelf close to the

troughs mouth, where the Totten Glacier is more directly connected to inflows from the oceanic domain offshore. The two long-term moorings would be deployed within 16 km of each other. The short-term moorings would be within a few kilometers of each other and no farther than 32 km (17.3 nmi) from the long-term moorings. All instruments would be kept at depths below 250 m (820.2 ft) to minimize damage or loss by icebergs.

The moorings would temporarily attached to anchors and be recovered using acoustic release mechanisms. The mooring recovery process would be similar regardless of mooring type or when they would be retrieved. Locating the moorings and releasing the moorings from the steel railroad wheel anchors (which would not be recovered) would be accomplished by transmitting sound over a period of several seconds. This is done with an acoustic deck command unit that sends a sequence of coded pulses to the receiving units, the acoustic releases, connected to the mooring anchors. The acoustic releases response to acknowledge the receipt of commands from the deck unit is by transmitting a short sequence of pulses back. Both of the acoustic units (onboard deck unit and moored releases) operate at frequencies between approximately 7 and 15 kHz. The beam pattern is approximately omnidirectional. The acoustic source level is less than 192 dB re 1μPa at 1 m.

In addition to the U.S. moorings described above, three new moorings would be deployed on behalf of Australia's national science agency the Commonwealth of Scientific and Industrial Research Organisation (CSIRO) Physical Oceanography group in the Totten Glacier region by the project team. These moorings would be retrieved approximately one year later by collaborators from other countries. Also, during this cruise, three CSIRO moorings that were deployed over a year ago in the western outlet of the Mertz-Ninnis Trough would be recovered. The recovery process and acoustic sources described above for the U.S. moorings would be used for recovery of the CSIRO moorings.

*Icebreaking*

Icebreaking is considered by NMFS to be a continuous sound and NMFS estimates that harassment occurs when marine mammals are exposed to continuous sounds at a received sound level of 120 dB SPL or above. Potential takes of marine mammals may ensue from icebreaking activity in which the *Palmer* is expected to engage in Antarctic waters (i.e., along the George V and Oates Coast of East Antarctica, >65° South, between 140° and 165° East). While breaking ice, the noise from the ship, including impact with ice, engine noise, and propeller cavitation, will exceed 120 dB (rms) continuously. If icebreaking does occur in Antarctic waters, NMFS, NSF and ASC expect it will occur during transit and non-seismic operations to gain access to coring, dredging, or other sampling locations and not during seismic airgun operations. The research activities and associated contingencies are designed to avoid areas of heavy sea ice condition. The buffer zone (160 dB [rms]) for the marine mammal Level B harassment threshold during the proposed activities is greater than the calculated radius during icebreaking. Therefore, if the *Palmer* breaks ice during seismic operations within the Antarctic waters (within the Dumont d'Urville Sea or other areas of the Southern Ocean), the more conservative and larger radius (i.e., that for seismic operations) will be used and supercede the buffer zone for icebreaking.

In 2008, acousticians from Scripps Institution of Oceanography Marine Physical Laboratory and University of New Hampshire Center for Coastal and Ocean Mapping conducted measurements of SPLs of the *Healy* icebreaking under various conditions (Roth and Schmidt, 2010). The results indicated that the highest mean SPL (185 dB) was measured at survey speeds of 4 to 4.5 kts in conditions of 5/10 ice and greater. Mean SPL under conditions where the ship was breaking heavy ice by backing and ramming was actually lower (180 dB). In addition, when backing and ramming, the vessel is essentially stationary, so the ensonified area is limited for a short period (on the order of minutes to tens of minutes) to the immediate vicinity of the vessel until the ship breaks free and once again makes headway.

The 120 dB received sound level radius around the *Healy* while icebreaking was estimated by researchers (USGS, 2010). Using a spherical spreading model, a source level of 185 dB decays to 120 dB in about 1,750 m (5,741.5 ft). This model is corroborated by Roth and Schmidt (2010). Therefore, as the ship travels through the ice, a watch 3,500 m (11,482.9 ft) wide would be subject to sound levels greater than or equal to 120 dB. This results in potential exposure of 3,500 km$^2$ (1,020.4 nmi$^2$) to sounds greater than or equal to 120 dB from icebreaking.

Data characterizing the sound levels generated by icebreaking activities conducted by the *Palmer* are not available; therefore, data for noise generating from an icebreaking vessel such as the U.S. Coast Guard Cutter (USCGC) *Healy* will be used as a proxy. It is noted that the *Palmer* is a smaller vessel and has less icebreaking capability than the U.S. Coast Guard's other polar icebreakers, being only capable of breaking ice up to 1 m thick at speeds of 3 kts (5.6 km/hr or 3 nmi). Therefore, the sound levels that may be generated by the *Palmer* are expected to be lower than the conservative levels estimated and measured for the *Healy.* Researchers will work to minimize time spent breaking ice as science operations are more difficult to conduct in icy conditions since the ice noise degrades the quality of the seismic and ADCP data and time spent breaking ice takes away from time supporting scientific research. Logistically, if the vessel were in heavy ice conditions, researchers would not tow the airgun array and streamer, as this would likely damage equipment and generate noisy data. It is possible that the seismic survey can be performed in low ice conditions if the Palmer could generate an open path behind the vessel.

Because the *Palmer* is not rated to break multi-year ice routinely, operations generally avoid transiting through older ice (i.e., 2 years or older, thicker than 1 m). If sea ice is encountered during the cruise, it is anticipated the *Palmer* will proceed primarily through one year sea ice, and possibly some new, very thin ice, and would follow leads wherever possible. Satellite imagery from the Totten region documents that sea ice is at its minimum extent during the month of February. The most recent image for the region, from November 21, 2013, shows that the sea ice is currently breaking up, with a significant coastal lead of open water. Based on a maximum sea ice extent of 250 km (135 nmi) and estimating that NSF and ASC will transit to the innermost shelf and back into open water twice, a round trip transit in each of the potential work regions, NSF and ASC estimate that the *Palmer* will actively break ice up to a distance of 1,000 km (540 nmi). Based on a ship's speed of 5 kts under moderate ice conditions, this distance represents approximately 108 hrs of icebreaking operations. It is noted that typical transit through areas primarily open water and containing brash ice or pancake ice will not be considered icebreaking.

*Dates, Duration, and Specified Geographic Region*

The proposed project and survey sites are located in selected regions of the Dumont d'Urville Sea in the Southern Ocean off the coast of East Antarctica and focus on the Totten Glacier and Moscow University Ice Shelf, located on the Sabrina Coast, from greater than approximately 64° South and between approximately 95 to 135° East (see Figure 2 of the IHA application), and the Mertz Glacier and Cook Ice Shelf systems located on the George V and Oates Coast, from greater than approximately 65° South and between approximately 140 to 165° East in International Waters. The proposed study sites are characterized by heavy ice cover, with a seasonal break-up in the ice that structures biological patterns. The proposed studies would occur in both areas, or entirely in one or the other, depending on ice conditions. Figure 3 of the IHA application illustrates the limited detailed bathymetry of the two study areas. Ice conditions encountered during the previous surveys in the region limited the area where bathymetric data could be collected. Water depths in the survey area range from approximately 100 to 1,000 m, and possibly exceeding 1,000 m in some areas. There is limited information on the depths in the study area and therefore more detailed information on bathymetry is not available. Figures 2 and 3 of the IHA application illustrate the limited available detailed bathymetry of the two proposed study areas due to ice conditions encountered during previous surveys in the region. The proposed seismic survey would be within an area of approximately 5,628 $km^2$ (1,640.9 $nmi^2$). This estimate is based on the maximum number of kilometers for the seismic survey (2,800 km) times the predicted rms radii (m) based on modeling and empirical measurements (assuming 100% use of the two 105 $in^3$ GI airguns in 100 to 1,000 m water depths) which was calculated to be 1,005 m (3,297.2 ft).

The icebreaking will occur, as necessary, between approximately 66 to 70° South and between 140 to 165° East. The total distance in the region of the vessel will travel include the proposed seismic survey and transit to dredging or sampling locations and will represent approximately 5,600 km (3,023.8 nmi). Based on a maximum sea ice extent of 250 km (135 nmi) and estimating that NSF and ASC will transit to the innermost shelf and back into open water twice, a round trip transit in each of the potential work regions, NSF and ASC estimate that the Palmer will actively break ice up to a distance of 1,000 km (540 nmi). Based on a ship's speed of 5 kts under moderate ice conditions, this distance represents approximately 108 hrs of icebreaking operations.

The *Palmer* is expected to depart from Hobart, Tasmania on approximately January 29, 2014 and arrive at Hobart, Tasmania on approximately March 16, 2014. Research operations would be over a span of 45-days, including to and from port. Ice-free or very low concentrations of sea ice are required in order to collect high quality seismic data and not impede passage of the vessel between sampling locations. This requirement restricts the cruise to operating in mid to late austral summer when the ice concentrations are typically the lowest. Some minor deviation from this schedule is possible, depending on logistics and weather (i.e., the cruise may depart earlier or be extended due to poor weather; there could be additional days of seismic operations if collected data are deemed to be of substandard quality).

**Description of the Marine Mammals in the Area of the Proposed Specified Activity**

The marine mammals that generally occur in the proposed action area belong to three taxonomic groups: Mysticetes (baleen whales), odontocetes (toothed whales), and pinnipeds (seals and sea lions). The marine mammal species that potentially occur within the Southern Ocean in proximity to the proposed action area in the Dumont d'Urville Sea include 28 species of cetaceans and 6 species of pinnipeds.

The Dumont d'Urville Sea may be a feeding ground for many of these marine mammals. Many of the species that may be potentially present in the study area seasonally migrate to higher latitudes along the east coast of Antarctica. In general, most species (except for the killer whale) migrate north in the middle of the austral winter and return to Antarctica in the early austral summer. Some species, particularly Antarctic minke (*Balaenopter*a *bonaerensis*) and killer whales (*Orcinus orca*), are expected to be present in higher concentrations along the ice edge (SCAR, 2002). The 6 species of pinnipeds that are found in the Southern Ocean and which may be present in the proposed study area include the crabeater (*Lebodon carcinophagus*), leopard (*Hydrurga leptonyx*), Wedell (*Leptonychotes weddellii*), Ross (*Ommatophoca rossii*), southern elephant (*Mirounga leonina*), and Antarctic fur seal (*Arctocephalus gazella*). Many of these pinniped species breed on either the pack ice or sub-Antarctic islands. Since the southern elephant seal and Antarctic fur seal haul-outs and rookeries are located on sub-Antarctic islands and prefer beaches, they are more common north of the seasonally shifting pack ice found in the proposed study area; therefore, these two species have not been considered further. Marine mammal species listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), includes the southern right (*Eubalaena australis*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whale. Of those endangered species, the humpback, sei, fin, blue, and sperm whale are likely to be encountered in the proposed survey area.

Various national Antarctic research programs along the coast of East Antarctica have conducted scientific cruises that included data on marine mammal sightings. These observations were made primarily between 30° East and 170° East and north to 60° South. The reported cetacean sightings are summarized in Tables 5 to 7 of the IHA application. For pinnipeds, observations made during a scientific cruise over a 13-day period in East Antarctica are summarized in Table 8 of the IHA application. These observations were made below 60° South and between 110° East to 165° East and include sightings of individual animals in the water as well as individuals that were hauled-out (i.e., resting on the surface of the sea ice).

Records from the International Whaling Commission's Southern Ocean Whale and Ecosystem Research (IWC–SOWER) circumpolar cruises were also considered. In addition to the 14 species known to occur in the Dumont d'Urville Sea of the Southern Ocean, there are 18 cetacean species with ranges that are known to occur in the sub-Antarctic waters of the study area which may also feed and/or migrate to the Southern Ocean during the austral summer, these include the southern right, pygmy right (*Caperea marginata*), Bryde's (*Balaenoptera brydei*), dwarf minke (*Balaenoptera acutorostrata* spp.), pygmy blue (*Balaenoptera musculus brevicauda*), pygmy dwarf sperm whale (*Kogia breviceps*), Arnoux's beaked (*Berardius arnuxii*), Blainville's beaked whale (*Mesoplodon densirostris*), Cuvier's beaked (*Ziphius cavirostris*), Shepherd's beaked (*Tasmacetus shepherdi*), Southern bottlenose (*Hyperoodon planifrons*), Andrew's

beaked (*Mesoplodon bowdoini*), Hector's beaked (*Mesoplodon hectori*), Gray's beaked (*Mesoplodon grayi*), strap-toothed beaked (*Mesoplodon layardii*), spade-toothed beaked (*Mesoplodon traversii*), southern right whale dolphin (*Lissodelphis peronii*), Dusky (*Lagenorhynchus obscurus*), and bottlenose dolphin (*Tursiops truncatus*). However, these species have not been sighted and are not expected to occur where the proposed activities would take place. These species are not considered further in this document.

Table 4 (below) presents information on the abundance, distribution, population status, conservation status, and population trend of the species of marine mammals that may occur in the proposed study area during February to March 2014.

TABLE 4—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE PROPOSED LOW-ENERGY SEISMIC SURVEY AREA IN THE ANTARCTIC AREA OF THE SOUTHERN OCEAN

[See text and Tables 4 in NSF and ASC's application for further details]

| Species | Habitat | Population estimate | ESA [1] | MMPA [2] | Population trend |
|---|---|---|---|---|---|
| Mysticetes: | | | | | |
| Southern right whale (*Eubalaena australis*). | Coastal, pelagic | 8,000 [3] to 15,000 [4] | EN | D | Increasing. |
| Pygmy right whale (*Caperea marginata*). | Coastal, pelagic | NA | NL | NC | NA. |
| Humpback whale (*Megaptera novaeangliae*). | Pelagic, nearshore waters, and banks. | 35,000 to 40,000 [3]—Worldwide.<br>9,484 [5]—Scotia Sea and Antarctica Peninsula. | EN | D | Increasing. |
| Dwarf minke whale (*Balaenoptera acutorostrata* sub-species). | Pelagic and coastal | NA | NL | NC | NA. |
| Antarctic minke whale (*Balaenoptera bonaerensis*). | Pelagic, ice floes | Several 100,000 [3]—Worldwide.<br>18,125 [5]—Scotia Sea and Antarctica Peninsula. | NL | NC | Stable. |
| Bryde's whale (*Balaenoptera brydei*). | Pelagic and coastal | NA | NL | NC | NA. |
| Sei whale (*Balaenoptera borealis*). | Primarily offshore, pelagic | 80,000 [3]—Worldwide | EN | D | NA. |
| Fin whale (*Balaenoptera physalus*). | Continental slope, pelagic | 140,000 [3]—Worldwide<br>4,672 [5]—Scotia Sea and Antarctica Peninsula. | EN | D | NA. |
| Blue whale (*Balaenoptera musculus*). | Pelagic, shelf, coastal | 8,000 to 9,000 [3]—Worldwide<br>1,700 [6]—Southern Ocean | EN | D | NA. |
| Odontocetes: | | | | | |
| Sperm whale (*Physeter macrocephalus*). | Pelagic, deep sea | 360,000 [3]—Worldwide<br>9,500 [3]—Antarctic | EN | D | NA. |
| Pygmy sperm whale (Kogia breviceps). | Pelagic, slope | NA | NL | NC | NA. |
| Arnoux's beaked whale (*Berardius arnuxii*). | Pelagic | NA | NL | NC | NA. |
| Blainville's beaked whale (*Mesoplodon densirostris*). | Pelagic | NA | NL | NC | NA. |
| Cuvier's beaked whale (*Ziphius cavirostris*). | Pelagic | NA | NL | NC | NA. |
| Shepherd's beaked whale (Tasmacetus shepherdi). | Pelagic | NA | NL | NC | NA. |
| Southern bottlenose whale (*Hyperoodon planifrons*). | Pelagic | 500,000 [3]—South of Antarctic Convergence. | NL | NC | NA. |
| Andrew's beaked whale (Mesoplodon bowdoini). | Pelagic | NA | NL | NC | NA. |
| Hector's beaked whale (Mesoplodon hectori). | Pelagic | NA | NL | NC | NA. |
| Gray's beaked whale (*Mesoplodon grayi*). | Pelagic | NA | NL | NC | NA. |
| Strap-toothed beaked whale (*Mesoplodon layardii*). | Pelagic | NA | NL | NC | NA. |
| Spade-toothed beaked whale (Mesoplodon traversii). | Pelagic | NA | NL | NC | NA. |

TABLE 4—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE PROPOSED LOW-ENERGY SEISMIC SURVEY AREA IN THE ANTARCTIC AREA OF THE SOUTHERN OCEAN—Continued

[See text and Tables 4 in NSF and ASC's application for further details]

| Species | Habitat | Population estimate | ESA [1] | MMPA [2] | Population trend |
|---|---|---|---|---|---|
| Killer whale (*Orcinus orca*). | Pelagic, shelf, coastal, pack ice. | 80,000 [3]—South of Antarctic Convergence. 25,000 [7]—Southern Ocean .. | NL ..... | NC ..... | NA. |
| Long-finned pilot whale (*Globicephala melas*). | Pelagic, shelf, coastal ..... | 200,000 [3 8]—South of Antarctic Convergence. | NL ..... | NC ..... | NA. |
| Bottlenose dolphin (*Tursiops truncatus*). | Offshore, inshore, coastal, estuaries. | >625,500 [3]—Worldwide ..... | NL ..... | NC ..... | NA. |
| Southern right whale dolphin (*Lissodelphis peronii*). | Pelagic ..... | NA ..... | NL ..... | NC ..... | NA. |
| Dusky dolphin (Lagenorhynchus obscurus). | Coastal, continental shelf and slope. | NA ..... | NL ..... | NC ..... | NA. |
| Hourglass dolphin (*Lagenorhynchus cruciger*). | Pelatic, ice edge ..... | 144,000 [3] ..... | NL ..... | NC ..... | NA. |
| Spectacled porpoise (*Phocoena dioptrica*). | Coastal, pelagic ..... | NA ..... | NL ..... | NC ..... | NA. |
| Pinnipeds: | | | | | |
| Crabeater seal (*Lobodon carcinophaga*). | Coastal, pack ice ..... | 5,000,000 to 15,000,000 [3 9] .. | NL ..... | NC ..... | Increasing. |
| Leopard seal (*Hydrurga leptonyx*). | Pack ice, sub-Antarctic islands. | 220,000 to 440,000 [3 10] ..... | NL ..... | NC ..... | NA. |
| Ross seal (*Ommatophoca rossii*). | Pack ice, smooth ice floes, pelagic. | 130,000 [3] ..... | NL ..... | NC ..... | NA. |
| Wedell seal (*Leptonychotes weddellii*). | Fast ice, pack ice, sub-Antarctic islands. | 500,000 to 1,000,000 [3 11] ..... | NL ..... | NC ..... | NA. |
| Southern elephant seal (*Mirounga leonina*). | Coastal, pelagic, sub-Antarctic waters. | 640,000 [12] to 650,000 [3] ..... | NL ..... | NC ..... | Decreasing, increasing or stable depending on breeding population. |
| Antarctic fur seal (*Arctocephalus gazella*). | Shelf, rocky habitats ..... | 1,600,000 [13] to 3,000,000 [3] .. | NL ..... | NC ..... | Increasing. |

NA = Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, S = Strategic, NC = Not Classified.
[3] Jefferson *et al.,* 2008.
[4] Kenney, 2009.
[5] Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) survey area (Reilly *et al.,* 2004).
[6] Sears and Perrin, 2009.
[7] Ford, 2009.
[8] Olson, 2009.
[9] Bengston, 2009.
[10] Rogers, 2009.
[11] Thomas and Terhune, 2009.
[12] Hindell and Perrin, 2009.
[13] Arnould, 2009.

Refer to sections 3 and 4 of NSF and ASC's IHA application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these other marine mammal species and their occurrence in the proposed project area. The IHA application also presents how NSF and ASC calculated the estimated densities for the marine mammals in the proposed survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the proposed IHA.

**Potential Effects on Marine Mammals**

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the proposed survey area. The effects of sounds from airgun operations might include one or more of the following: Tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the proposed project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected. A more comprehensive review of these issues can be found in the ''Programmatic Environmental

Impact Statement/Overseas Environmental Impact Statement prepared for Marine Seismic Research that is funded by the National Science Foundation and conducted by the U.S. Geological Survey'' (NSF/USGS, 2011).

*Tolerance*

Richardson *et al.* (1995) defines tolerance as the occurrence of marine mammals in areas where they are exposed to human activities or man-made noise. In many cases, tolerance develops by the animal habituating to the stimulus (i.e., the gradual waning of responses to a repeated or ongoing stimulus) (Richardson, *et al.,* 1995; Thorpe, 1963), but because of ecological or physiological requirements, many marine animals may need to remain in areas where they are exposed to chronic stimuli (Richardson, *et al.,* 1995).

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Several studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of the marine mammal group. Although various baleen whales and toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times marine mammals of all three types have shown no overt reactions. The relative responsiveness of baleen and toothed whales are quite variable.

*Masking*

The term masking refers to the inability of a subject to recognize the occurrence of an acoustic stimulus as a result of the interference of another acoustic stimulus (Clark *et al.,* 2009). Introduced underwater sound may, through masking, reduce the effective communication distance of a marine mammal species if the frequency of the source is close to that used as a signal by the marine mammal, and if the anthropogenic sound is present for a significant fraction of the time (Richardson *et al.,* 1995).

The airguns for the proposed low-energy seismic survey have dominant frequency components of 2 to 188 Hz. This frequency range fully overlaps the lower part of the frequency range of odontocete calls and/or functional hearing (full range about 150 Hz to 180 kHz). Airguns also produce a small portion of their sound at mid and high frequencies that overlap most, if not all, frequencies produced by odontocetes. While it is assumed that mysticetes can detect acoustic impulses from airguns and vessel sounds (Richardson *et al.,* 1995a), sub-bottom profilers, pingers, and most of the multi-beam echosounders would likely be detectable by some mysticetes based on presumed mysticete hearing sensitivity. Odontocetes are presumably more sensitive to mid to high frequencies produced by the mulit-beam echosounders, sub-bottom profilers, and pingers than to the dominant low frequencies produced by the airguns and vessel. A more comprehensive review of the relevant background information for odontocetes appears in Section 3.6.4.3, Section 3.7.4.3 and Appendix E of the NSF/USGS PEIS (2011).

Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited. Because of the intermittent nature and low duty cycle of seismic airgun pulses, animals can emit and receive sounds in the relatively quiet intervals between pulses. However, in some situations, reverberation occurs for much or the entire interval between pulses (e.g., Simard *et al.,* 2005; Clark and Gagnon, 2006) which could mask calls. Some baleen and toothed whales are known to continue calling in the presence of seismic pulses, and their calls can usually be heard between the seismic pulses (e.g., Richardson *et al.,* 1986; McDonald *et al.,* 1995; Greene *et al.,* 1999; Nieukirk *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a,b, 2006; and Dunn and Hernandez, 2009). However, Clark and Gagnon (2006) reported that fin whales in the North Atlantic Ocean went silent for an extended period starting soon after the onset of a seismic survey in the area. Similarly, there has been one report that sperm whales ceased calling when exposed to pulses from a very distant seismic ship (Bowles *et al.,* 1994). However, more recent studies found that they continued calling in the presence of seismic pulses (Madsen *et al.,* 2002; Tyack *et al.,* 2003; Smultea *et al.,* 2004; Holst *et al.,* 2006; and Jochens *et al.,* 2008). Dilorio and Clark (2009) found evidence of increased calling by blue whales during operations by a lower-energy seismic source (i.e., sparker). Dolphins and porpoises commonly are heard calling while airguns are operating (e.g., Gordon *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a, b; and Potter *et al.,* 2007). The sounds important to small odontocetes are predominantly at much higher frequencies than are the dominant components of airgun sounds, thus limiting the potential for masking.

Pinnipeds have the most sensitive hearing and/or produce most of their sounds in frequencies higher than the dominant components of airgun sound, but there is some overlap in the frequencies of the airgun pulses and the calls. However, the intermittent nature of airgun pules presumably reduces the potential for masking.

Marine mammals are thought to be able to compensate for masking by adjusting their acoustic behavior through shifting call frequencies, increasing call volume, and increasing vocalization rates. For example blue whales are found to increase call rates when exposed to noise from seismic surveys in the St. Lawrence Estuary (Dilorio and Clark, 2009). The North Atlantic right whales (*Eubalaena glacialis*) exposed to high shipping noise increased call frequency (Parks *et al.,* 2007), while some humpback whales respond to low-frequency active sonar playbacks by increasing song length (Miller *et al.,* 2000). In general, NMFS expects the masking effects of seismic pulses to be minor, given the normally intermittent nature of seismic pulses.

*Behavioral Disturbance*

Marine mammals may behaviorally react to sound when exposed to anthropogenic noise. Disturbance includes a variety of effects, including subtle to conspicuous changes in behavior, movement, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). These behavioral reactions are often shown as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (e.g., pinnipeds flushing into the water from haul-outs or rookeries). If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a

prolonged period, impacts on individuals and populations could be significant (e.g., Lusseau and Bejder, 2007; Weilgart, 2007).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, and/or reproduction. Some of these significant behavioral modifications include:

- Change in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Richardson *et al.,* 1995; Southall *et al.,* 2007). Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals would be present within a particular distance of industrial activities and/or exposed to a particular level of sound. In most cases, this approach likely overestimates the numbers of marine mammals that would be affected in some biologically-important manner.

*Baleen Whales*—Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable (reviewed in Richardson *et al.,* 1995; Gordon *et al.,* 2004). Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances. However, baleen whales exposed to strong noise pulses from airguns often react by deviating from their normal migration route and/or interrupting their feeding and moving away. In the cases of migrating gray (*Eschrichtius robustus*) and bowhead (*Balaena mysticetus*) whales, the observed changes in behavior appeared to be of little or no biological consequence to the animals (Richardson, *et al.,* 1995). They simply avoided the sound source by displacing their migration route to varying degrees, but within the natural boundaries of the migration corridors.

Studies of gray, bowhead, and humpback whales have shown that seismic pulses with received levels of 160 to 170 dB re 1 μPa (rms) seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed (Malme *et al.,* 1986, 1988; Richardson *et al.,* 1995). In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 4 to 15 km (2.2 to 8.1 nmi) from the source. A substantial proportion of the baleen whales within those distances may show avoidance or other strong behavioral reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and studies have shown that some species of baleen whales, notably bowhead, gray, and humpback whales, at times, show strong avoidance at received levels lower than 160 to 170 dB re 1 μPa (rms).

Researchers have studied the responses of humpback whales to seismic surveys during migration, feeding during the summer months, breeding while offshore from Angola, and wintering offshore from Brazil. McCauley *et al.* (1998, 2000a) studied the responses of humpback whales off western Australia to a full-scale seismic survey with a 16 airgun array (2,678 $in^3$) and to a single airgun (20 $in^3$) with source level of 227 dB re 1 μPa (p-p). In the 1998 study, they documented that avoidance reactions began at 5 to 8 km (2.7 to 4.3 nmi) from the array, and that those reactions kept most pods approximately 3 to 4 km (1.6 to 2.2 nmi) from the operating seismic boat. In the 2000 study, they noted localized displacement during migration of 4 to 5 km (2.2 to 2.7 nmi) by traveling pods and 7 to 12 km (3.8 to 6.5 nmi) by more sensitive resting pods of cow-calf pairs. Avoidance distances with respect to the single airgun were smaller but consistent with the results from the full array in terms of the received sound levels. The mean received level for initial avoidance of an approaching airgun was 140 dB re 1 μPa (rms) for humpback pods containing females, and at the mean closest point of approach distance the received level was 143 dB re 1 μPa (rms). The initial avoidance response generally occurred at distances of 5 to 8 km (2.7 to 4.3 nmi) from the airgun array and 2 km (1.1 nmi) from the single airgun. However, some individual humpback whales, especially males, approached within distances of 100 to 400 m (328 to 1,312 ft), where the maximum received level was 179 dB re 1 μPa (rms).

Data collected by observers during several seismic surveys in the Northwest Atlantic showed that sighting rates of humpback whales were significantly greater during non-seismic periods compared with periods when a full array was operating (Moulton and Holst, 2010). In addition, humpback whales were more likely to swim away and less likely to swim towards a vessel during seismic vs. non-seismic periods (Moulton and Holst, 2010).

Humpback whales on their summer feeding grounds in southeast Alaska did not exhibit persistent avoidance when exposed to seismic pulses from a 1.64–L (100 $in^3$) airgun (Malme *et al.,* 1985). Some humpbacks seemed ''startled'' at received levels of 150 to 169 dB re 1 μPa. Malme *et al.* (1985) concluded that there was no clear evidence of avoidance, despite the possibility of subtle effects, at received levels up to 172 dB re 1 μPa (rms). However, Moulton and Holst (2010) reported that humpback whales monitored during seismic surveys in the Northwest Atlantic had lower sighting rates and were most often seen swimming away from the vessel during seismic periods compared with periods when airguns were silent.

Studies have suggested that South Atlantic humpback whales wintering off Brazil may be displaced or even strand upon exposure to seismic surveys (Engel *et al.,* 2004). The evidence for this was circumstantial and subject to alternative explanations (IAGC, 2004). Also, the evidence was not consistent with subsequent results from the same area of Brazil (Parente *et al.,* 2006), or with direct studies of humpbacks exposed to seismic surveys in other areas and seasons. After allowance for data from subsequent years, there was ''no observable direct correlation'' between strandings and seismic surveys (IWC, 2007: 236).

Reactions of migrating and feeding (but not wintering) gray whales to seismic surveys have been studied. Malme *et al.* (1986, 1988) studied the responses of feeding eastern Pacific gray whales to pulses from a single 100 $in^3$ airgun off St. Lawrence Island in the northern Bering Sea. They estimated, based on small sample sizes, that 50 percent of feeding gray whales stopped feeding at an average received pressure level of 173 dB re 1 μPa on an (approximate) rms basis, and that 10 percent of feeding whales interrupted feeding at received levels of 163 dB re 1 μPa (rms). Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast (Malme *et al.,* 1984; Malme and Miles, 1985), and western Pacific gray whales

feeding off Sakhalin Island, Russia (Wursig *et al.,* 1999; Gailey *et al.,* 2007; Johnson *et al.,* 2007; Yazvenko *et al.,* 2007a, b), along with data on gray whales off British Columbia (Bain and Williams, 2006).

Various species of *Balaenoptera* (blue, sei, fin, and minke whales) have occasionally been seen in areas ensonified by airgun pulses (Stone, 2003; MacLean and Haley, 2004; Stone and Tasker, 2006), and calls from blue and fin whales have been localized in areas with airgun operations (e.g., McDonald *et al.,* 1995; Dunn and Hernandez, 2009; Castellote *et al.,* 2010). Sightings by observers on seismic vessels off the United Kingdom from 1997 to 2000 suggest that, during times of good sightability, sighting rates for mysticetes (mainly fin and sei whales) were similar when large arrays of airguns were shooting versus silent (Stone, 2003; Stone and Tasker, 2006). However, these whales tended to exhibit localized avoidance, remaining significantly further (on average) from the airgun array during seismic operations compared with non-seismic periods (Stone and Tasker, 2006). Castellote *et al.* (2010) reported that singing fin whales in the Mediterranean moved away from an operating airgun array.

Ship-based monitoring studies of baleen whales (including blue, fin, sei, minke, and humpback whales) in the Northwest Atlantic found that overall, this group had lower sighting rates during seismic vs. non-seismic periods (Moulton and Holst, 2010). Baleen whales as a group were also seen significantly farther from the vessel during seismic compared with non-seismic periods, and they were more often seen to be swimming away from the operating seismic vessel (Moulton and Holst, 2010). Blue and minke whales were initially sighted significantly farther from the vessel during seismic operations compared to non-seismic periods; the same trend was observed for fin whales (Moulton and Holst, 2010). Minke whales were most often observed to be swimming away from the vessel when seismic operations were underway (Moulton and Holst, 2010).

Data on short-term reactions by cetaceans to impulsive noises are not necessarily indicative of long-term or biologically significant effects. It is not known whether impulsive sounds affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales have continued to migrate annually along the west coast of North America with substantial increases in the population over recent years, despite intermittent seismic exploration (and much ship traffic) in that area for decades (Appendix A in Malme *et al.,* 1984; Richardson *et al.,* 1995; Allen and Angliss, 2010). The western Pacific gray whale population did not seem affected by a seismic survey in its feeding ground during a previous year (Johnson *et al.,* 2007). Similarly, bowhead whales have continued to travel to the eastern Beaufort Sea each summer, and their numbers have increased notably, despite seismic exploration in their summer and autumn range for many years (Richardson *et al.,* 1987; Allen and Angliss, 2010). The history of coexistence between seismic surveys and baleen whales suggests that brief exposures to sound pulses from any single seismic survey are unlikely to result in prolonged effects.

*Toothed Whales*—Little systematic information is available about reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, there are recent systematic studies on sperm whales (e.g., Gordon *et al.,* 2006; Madsen *et al.,* 2006; Winsor and Mate, 2006; Jochens *et al.,* 2008; Miller *et al.,* 2009). There is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (e.g., Stone, 2003; Smultea *et al.,* 2004; Moulton and Miller, 2005; Bain and Williams, 2006; Holst *et al.,* 2006; Stone and Tasker, 2006; Potter *et al.,* 2007; Hauser *et al.,* 2008; Holst and Smultea, 2008; Weir, 2008; Barkaszi *et al.,* 2009; Richardson *et al.,* 2009; Moulton and Holst, 2010).

Seismic operators and PSOs on seismic vessels regularly see dolphins and other small toothed whales near operating airgun arrays, but in general there is a tendency for most delphinids to show some avoidance of operating seismic vessels (e.g., Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003; Moulton and Miller, 2005; Holst *et al.,* 2006; Stone and Tasker, 2006; Weir, 2008; Richardson *et al.,* 2009; Barkaszi *et al.,* 2009; Moulton and Holst, 2010). Some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing (e.g., Moulton and Miller, 2005). Nonetheless, small toothed whales more often tend to head away, or to maintain a somewhat greater distance from the vessel, when a large array of airguns is operating than when it is silent (e.g., Stone and Tasker, 2006; Weir, 2008; Barry *et al.,* 2010; Moulton and Holst, 2010). In most cases, the avoidance radii for delphinids appear to be small, on the order of one km or less, and some individuals show no apparent avoidance. Captive bottlenose dolphins and beluga whales (*Delphinapterus leucas*) exhibited changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.,* 2000, 2002, 2005). However, the animals tolerated high received levels of sound before exhibiting aversive behaviors.

Results of porpoises depend on species. The limited available data suggest that harbor porpoises (*Phocoena phocoena*) show stronger avoidance of seismic operations than do Dall's porpoises (*Phocoenoides dalli*) (Stone, 2003; MacLean and Koski, 2005; Bain and Williams, 2006; Stone and Tasker, 2006). Dall's porpoises seem relatively tolerant of airgun operations (MacLean and Koski, 2005; Bain and Williams, 2006), although they too have been observed to avoid large arrays of operating airguns (Calambokidis and Osmek, 1998; Bain and Williams, 2006). This apparent difference in responsiveness of these two porpoise species is consistent with their relative responsiveness to boat traffic and some other acoustic sources (Richardson *et al.,* 1995; Southall *et al.,* 2007).

Most studies of sperm whales exposed to airgun sounds indicate that the sperm whale shows considerable tolerance of airgun pulses (e.g., Stone, 2003; Moulton *et al.,* 2005, 2006a; Stone and Tasker, 2006; Weir, 2008). In most cases the whales do not show strong avoidance, and they continue to call. However, controlled exposure experiments in the Gulf of Mexico indicate that foraging behavior was altered upon exposure to airgun sound (Jochens *et al.,* 2008; Miller *et al.,* 2009; Tyack, 2009). There are almost no specific data on the behavioral reactions of beaked whales to seismic surveys. However, some northern bottlenose whales (*Hyperoodon ampullatus*) remained in the general area and continued to produce high-frequency clicks when exposed to sound pulses from distant seismic surveys (Gosselin and Lawson, 2004; Laurinolli and Cochrane, 2005; Simard *et al.,* 2005). Most beaked whales tend to avoid approaching vessels of other types (e.g., Wursig *et al.,* 1998). They may also dive for an extended period when approached by a vessel (e.g., Kasuya, 1986), although it is uncertain how much longer such dives may be as compared to dives by undisturbed beaked whales, which also are often quite long (Baird *et al.,* 2006; Tyack *et al.,* 2006). Based on a single observation,

Aguilar-Soto *et al.* (2006) suggested that foraging efficiency of Cuvier's beaked whales may be reduced by close approach of vessels. In any event, it is likely that most beaked whales would also show strong avoidance of an approaching seismic vessel, although this has not been documented explicitly. In fact, Moulton and Holst (2010) reported 15 sightings of beaked whales during seismic studies in the Northwest Atlantic; seven of those sightings were made at times when at least one airgun was operating. There was little evidence to indicate that beaked whale behavior was affected by airgun operations; sighting rates and distances were similar during seismic and non-seismic periods (Moulton and Holst, 2010).

There are increasing indications that some beaked whales tend to strand when naval exercises involving mid-frequency sonar operation are ongoing nearby (e.g., Simmonds and Lopez-Jurado, 1991; Frantzis, 1998; NOAA and USN, 2001; Jepson *et al.,* 2003; Hildebrand, 2005; Barlow and Gisiner, 2006; see also the ''Stranding and Mortality'' section in this notice). These strandings are apparently a disturbance response, although auditory or other injuries or other physiological effects may also be involved. Whether beaked whales would ever react similarly to seismic surveys is unknown. Seismic survey sounds are quite different from those of the sonar in operation during the above-cited incidents.

Odontocete reactions to large arrays of airguns are variable and, at least for delphinids, seem to be confined to a smaller radius than has been observed for the more responsive of some mysticetes. However, other data suggest that some odontocete species, including harbor porpoises, may be more responsive than might be expected given their poor low-frequency hearing. Reactions at longer distances may be particularly likely when sound propagation conditions are conducive to transmission of the higher frequency components of airgun sound to the animals' location (DeRuiter *et al.,* 2006; Goold and Coates, 2006; Tyack *et al.,* 2006; Potter *et al.,* 2007).

*Pinnipeds*—Pinnipeds are not likely to show a strong avoidance reaction to the airgun array. Visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior. In the Beaufort Sea, some ringed seals avoided an area of 100 m to (at most) a few hundred meters around seismic vessels, but many seals remained within 100 to 200 m (328 to 656 ft) of the trackline as the operating airgun array passed by (e.g., Harris *et al.,* 2001; Moulton and Lawson, 2002; Miller *et al.,* 2005.). Ringed seal (*Pusa hispida*) sightings averaged somewhat farther away from the seismic vessel when the airguns were operating than when they were not, but the difference was small (Moulton and Lawson, 2002). Similarly, in Puget Sound, sighting distances for harbor seals (*Phoca vitulina*) and California sea lions (*Zalophus californianus*) tended to be larger when airguns were operating (Calambokidis and Osmek, 1998). Previous telemetry work suggests that avoidance and other behavioral reactions may be stronger than evident to date from visual studies (Thompson *et al.,* 1998).

During seismic exploration off Nova Scotia, gray seals (*Halichoerus grypus*) exposed to noise from airguns and linear explosive charges did not react strongly (J. Parsons in Greene *et al.,* 1985). Pinnipeds in both water and air, sometimes tolerate strong noise pulses from non-explosive and explosive scaring devices, especially if attracted to the area for feeding and reproduction (Mate and Harvey, 1987; Reeves *et al.,* 1996). Thus pinnipeds are expected to be rather tolerant of, or habituate to, repeated underwater sounds from distant seismic sources, at least when the animals are strongly attracted to the area.

*Hearing Impairment and Other Physical Effects*

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (TTS) (Southall *et al.,* 2007). Researchers have studied TTS in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall *et al.,* 2007). However, there has been no specific documentation of TTS let alone permanent hearing damage, i.e., permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.

*Temporary Threshold Shift*—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007). Table 2 (above) presents the estimated distances from the *Palmer's* airguns at which the received energy level (per pulse, flat-weighted) would be expected to be greater than or equal to 180 and 190 dB re 1 μPa (rms).

To avoid the potential for injury, NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 180 and 190 dB re 1 μPa (rms). NMFS believes that to avoid the potential for Level A harassment, cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 180 and 190 dB re 1 μPa (rms), respectively. The established 180 and 190 dB (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. NMFS also assumes that cetaceans and pinnipeds exposed to levels exceeding 160 dB re 1 μPa (rms) may experience Level B harassment.

For toothed whales, researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. The experiments show that exposure to a single impulse at a received level of 207 kPa (or 30 psi, p-p), which is equivalent to 228 dB re 1 Pa (p-p), resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within 4 minutes of the exposure (Finneran *et al.,* 2002). For the

one harbor porpoise tested, the received level of airgun sound that elicited onset of TTS was lower (Lucke *et al.,* 2009). If these results from a single animal are representative, it is inappropriate to assume that onset of TTS occurs at similar received levels in all odontocetes (*cf.* Southall *et al.,* 2007). Some cetaceans apparently can incur TTS at considerably lower sound exposures than are necessary to elicit TTS in the beluga or bottlenose dolphin.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales than those of odontocetes (Southall *et al.,* 2007).

In pinnipeds, researchers have not measured TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound. Initial evidence from more prolonged (non-pulse) exposures suggested that some pinnipeds (harbor seals in particular) incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.,* 1999, 2005; Ketten *et al.,* 2001). The TTS threshold for pulsed sounds has been indirectly extimated as being an SEL of approximately 171 dB re 1 $\mu Pa^2 \cdot s$ (Southall *et al.,* 2007) which would be equivalent to a single pulse with a received level of approximately 181 to 186 dB re 1 μPa (rms), or a series of pulses for which the highest rms values are a few dB lower. Corresponding values for California sea lions and northern elephant seals (*Mirounga angustirostris*) are likely to be higher (Kastak *et al.,* 2005).

*Permanent Threshold Shift*—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the possibility that mammals close to an airgun array might incur at least mild TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS (e.g., Richardson *et al.,* 1995, p. 372*ff;* Gedamke *et al.,* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals (Southall *et al.,* 2007). PTS might occur at a received sound level at least several dBs above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise times. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably greater than 6 dB (Southall *et al.,* 2007).

Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS would occur. Baleen whales generally avoid the immediate area around operating seismic vessels, as do some other marine mammals.

*Stranding and Mortality*—When a living or dead marine mammal swims or floats onto shore and becomes ''beached'' or incapable of returning to sea, the event is termed a ''stranding'' (Geraci *et al.,* 1999; Perrin and Geraci, 2002; Geraci and Lounsbury, 2005; NMFS, 2007). The legal definition for a stranding under the MMPA is that ''(A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.''

Marine mammals are known to strand for a variety of reasons, such as infectious agents, biotoxicosis, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most strandings are unknown (Geraci *et al.,* 1976; Eaton, 1979; Odell *et al.,* 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.,* 2003; Fair and Becker, 2000; Foley *et al.,* 2001; Moberg, 2000; Relyea, 2005a, 2005b; Romero, 2004; Sih *et al.,* 2004).

*Strandings Associated With Military Active Sonar*—Several sources have published lists of mass stranding events of cetaceans in an attempt to identify relationships between those stranding events and military active sonar (Hildebrand, 2004; IWC, 2005; Taylor *et al.,* 2004). For example, based on a review of stranding records between 1960 and 1995, the International Whaling Commission (2005) identified ten mass stranding events and concluded that, out of eight stranding events reported from the mid-1980s to the summer of 2003, seven had been coincident with the use of mid-frequency active sonar and most involved beaked whales.

Over the past 12 years, there have been five stranding events coincident with military mid-frequency active sonar use in which exposure to sonar is believed to have been a contributing factor to strandings: Greece (1996); the Bahamas (2000); Madeira (2000); Canary Islands (2002); and Spain (2006). Refer to Cox *et al.* (2006) for a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), Madeira (2000), and Canary Islands (2002); and Fernandez *et al.,* (2005) for an additional summary of the Canary Islands 2002 stranding event.

*Potential for Stranding From Seismic Surveys*—Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.,* 1993; Ketten, 1995). However, explosives are no longer used in marine waters for commercial seismic surveys or (with rare exceptions) for seismic research. These methods have been replaced entirely by airguns or related non-explosive pulse generators. Airgun

pulses are less energetic and have slower rise times, and there is no specific evidence that they can cause serious injury, death, or stranding even in the case of large airgun arrays. However, the association of strandings of beaked whales with naval exercises involving mid-frequency active sonar (non-pulse sound) and, in one case, the co-occurrence of an L–DEO seismic survey (Malakoff, 2002; Cox *et al.,* 2006), has raised the possibility that beaked whales exposed to strong ''pulsed'' sounds could also be susceptible to injury and/or behavioral reactions that can lead to stranding (e.g., Hildebrand, 2005; Southall *et al.,* 2007).

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;

(3) A physiological change such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are indications that gas-bubble disease (analogous to ''the bends''), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. The evidence for this remains circumstantial and associated with exposure to naval mid-frequency sonar, not seismic surveys (Cox *et al.,* 2006; Southall *et al.,* 2007).

Seismic pulses and mid-frequency sonar signals are quite different, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses. Sounds produced by airgun arrays are broadband impulses with most of the energy below one kHz. Typical military mid-frequency sonar emits non-impulse sounds at frequencies of 2 to 10 kHz, generally with a relatively narrow bandwidth at any one time. A further difference between seismic surveys and naval exercises is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to expect that the same to marine mammals will result from military sonar and seismic surveys. However, evidence that sonar signals can, in special circumstances, lead (at least indirectly) to physical damage and mortality (e.g., Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.,* 2003; Fernández *et al.,* 2004, 2005; Hildebrand 2005; Cox *et al.,* 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.,* 2004) were not well founded (IAGC, 2004; IWC, 2007). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* was operating a 20 airgun (8,490 $in^3$) array in the general area. The link between the stranding and the seismic surveys was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005). No injuries of beaked whales are anticipated during the proposed study because of:

(1) The high likelihood that any beaked whales nearby would avoid the approaching vessel before being exposed to high sound levels, and

(2) Differences between the sound sources operated by L–DEO and those involved in the naval exercises associated with strandings.

*Non-auditory Physiological Effects*—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. However, resonance effects (Gentry, 2002) and direct noise-induced bubble formations (Crum *et al.,* 2005) are implausible in the case of exposure to an impulsive broadband source like an airgun array. If seismic surveys disrupt diving patterns of deep-diving species, this might perhaps result in bubble formation and a form of the bends, as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses.

In general, very little is known about the potential for seismic survey sounds (or other types of strong underwater sounds) to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007), or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes, and some pinnipeds, are especially unlikely to incur non-auditory physical effects.

*Potential Effects of Other Acoustic Devices and Sources*

*Multibeam Echosounder*

NSF and ASC will operate the Simrad EM120 multibeam echosounder from the source vessel during the planned study. Sounds from the multibeam echosounder are very short pulses, occurring for 15 ms, depending on water depth. Most of the energy in the sound pulses emitted by the multibeam echosounder is at frequencies near 12 kHz, and the maximum source level is 242 dB re 1 μPa (rms). The beam is narrow (1 to 2°) in fore-aft extent and wide (150°) in the cross-track extent. Each ping consists of nine (in water greater than 1,000 m deep) consecutive successive fan-shaped transmissions (segments) at different cross-track angles. Any given mammal at depth near the trackline would be in the main beam for only one or two of the nine segments. Also, marine mammals that encounter the Simrad EM120 are unlikely to be subjected to repeated pulses because of the narrow fore-aft width of the beam and will receive only limited amounts of pulse energy because of the short pulses. Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 15 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a multibeam echosounder emits a

pulse is small. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to receive the multiple pulses that might result in sufficient exposure to cause TTS.

Navy sonars that have been linked to avoidance reactions and stranding of cetaceans: (1) Generally have longer pulse duration than the Simrad EM120; and (2) are often directed close to horizontally, as well as omnidirectional, versus more downward and narrowly for the multibeam echosounder. The area of possible influence of the multibeam echosounder is much smaller—a narrow band below the source vessel. Also, the duration of exposure for a given marine mammal can be much longer for naval sonar. During NSF and ASC's operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. Possible effects of a multibeam echosounder on marine mammals are described below.

*Masking*—Marine mammal communications will not be masked appreciably by the multibeam echosounder signals given the low duty cycle of the echosounder and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of baleen whales, the multibeam echosounder signals (12 kHz) do not overlap with the predominant frequencies in the calls, which would avoid any significant masking.

*Behavioral Responses*—Behavioral reactions of free-ranging marine mammals to sonars, echosounders, and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21 to 25 kHz ''whale-finding'' sonar with a source level of 215 dB re 1 μPa, gray whales reacted by orienting slightly away from the source and being deflected from their course by approximately 200 m (656.2 ft) (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz acoustic Doppler current profiler were transmitting during studies in the Eastern Tropical Pacific, baleen whales showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 second tonal signals at frequencies similar to those that will be emitted by the multibeam echosounder used by NSF and ASC, and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.,* 2000; Finneran *et al.,* 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case, the test sounds were quite different in duration as compared with those from a multibeam echosounder.

*Hearing Impairment and Other Physical Effects*—Given several stranding events that have been associated with the operation of naval sonar in specific circumstances, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the multibeam echosounder proposed for use by NSF and ASC is quite different than sonar used for Navy operations. Pulse duration of the multibeam echosounder is very short relative to the naval sonar. Also, at any given location, an individual marine mammal would be in the beam of the multibeam echosounder for much less time given the generally downward orientation of the beam and its narrow fore-aft beamwidth; Navy sonar often uses near-horizontally-directed sound. Those factors would all reduce the sound energy received from the multibeam echosounder rather drastically relative to that from naval sonar.

NMFS believes that the brief exposure of marine mammals to one pulse, or small numbers of signals, from the multi-beam echosounder in this particular case is not likely to result in the harassment of marine mammals.

*Single-Beam Echosounder*

NSF and ASC will operate the Knudsen 3260 and Bathy 2000 single-beam echosounders from the source vessel during the planned study. Sounds from the single-beam echosounder are very short pulses, depending on water depth. Most of the energy in the sound pulses emitted by the singlebeam echosounder is at frequencies near 12 kHz for bottom-tracking purposes or at 3.5 kHz in the sub-bottom profiling mode. The sonar emits energy in a 30° beam from the bottom of the ship. Marine mammals that encounter the Simrad EM120 are unlikely to be subjected to repeated pulses because of the narrow fore–aft width of the beam and will receive only limited amounts of pulse energy because of the short pulses. Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 15 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a multibeam echosounder emits a pulse is small. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to receive the multiple pulses that might result in sufficient exposure to cause TTS.

Navy sonars that have been linked to avoidance reactions and stranding of cetaceans: (1) Generally have longer pulse duration than the Simrad EM120; and (2) are often directed close to horizontally versus more downward for the echosounder. The area of possible influence of the single-beam echosounder is much smaller—a narrow band below the source vessel. Also, the duration of exposure for a given marine mammal can be much longer for naval sonar. During NSF and ASC's operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. Possible effects of a single-beam echosounder on marine mammals are described below.

*Masking*—Marine mammal communications will not be masked appreciably by the single-beam echosounder signals given the low duty cycle of the echosounder and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of baleen whales, the single-beam echosounder signals (12 or 3.5 kHz) do not overlap with the predominant frequencies in the calls, which would avoid any significant masking.

*Behavioral Responses*—Behavioral reactions of free-ranging marine mammals to sonars, echosounders, and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21 to 25 kHz ''whale-finding'' sonar with a source level of 215 dB re 1 μPa, gray whales reacted by orienting slightly away from the source and being deflected from their course by approximately 200 m (656.2 ft) (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz ADCP were transmitting during studies in the Eastern Tropical Pacific, baleen whales

showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 second tonal signals at frequencies similar to those that will be emitted by the single-beam echosounder used by NSF and ASC, and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.,* 2000; Finneran *et al.,* 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case, the test sounds were quite different in duration as compared with those from a single-beam echosounder.

*Hearing Impairment and Other Physical Effects*—Given recent stranding events that have been associated with the operation of naval sonar, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the single-beam echosounder proposed for use by NSF and ASC is quite different than sonar used for Navy operations. Pulse duration of the single-beam echosounder is very short relative to the naval sonar. Also, at any given location, an individual marine mammal would be in the beam of the single-beam echosounder for much less time given the generally downward orientation of the beam and its narrow fore-aft beamwidth; Navy sonar often uses near-horizontally-directed sound. Those factors would all reduce the sound energy received from the single-beam echosounder rather drastically relative to that from naval sonar.

NMFS believes that the brief exposure of marine mammals to one pulse, or small numbers of signals, from the single-beam echosounder in this particular case is not likely to result in the harassment of marine mammals.

*Acoustic Doppler Current Profilers*

NSF and ASC will operate the ADCP Teledyne RDI VM–150 and ADCP Ocean Surveyor OS–38 from the source vessel during the planned study. Most of the energy in the sound pulses emitted by the ADCPs operate at frequencies near 150 kHz, and the maximum source level is 223.6 dB re 1 μPa (rms). Sound energy from the ADCP is emitted as a 30° conically-shaped beam. Marine mammals that encounter the ADCPs are unlikely to be subjected to repeated pulses because of the narrow fore–aft width of the beam and will receive only limited amounts of pulse energy because of the short pulses. Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 15 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when the ADCPs emits a pulse is small. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to receive the multiple pulses that might result in sufficient exposure to cause TTS.

Navy sonars that have been linked to avoidance reactions and stranding of cetaceans: (1) Generally have longer pulse duration than the ADCPs; and (2) are often directed close to horizontally versus more downward for the ADCPs. The area of possible influence of the multibeam echosounder is much smaller—a narrow band below the source vessel. Also, the duration of exposure for a given marine mammal can be much longer for naval sonar. During NSF and ASC's operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. Possible effects of the ADCPs on marine mammals are described below.

*Masking*—Marine mammal communications will not be masked appreciably by the ADCP signals given the low duty cycle of the ADCPs and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of baleen whales, the ADCP signals (150 kHz) do not overlap with the predominant frequencies in the calls, which would avoid any significant masking.

*Behavioral Responses*—Behavioral reactions of free-ranging marine mammals to sonars, echosounders, and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21 to 25 kHz ''whale-finding'' sonar with a source level of 215 dB re 1 μPa, gray whales reacted by orienting slightly away from the source and being deflected from their course by approximately 200 m (656.2 ft) (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz ADCP were transmitting during studies in the Eastern Tropical Pacific, baleen whales showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 second tonal signals at frequencies similar to those that will be emitted by the multibeam echosounder used by NSF and ASC, and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.,* 2000; Finneran *et al.,* 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case, the test sounds were quite different in duration as compared with those from a multibeam echosounder.

*Hearing Impairment and Other Physical Effects*—Given recent stranding events that have been associated with the operation of naval sonar, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the multibeam echosounder proposed for use by NSF and ASC is quite different than sonar used for Navy operations. Pulse duration of the ADCP is very short relative to the naval sonar. Also, at any given location, an individual marine mammal would be in the beam of the multibeam echosounder for much less time given the generally downward orientation of the beam and its narrow fore-aft beamwidth; Navy sonar often uses near-horizontally-directed sound. Those factors would all reduce the sound energy received from the multibeam echosounder rather drastically relative to that from naval sonar.

NMFS believes that the brief exposure of marine mammals to one pulse, or small numbers of signals, from the multi-beam echosounder in this particular case is not likely to result in the harassment of marine mammals.

*Acoustic Locator*

NSF and ASC will operate the acoustic locator from the source vessel during the planned study during sampling. Sounds from the locator are very short pulses, occurring for 5 ms. Most of the energy in the sound pulses emitted by the acoustic locator is at frequencies near 12 kHz, and the maximum source level is 162 dB re 1 μPa (rms). Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 5 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a

multibeam echosounder emits a pulse is small. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to receive the multiple pulses that might result in sufficient exposure to cause TTS.

*Masking*—Marine mammal communications will not be masked appreciably by the acoustic locator signals given the low duty cycle and the low source level. Furthermore, in the case of baleen whales, the acoustic locator signals (12 kHz) do not overlap with the predominant frequencies in the calls, which would avoid any significant masking.

*Behavioral Responses*—Behavioral reactions of free-ranging marine mammals to sonars, echosounders, and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21 to 25 kHz ''whale-finding'' sonar with a source level of 215 dB re 1 μPa, gray whales reacted by orienting slightly away from the source and being deflected from their course by approximately 200 m (656.2 ft) (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz ADCP were transmitting during studies in the Eastern Tropical Pacific, baleen whales showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

NMFS believes that the brief exposure of marine mammals to one pulse, or small numbers of signals, from the acoustic locator is not likely to result in the harassment of marine mammals.

*Core and Dredge Sampling*

During coring and dredging, the noise created by the mechanical action of the devices on the seafloor is expected to be perceived by nearby fish and other marine organisms and deter them from swimming toward the source. Coring and dredging activities would be highly localized and short-term in duration and would not be expected to significantly interfere with marine mammal behavior. The potential direct effects include temporary localized disturbance or displacement from associated sounds and/or physical movement/actions of the operations. Additionally, the potential indirect effects may consist of very localized and transitory/short-term disturbance of bottom habitat and associated prey in shallow-water areas as a result of coring, dredging, and sediment sampling (NSF/USGS PEIS, 2011). NMFS believes that the brief exposure of marine mammals to noise created from the mechanical action of the devices for core and dredge sampling is not likely to result in the harassment of marine mammals.

*Vessel Movement and Collisions*

Vessel movement in the vicinity of marine mammals has the potential to result in either a behavioral response or a direct physical interaction. Both scenarios are discussed below in this section.

*Behavioral Responses to Vessel Movement*—There are limited data concerning marine mammal behavioral responses to vessel traffic and vessel noise, and a lack of consensus among scientists with respect to what these responses mean or whether they result in short-term or long-term adverse effects. In those cases where there is a busy shipping lane or where there is a large amount of vessel traffic, marine mammals (especially low frequency specialists) may experience acoustic masking (Hildebrand, 2005) if they are present in the area (e.g., killer whales in Puget Sound; Foote *et al.,* 2004; Holt *et al.,* 2008). In cases where vessels actively approach marine mammals (e.g., whale watching or dolphin watching boats), scientists have documented that animals exhibit altered behavior such as increased swimming speed, erratic movement, and active avoidance behavior (Bursk, 1983; Acevedo, 1991; Baker and MacGibbon, 1991; Trites and Bain, 2000; Williams *et al.,* 2002; Constantine *et al.,* 2003), reduced blow interval (Ritcher *et al.,* 2003), disruption of normal social behaviors (Lusseau, 2003, 2006), and the shift of behavioral activities which may increase energetic costs (Constantine *et al.,* 2003, 2004). A detailed review of marine mammal reactions to ships and boats is available in Richardson *et al.,* (1995). For each of the marine mammal taxonomy groups, Richardson *et al.,* (1995) provides the following assessment regarding reactions to vessel traffic:

*Toothed whales*—''In summary, toothed whales sometimes show no avoidance reaction to vessels, or even approach them. However, avoidance can occur, especially in response to vessels of types used to chase or hunt the animals. This may cause temporary displacement, but we know of no clear evidence that toothed whales have abandoned significant parts of their range because of vessel traffic.''

*Baleen whales*—''When baleen whales receive low-level sounds from distant or stationary vessels, the sounds often seem to be ignored. Some whales approach the sources of these sounds. When vessels approach whales slowly and non-aggressively, whales often exhibit slow and inconspicuous avoidance maneuvers. In response to strong or rapidly changing vessel noise, baleen whales often interrupt their normal behavior and swim rapidly away. Avoidance is especially strong when a boat heads directly toward the whale.''

Behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors, such as species, behavioral contexts, geographical regions, source characteristics (moving or stationary, speed, direction, etc.), prior experience of the animal and physical status of the animal. For example, studies have shown that beluga whales' reaction varied when exposed to vessel noise and traffic. In some cases, beluga whales exhibited rapid swimming from ice-breaking vessels up to 80 km (43.2 nmi) away and showed changes in surfacing, breathing, diving, and group composition in the Canadian high Arctic where vessel traffic is rare (Finley *et al.,* 1990). In other cases, beluga whales were more tolerant of vessels, but responded differentially to certain vessels and operating characteristics by reducing their calling rates (especially older animals) in the St. Lawrence River where vessel traffic is common (Blane and Jaakson, 1994). In Bristol Bay, Alaska, beluga whales continued to feed when surrounded by fishing vessels and resisted dispersal even when purposefully harassed (Fish and Vania, 1971).

In reviewing more than 25 years of whale observation data, Watkins (1986) concluded that whale reactions to vessel traffic were ''modified by their previous experience and current activity: habituation often occurred rapidly, attention to other stimuli or preoccupation with other activities sometimes overcame their interest or wariness of stimuli.'' Watkins noticed that over the years of exposure to ships in the Cape Cod area, minke whales changed from frequent positive interest (e.g., approaching vessels) to generally uninterested reactions; fin whales changed from mostly negative (e.g., avoidance) to uninterested reactions; fin whales changed from mostly negative (e.g., avoidance) to uninterested reactions; right whales apparently continued the same variety of responses (negative, uninterested, and positive responses) with little change; and humpbacks dramatically changed from mixed responses that were often

negative to reactions that were often strongly positive. Watkins (1986) summarized that ''whales near shore, even in regions with low vessel traffic, generally have become less wary of boats and their noises, and they have appeared to be less easily disturbed than previously. In particular locations with intense shipping and repeated approaches by boats (such as the whale-watching areas of Stellwagen Bank), more and more whales had positive reactions to familiar vessels, and they also occasionally approached other boats and yachts in the same ways.''

Although the radiated sound from the *Palmer* will be audible to marine mammals over a large distance, it is unlikely that marine mammals will respond behaviorally (in a manner that NMFS would consider harassment under the MMPA) to low-level distant shipping noise as the animals in the area are likely to be habituated to such noises (Nowacek *et al.,* 2004). In light of these facts, NMFS does not expect the *Palmer's* movements to result in Level B harassment.

*Vessel Strike*—Ship strikes of cetaceans can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (e.g., the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (e.g., bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Jensen and Silber, 2003; Vanderlaan and Taggart, 2007). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 kts (24.1 km/hr, 14.9 mph).

NSF and ASC's proposed operation of one source vessel for the proposed low-energy seismic survey is relatively small in scale compared to the number of commercial ships transiting at higher speeds in the same areas on an annual basis. The probability of vessel and marine mammal interactions occurring during the proposed low-energy seismic survey is unlikely due to the *Palmer's* slow operational speed, which is typically 5 kts. Outside of seismic operations, the *Palmer's* cruising speed would be approximately 10.1 to 14.5 kts, which is generally below the speed at which studies have noted reported increases of marine mammal injury or death (Laist *et al.,* 2001).

As a final point, the *Palmer* has a number of other advantages for avoiding ship strikes as compared to most commercial merchant vessels, including the following: the *Palmer's* bridge and aloft observation tower offers good visibility to visually monitor for marine mammal presence; PSOs posted during operations scan the ocean for marine mammals and must report visual alerts of marine mammal presence to crew; and the PSOs receive extensive training that covers the fundamentals of visual observing for marine mammals and information about marine mammals and their identification at sea.

*Entanglement*

Entanglement can occur if wildlife becomes immobilized in survey lines, cables, nets, or other equipment that is moving through the water column. The proposed low-energy seismic survey would require towing approximately a single 100 m cable streamer. This large of an array carries the risk of entanglement for marine mammals. Wildlife, especially slow moving individuals, such as large whales, have a low probability of becoming entangled due to slow speed of the survey vessel and onboard monitoring efforts. In May 2011, there was one recorded entanglement of an olive ridley sea turtle (*Lepidochelys olivacea*) in the R/V *Marcus G. Langseth*'s barovanes after the conclusion of a seismic survey off Costa Rica. There have been cases of baleen whales, mostly gray whales (Heyning, 1990), becoming entangled in fishing lines. The probability for entanglement of marine mammals is considered not significant because of the vessel speed and the monitoring efforts onboard the survey vessel.

*Icebreaking Activities*

Icebreakers produce more noise while breaking ice than ships of comparable size due, primarily, to the sounds of propeller cavitating (Richardson *et al.,* 1995). Multi-year ice, which is expected to be encountered in the proposed survey area. Icebreakers commonly back and ram into heavy ice until losing momentum to make way. The highest noise levels usually occur while backing full astern in preparation to ram forward through the ice. Overall the noise generated by an icebreaker pushing ice was 10 to 15 dB greater than the noise produced by the ship underway in open water (Richardson *et al.,* 1995). In general, the Antarctic and Southern Ocean is a noisy environment. Calving and grounding icebergs as well as the break-up of ice sheets, can produce a large amount of underwater noise. Little information is available about the increased sound levels due to icebreaking.

*Cetaceans*—Few studies have been conducted to evaluate the potential interference of icebreaking noise with marine mammal vocalizations. Erbe and Farmer (1998) measured masked hearing thresholds of a captive beluga whale. They reported that the recording of a CCG ship, *Henry Larsen,* ramming ice in the Beaufort Sea, masked recordings of beluga vocalizations at a noise to signal pressure ratio of 18 dB, when the noise pressure level was eight times as high as the call pressure. Erbe and Farmer (2000) also predicted when icebreaker noise would affect beluga whales through software that combined a sound propagation model and beluga whale impact threshold models. They again used the data from the recording of the *Henry Larsen* in the Beaufort Sea and predicted that masking of beluga whale vocalizations could extend between 40 and 71 km (21.6 and 38.3 nmi) near the surface. Lesage *et al.* (1999) report that beluga whales changed their call type and call frequency when exposed to boat noise. It is possible that the whales adapt to the ambient noise levels and are able to communicate despite the sound. Given the documented reaction of belugas to ships and icebreakers it is highly unlikely that beluga whales would remain in the proximity of vessels where vocalizations would be masked.

Beluga whales have been documented swimming rapidly away from ships and icebreakers in the Canadian high Arctic when a ship approaches to within 35 to 50 km (18.9 to 27 nmi), and they may travel up to 80 km (43.2 nmi) from the vessel's track (Richardson *et al.,* 1995). It is expected that belugas avoid

icebreakers as soon as they detect the ships (Cosens and Dueck, 1993). However, the reactions of beluga whales to ships vary greatly and some animals may become habituated to high levels of ambient noise (Erbe and Darmber, 2000).

There is little information about the effects of icebreaking ships on baleen whales. Migrating bowhead whales appeared to avoid an area around a drill site by greater than 25 km (13.5 mi) where an icebreaker was working in the Beaufort Sea. There was intensive icebreaking daily in support of the drilling activities (Brewer *et al.,* 1993). Migrating bowheads also avoided a nearby drill site at the same time of year where little icebreaking was being conducted (LGL and Greeneridge, 1987). It is unclear as to whether the drilling activities, icebreaking operations, or the ice itself might have been the cause for the whale's diversion. Bowhead whales are not expected to occur in the proximity of the proposed action area.

Pinnipeds—Brueggeman *et al.* (1992) reported on the reactions of seals to an icebreaker during activities at two prospects in the Chukchi Sea. Reactions of seals to the icebreakers varied between the two prospects. Most (67%) seals did not react to the icebreaker at either prospect. Reaction at one prospect was greatest during icebreaking activity (running/maneuvering/jogging) and was 0.23 km (0.12 nmi) of the vessel and lowest for animals beyond 0.93 km (0.5 nmi). At the second prospect however, seal reaction was lowest during icebreaking activity with higher and similar levels of response during general (non-icebreaking) vessel operations and when the vessel was at anchor or drifting. The frequency of seal reaction generally declined with increasing distance from the vessel except during general vessel activity where it remained consistently high to about 0.46 km (0.25 nmi) from the vessel before declining.

Similarly, Kanik *et al.* (1980) found that ringed (*Pusa hispida*) and harp seals (*Pagophilus groenlandicus*) often dove into the water when an icebreaker was breaking ice within 1 km (0.5 nmi) of the animals. Most seals remained on the ice when the ship was breaking ice 1 to 2 km (0.5 to 1.1 nmi) away.

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections) which, as noted are designed to effect the least practicable adverse impact on affected marine mammal species and stocks.

**Anticipated Effects on Marine Mammal Habitat**

The proposed seismic survey is not anticipated to have any permanent impact on habitats used by the marine mammals in the proposed survey area, including the food sources they use (i.e. fish and invertebrates). Additionally, no physical damage to any habitat is anticipated as a result of conducting airgun operations during the proposed low-energy seismic survey. While it is anticipated that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and was considered in further detail earlier in this document, as behavioral modification. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals in any particular area of the approximately 5,628 km$^2$ proposed project area, previously discussed in this notice.

The *Palmer* is designed for continuous passage at 3 kts through ice 1 m thick. During the proposed project the *Palmer* will typically encounter first- or second-year ice while avoiding thicker ice floes, particularly large intact multi-year ice, whenever possible. In addition, the vessel will follow leads when possible while following the survey route. As the vessel passes through the ice, the ship causes the ice to part and travel alongside the hull. This ice typically returns to fill the wake as the ship passes. The effects are transitory (i.e., hours at most) and localized (i.e., constrained to a relatively narrow swath perhaps 10 m (32.1 ft) to each side of the vessel. The *Palmer*'s maximum beam is 18.3 m (60 ft). Applying the maximum estimated amount of icebreaking (1,000 km), to the corridor opened by the ship, NSF and ASC anticipate that a maximum of approximately 18 km$^2$ (5.3 nmi$^2$) of ice may be disturbed. This represents an inconsequential amount of the total ice present in the Southern Ocean.

Sea ice is important for pinniped life functions such as resting, breeding, and molting. Icebreaking activities may damage seal breathing holes and will also reduce the haul-out area in the immediate vicinity of the ship's track. Icebreaking along a maximum of 1,000 km of trackline will alter local ice conditions in the immediate vicinity of the vessel. This has the potential to temporarily lead to a reduction of suitable seal haul-out habitat. However, the dynamic sea-ice environment requires that seals be able to adapt to changes in sea, ice, and snow conditions, and they therefore create new breathing holes and lairs throughout the winter and spring (Hammill and Smith, 1989). In addition, seals often use open leads and cracks in the ice to surface and breathe (Smith and Stirling, 1975). Disturbance of the ice will occur in a very small area relative to the Southern Ocean ice-pack and no significant impact on marine mammals is anticipated by icebreaking during the proposed low-energy seismic survey. The next section discusses the potential impacts of anthropogenic sound sources on common marine mammal prey in the proposed survey area (i.e., fish and invertebrates).

*Anticipated Effects on Fish*

One reason for the adoption of airguns as the standard energy source for marine seismic surveys is that, unlike explosives, they have not been associated with large-scale fish kills. However, existing information on the impacts of seismic surveys on marine fish and invertebrate populations is limited. There are three types of potential effects of exposure to seismic surveys: (1) Pathological, (2) physiological, and (3) behavioral. Pathological effects involve lethal and temporary or permanent sub-lethal injury. Physiological effects involve temporary and permanent primary and secondary stress responses, such as changes in levels of enzymes and proteins. Behavioral effects refer to temporary and (if they occur) permanent changes in exhibited behavior (e.g., startle and avoidance behavior). The three categories are interrelated in complex ways. For example, it is possible that certain physiological and behavioral changes could potentially lead to an ultimate pathological effect on individuals (i.e., mortality).

The specific received sound levels at which permanent adverse effects to fish potentially could occur are little studied and largely unknown. Furthermore, the available information on the impacts of seismic surveys on marine fish is from studies of individuals or portions of a population; there have been no studies at the population scale. The studies of individual fish have often been on caged fish that were exposed to airgun pulses in situations not representative of an actual seismic survey. Thus, available information provides limited insight on possible real-world effects at the ocean or population scale. This makes drawing conclusions about impacts on fish problematic because, ultimately, the most important issues concern effects on marine fish populations, their

viability, and their availability to fisheries.

Hastings and Popper (2005), Popper (2009), and Popper and Hastings (2009a, b) provided recent critical reviews of the known effects of sound on fish. The following sections provide a general synopsis of the available information on the effects of exposure to seismic and other anthropogenic sound as relevant to fish. The information comprises results from scientific studies of varying degrees of rigor plus some anecdotal information. Some of the data sources may have serious shortcomings in methods, analysis, interpretation, and reproducibility that must be considered when interpreting their results (see Hastings and Popper, 2005). Potential adverse effects of the program's sound sources on marine fish are noted.

*Pathological Effects*—The potential for pathological damage to hearing structures in fish depends on the energy level of the received sound and the physiology and hearing capability of the species in question. For a given sound to result in hearing loss, the sound must exceed, by some substantial amount, the hearing threshold of the fish for that sound (Popper, 2005). The consequences of temporary or permanent hearing loss in individual fish on a fish population are unknown; however, they likely depend on the number of individuals affected and whether critical behaviors involving sound (e.g., predator avoidance, prey capture, orientation and navigation, reproduction, etc.) are adversely affected.

Little is known about the mechanisms and characteristics of damage to fish that may be inflicted by exposure to seismic survey sounds. Few data have been presented in the peer-reviewed scientific literature. As far as NSF, ASC, and NMFS know, there are only two papers with proper experimental methods, controls, and careful pathological investigation implicating sounds produced by actual seismic survey airguns in causing adverse anatomical effects. One such study indicated anatomical damage, and the second indicated TTS in fish hearing. The anatomical case is McCauley *et al.* (2003), who found that exposure to airgun sound caused observable anatomical damage to the auditory maculae of pink snapper (*Pagrus auratus*). This damage in the ears had not been repaired in fish sacrificed and examined almost two months after exposure. On the other hand, Popper *et al.* (2005) documented only TTS (as determined by auditory brainstem response) in two of three fish species from the Mackenzie River Delta. This study found that broad whitefish (*Coregonus nasus*) exposed to five airgun shots were not significantly different from those of controls. During both studies, the repetitive exposure to sound was greater than would have occurred during a typical seismic survey. However, the substantial low-frequency energy produced by the airguns (less than 400 Hz in the study by McCauley *et al.* [2003] and less than approximately 200 Hz in Popper *et al.* [2005]) likely did not propagate to the fish because the water in the study areas was very shallow (approximately nine m in the former case and less than two m in the latter). Water depth sets a lower limit on the lowest sound frequency that will propagate (the ''cutoff frequency'') at about one-quarter wavelength (Urick, 1983; Rogers and Cox, 1988).

Wardle *et al.* (2001) suggested that in water, acute injury and death of organisms exposed to seismic energy depends primarily on two features of the sound source: (1) The received peak pressure, and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. According to Buchanan *et al.* (2004), for the types of seismic airguns and arrays involved with the proposed program, the pathological (mortality) zone for fish would be expected to be within a few meters of the seismic source. Numerous other studies provide examples of no fish mortality upon exposure to seismic sources (Falk and Lawrence, 1973; Holliday *et al.,* 1987; La Bella *et al.,* 1996; Santulli *et al.,* 1999; McCauley *et al.,* 2000a, b, 2003; Bjarti, 2002; Thomsen, 2002; Hassel *et al.,* 2003; Popper *et al.,* 2005; Boeger *et al.,* 2006).

An experiment of the effects of a single 700 $in^3$ airgun was conducted in Lake Meade, Nevada (USGS, 1999). The data were used in an Environmental Assessment of the effects of a marine reflection survey of the Lake Meade fault system by the National Park Service (Paulson *et al.,* 1993, in USGS, 1999). The airgun was suspended 3.5 m (11.5 ft) above a school of threadfin shad in Lake Meade and was fired three successive times at a 30 second interval. Neither surface inspection nor diver observations of the water column and bottom found any dead fish.

For a proposed seismic survey in Southern California, USGS (1999) conducted a review of the literature on the effects of airguns on fish and fisheries. They reported a 1991 study of the Bay Area Fault system from the continental shelf to the Sacramento River, using a 10 airgun (5,828 $in^3$) array. Brezzina and Associates were hired by USGS to monitor the effects of the surveys and concluded that airgun operations were not responsible for the death of any of the fish carcasses observed. They also concluded that the airgun profiling did not appear to alter the feeding behavior of sea lions, seals, or pelicans observed feeding during the seismic surveys.

Some studies have reported, some equivocally, that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.,* 1996; Dalen *et al.,* 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates. However, Payne *et al.* (2009) reported no statistical differences in mortality/morbidity between control and exposed groups of capelin eggs or monkfish larvae. Saetre and Ona (1996) applied a 'worst-case scenario' mathematical model to investigate the effects of seismic energy on fish eggs and larvae. They concluded that mortality rates caused by exposure to seismic surveys are so low, as compared to natural mortality rates, that the impact of seismic surveying on recruitment to a fish stock must be regarded as insignificant.

*Physiological Effects*—Physiological effects refer to cellular and/or biochemical responses of fish to acoustic stress. Such stress potentially could affect fish populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses of fish after exposure to seismic survey sound appear to be temporary in all studies done to date (Sverdrup *et al.,* 1994; Santulli *et al.,* 1999; McCauley *et al.,* 2000a, b). The periods necessary for the biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

*Behavioral Effects*—Behavioral effects include changes in the distribution, migration, mating, and catchability of fish populations. Studies investigating the possible effects of sound (including seismic survey sound) on fish behavior have been conducted on both uncaged and caged individuals (e.g., Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Santulli *et al.,* 1999; Wardle *et al.,* 2001; Hassel *et al.,* 2003). Typically, in these studies fish exhibited a sharp startle response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

The Minerals Management Service (MMS, 2005) assessed the effects of a proposed seismic survey in Cook Inlet. The seismic survey proposed using three vessels, each towing two, four-airgun arrays ranging from 1,500 to 2,500 $in^3$. MMS noted that the impact to fish populations in the survey area and adjacent waters would likely be very low and temporary. MMS also concluded that seismic surveys may displace the pelagic fishes from the area temporarily when airguns are in use. However, fishes displaced and avoiding the airgun noise are likely to backfill the survey area in minutes to hours after cessation of seismic testing. Fishes not dispersing from the airgun noise (e.g., demersal species) may startle and move short distances to avoid airgun emissions.

In general, any adverse effects on fish behavior or fisheries attributable to seismic testing may depend on the species in question and the nature of the fishery (season, duration, fishing method). They may also depend on the age of the fish, its motivational state, its size, and numerous other factors that are difficult, if not impossible, to quantify at this point, given such limited data on effects of airguns on fish, particularly under realistic at-sea conditions.

*Anticipated Effects on Invertebrates*

The existing body of information on the impacts of seismic survey sound on marine invertebrates is very limited. However, there is some unpublished and very limited evidence of the potential for adverse effects on invertebrates, thereby justifying further discussion and analysis of this issue. The three types of potential effects of exposure to seismic surveys on marine invertebrates are pathological, physiological, and behavioral. Based on the physical structure of their sensory organs, marine invertebrates appear to be specialized to respond to particle displacement components of an impinging sound field and not to the pressure component (Popper *et al.,* 2001).

The only information available on the impacts of seismic surveys on marine invertebrates involves studies of individuals; there have been no studies at the population scale. Thus, available information provides limited insight on possible real-world effects at the regional or ocean scale. The most important aspect of potential impacts concerns how exposure to seismic survey sound ultimately affects invertebrate populations and their viability, including availability to fisheries.

Literature reviews of the effects of seismic and other underwater sound on invertebrates were provided by Moriyasu *et al.* (2004) and Payne *et al.* (2008). The following sections provide a synopsis of available information on the effects of exposure to seismic survey sound on species of decapod crustaceans and cephalopods, the two taxonomic groups of invertebrates on which most such studies have been conducted. The available information is from studies with variable degrees of scientific soundness and from anecdotal information. A more detailed review of the literature on the effects of seismic survey sound on invertebrates is provided in Appendix D of NSF/USGS's PEIS.

*Pathological Effects*—In water, lethal and sub-lethal injury to organisms exposed to seismic survey sound appears to depend on at least two features of the sound source: (1) The received peak pressure; and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. For the type of airgun array planned for the proposed program, the pathological (mortality) zone for crustaceans and cephalopods is expected to be within a few meters of the seismic source, at most; however, very few specific data are available on levels of seismic signals that might damage these animals. This premise is based on the peak pressure and rise/decay time characteristics of seismic airgun arrays currently in use around the world.

Some studies have suggested that seismic survey sound has a limited pathological impact on early developmental stages of crustaceans (Pearson *et al.,* 1994; Christian *et al.,* 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.,* 2003, 2004; DFO, 2004) and adult cephalopods (McCauley *et al.,* 2000a, b) exposed to seismic survey sound have not resulted in any significant pathological impacts on the animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.,* 2004), but the article provides little evidence to support this claim. Tenera Environmental (2011b) reported that Norris and Mohl (1983, summarized in Mariyasu *et al.,* 2004) observed lethal effects in squid (*Loligo vulgaris*) at levels of 246 to 252 dB after 3 to 11 minutes.

Andre *et al.* (2011) exposed four species of cephalopods (*Loligo vulgaris, Sepia officinalis, Octopus vulgaris,* and *Ilex coindetii*), primarily cuttlefish, to two hours of continuous 50 to 400 Hz sinusoidal wave sweeps at 157±5 dB re 1 μPa while captive in relatively small tanks. They reported morphological and ultrastructural evidence of massive acoustic trauma (i.e., permanent and substantial alterations [lesions] of statocyst sensory hair cells) to the exposed animals that increased in severity with time, suggesting that cephalopods are particularly sensitive to low frequency sound. The received SPL was reported as 157±5 dB re 1 μPa, with peak levels at 175 dB re 1 μPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound, the cephalopods were subjected to higher sound levels than they would be under natural conditions, and they were unable to swim away from the sound source.

*Physiological Effects*—Physiological effects refer mainly to biochemical responses by marine invertebrates to acoustic stress. Such stress potentially could affect invertebrate populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses (i.e., changes in haemolymph levels of enzymes, proteins, etc.) of crustaceans have been noted several days or months after exposure to seismic survey sounds (Payne *et al.,* 2007). It was noted however, than no behavioral impacts were exhibited by crustaceans (Christian *et al.,* 2003, 2004; DFO, 2004). The periods necessary for these biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

*Behavioral Effects*—There is increasing interest in assessing the possible direct and indirect effects of seismic and other sounds on invertebrate behavior, particularly in relation to the consequences for fisheries. Changes in behavior could potentially affect such aspects as reproductive success, distribution, susceptibility to predation, and catchability by fisheries. Studies investigating the possible behavioral effects of exposure to seismic survey sound on crustaceans and cephalopods have been conducted on both uncaged and caged animals. In some cases, invertebrates exhibited startle responses (e.g., squid in McCauley *et al.,* 2000a, b). In other cases, no behavioral impacts were noted (e.g., crustaceans in Christian *et al.,* 2003, 2004; DFO 2004). There have been anecdotal reports of

reduced catch rates of shrimp shortly after exposure to seismic surveys; however, other studies have not observed any significant changes in shrimp catch rate (Andriguetto-Filho *et al.,* 2005). Similarly, Parry and Gason (2006) did not find any evidence that lobster catch rates were affected by seismic surveys. Any adverse effects on crustacean and cephalopod behavior or fisheries attributable to seismic survey sound depend on the species in question and the nature of the fishery (season, duration, fishing method).

**Proposed Mitigation**

In order to issue an Incidental Take Authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

NSF and ASC reviewed the following source documents and have incorporated a suite of appropriate mitigation measures into their project description.

(1) Protocols used during previous NSF and USGS-funded seismic research cruises as approved by NMFS and detailed in the recently completed ''Final Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey;''

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, NSF, ASC and/or its designees have proposed to implement the following mitigation measures for marine mammals:

(1) Proposed exclusion zones around the sound source;

(2) Speed and course alterations;

(3) Shut-down procedures; and

(4) Ramp-up procedures.

*Proposed Exclusion Zones*—During pre-planning of the cruise, the smallest airgun array was identified that could be used and still meet the geophysical scientific objectives. NSF and ASC use radii to designate exclusion and buffer zones and to estimate take for marine mammals. Table 2 (presented earlier in this document) shows the distances at which one would expect to receive three sound levels (160, 180, and 190 dB) from the two GI airgun array. The 180 and 190 dB level shut-down criteria are applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000). NSF and ASC used these levels to establish the exclusion and buffer zones.

Received sound levels have been modeled by L–DEO for a number of airgun configurations, including two 45 in$^3$ Nucleus G airguns, in relation to distance and direction from the airguns (see Figure 2 of the IHA application). In addition, propagation measurements of pulses from two GI airguns have been reported for shallow water (approximately 30 m [98.4 ft] depth in the GOM (Tolstoy *et al.,* 2004). However, measurements were not made for the two GI airguns in deep water. The model does not allow for bottom interactions, and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the GI airguns where sound levels are predicted to be 190, 180, and 160 dB re 1 μPa (rms) in shallow, intermediate, and deep water were determined (see Table 2 above).

Empirical data concerning the 190, 180, and 160 dB (rms) distances were acquired for various airgun arrays based on measurements during the acoustic verification studies conducted by L–DEO in the northern GOM in 2003 (Tolstoy *et al.,* 2004) and 2007 to 2008 (Tolstoy *et al.,* 2009). Results of the 36 airgun array are not relevant for the two GI airguns to be used in the proposed survey. The empirical data for the 6, 10, 12, and 20 airgun arrays indicate that, for deep water, the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004). Measurements were not made for the two GI airgun array in deep water; however, NSF and ASC propose to use the safety radii predicted by L–DEO's model for the proposed GI airgun operations in shallow, intermediate, and deep water, although they are likely conservative given the empirical results for the other arrays.

Based on the modeling data, the outputs from the pair of 45 in$^3$ or 105 in$^3$ GI airguns proposed to be used during the seismic survey are considered a low-energy acoustic source in the NSF/USGS PEIS (2011) for marine seismic research. A low-energy seismic source was defined in the NSF/USGS PEIS as an acoustic source whose received level at 100 m is less than 180 dB. The NSF/USGS PEIS also established for these low-energy sources, a standard exclusion zone of 100 m for all low-energy sources in water depths greater than 100 m. This standard 100 m exclusion zone would be used during the proposed low-energy seismic survey. The 180 and 190 dB (rms) radii are shut-down criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000); these levels were used to establish exclusion zones. Therefore, the assumed 180 and 190 dB radii are 100 m for intermediate and deep water, respectively. If the PSO detects a marine mammal(s) within or about to enter the appropriate exclusion zone, the airguns will be shut-down immediately.

*Speed and Course Alterations*—If a marine mammal is detected outside the exclusion zone and, based on its position and direction of travel (relative motion), is likely to enter the exclusion zone, changes of the vessel's speed and/or direct course will be considered if this does not compromise operational safety or damage the deployed equipment. This would be done if operationally practicable while minimizing the effect on the planned science objectives. For marine seismic surveys towing large streamer arrays, however, course alterations are not typically implemented due to the vessel's limited maneuverability. After any such speed and/or course alteration is begun, the marine mammal activities and movements relative to the seismic vessel will be closely monitored to ensure that the marine mammal does not approach within the exclusion zone. If the marine mammal appears likely to enter the exclusion zone, further mitigation actions will be taken, including further speed and/or course alterations, and/or shut-down of the airgun(s). Typically, during seismic operations, the source vessel is unable to change speed or course, and one or more alternative mitigation measures will need to be implemented.

*Shut-down Procedures*—NSF and ASC will shut-down the operating airgun(s) if a marine mammal is detected outside the exclusion zone for the airgun(s), and if the vessel's speed and/or course cannot be changed to avoid having the animal enter the exclusion zone, the seismic source will be shut-down before the animal is within the exclusion zone. Likewise, if a marine mammal is already within the exclusion zone when first detected, the seismic source will be shut-down immediately.

Following a shut-down, NSF and ASC will not resume airgun activity until the marine mammal has cleared the exclusion zone. NSF and ASC will consider the animal to have cleared the exclusion zone if:

• A PSO has visually observed the animal leave the exclusion zone, or

• A PSO has not sighted the animal within the exclusion zone for 15 minutes for species with shorter dive durations (i.e., small odontocetes and pinnipeds), or 30 minutes for species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, pygmy and dwarf sperm, killer, and beaked whales).

Although power-down procedures are often standard operating practice for seismic surveys, they are not proposed to be used during this planned seismic survey because powering-down from two airguns to one airgun would make only a small difference in the exclusion zone(s)—but probably not enough to allow continued one-airgun operations if a marine mammal came within the exclusion zone for two airguns.

*Ramp-up Procedures*—Ramp-up of an airgun array provides a gradual increase in sound levels, and involves a step-wise increase in the number and total volume of airguns firing until the full volume of the airgun array is achieved. The purpose of a ramp-up is to ''warn'' marine mammals in the vicinity of the airguns and to provide the time for them to leave the area avoiding any potential injury or impairment of their hearing abilities. NSF and ASC will follow a ramp-up procedure when the airgun array begins operating after a specified period without airgun operations or when a shut-down shut down has exceeded that period. NSF and ASC propose that, for the present cruise, this period would be approximately 15 minutes. SIO, L–DEO, and USGS have used similar periods (approximately 15 minutes) during previous low-energy seismic surveys.

Ramp-up will begin with a single GI airgun (45 or 105 $in^3$). The second GI airgun (45 or 105 $in^3$) will be added after 5 minutes. During ramp-up, the PSOs will monitor the exclusion zone, and if marine mammals are sighted, a shut-down will be implemented as though both GI airguns were operational.

If the complete exclusion zone has not been visible for at least 30 minutes prior to the start of operations in either daylight or nighttime, NSF and ASC will not commence the ramp-up. Given these provisions, it is likely that the airgun array will not be ramped-up from a complete shut-down at night or in thick fog, because the outer part of the exclusion zone for that array will not be visible during those conditions. If one airgun has operated, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away if they choose. A ramp-up from a shut-down may occur at night, but only where the exclusion zone is small enough to be visible. NSF and ASC will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable exclusion zones during the day or close to the vessel at night.

NMFS has carefully evaluated the applicant's proposed mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Proposed Monitoring and Reporting**

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

*Proposed Monitoring*

NSF and ASC proposes to sponsor marine mammal monitoring during the proposed project, in order to implement the proposed mitigation measures that require real-time monitoring, and to satisfy the anticipated monitoring requirements of the IHA. NSF and ASC's proposed ''Monitoring Plan'' is described below this section. NSF and ASC understand that this monitoring plan will be subject to review by NMFS and that refinements may be required. The monitoring work described here has been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same regions. NSF and ASC is prepared to discuss coordination of their monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

*Vessel-Based Visual Monitoring*

PSOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during icebreaking activities, daytime airgun operations (austral summer) and during any ramp-ups of the airguns at night. Nighttime operations of the airguns are not anticipated. PSOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of airgun operations and after an extended shut-down (i.e., greater than approximately 15 minutes for this proposed low-energy seismic survey). When feasible, PSOs will conduct observations during daytime periods when the seismic system is not operating (such as during transits) for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSO observations, the airguns will be shut-down when marine mammals are observed within or about to enter a designated exclusion zone. The exclusion zone is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

During seismic operations in the Dumont d'Urville Sea of the Southern Ocean, at least two PSOs will be based aboard the *Palmer*. At least one PSO will stand watch at all times while the *Palmer* is operating airguns during the proposed low-energy seismic survey; this procedure will also be followed when the vessel is conducting icebreaking during transit. NSF and ASC will appoint the PSOs with NMFS's concurrence. The lead PSO would be experienced with marine mammal species in the Southern Ocean, the second PSO would receive additional specialized training from the PSO to ensure that they can identify marine mammal species commonly found in the Southern Ocean. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns.

During the majority of seismic operations, at least one PSO will be on duty from observation platforms (i.e., the best available vantage point on the source vessel) to monitor marine mammals near the seismic vessel. PSO(s) will be on duty in shifts no longer than 4 hours in duration. Other crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the low-energy seismic survey, the crew will be given additional instruction on how to do so. (**Note:** because of the high latitude locations of the study areas, twilight/darkness conditions are expected to be limited to between 3 and 6 hours per day during the proposed action.)

The *Palmer* is a suitable platform for marine mammal observations and will serve as the platform from which PSOs will watch for marine mammals before and during seismic operations. Two locations are likely as observation stations onboard the *Palmer.* Observing stations are located on the bridge level, with the PSO eye level at approximately 16.5 m (54.1 ft) above the waterline and the PSO would have a good view around the entire vessel. In addition, there is an aloft observation tower for the PSO approximately 24.4 m (80.1 ft) above the waterline that is protected from the weather, and affords PSOs an even greater view. Standard equipment for PSOs will be reticle binoculars. Night-vision equipment will not be available or required due to the constant daylight conditions during the Antarctic summer. The PSOs will be in communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or seismic source shut-down. Observing stations will be at the bridge level and the aloft observation tower. The approximate view around the vessel from the bridge is 270° and 360° from the aloft observation tower. During daytime, the PSO(s) will scan the area around the vessel systematically with reticle binoculars (e.g., 7 × 50 Fujinon FMTRC–SX) and the naked eye. These binoculars will have a built-in daylight compass. Estimating distances is done primarily with the reticles in the binoculars. The PSO(s) will be in direct (radio) wireless communication with ship's officers on the bridge and scientists in the vessel's operations laboratory during seismic operations, so they can advise the vessel operator, science support personnel, and the science party promptly of the need for avoidance maneuvers or a shut-down of the seismic source. PSOs will monitor for the presence pinnipeds and cetaceans during icebreaking activities, and will be limited to those marine mammal species in proximity to the ice margin habitat. Observations within the buffer zone would also include pinnipeds that may be present on the surface of the sea ice (i.e., hauled-out) and that could potentially dive into the water as the vessel approaches, indicating disturbance from noise generated by icebreaking activities).

When marine mammals are detected within or about to enter the designated exclusion zone, the airguns will immediately be shut-down if necessary. The PSO(s) will continue to maintain watch to determine when the animal(s) are outside the exclusion zone by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the exclusion zone, or if not observed after 15 minutes for species with shorter dive durations (small odontocetes and pinnipeds) or 30 minutes for species with longer dive durations (mysticetes and large odontocetes, including sperm, killer, and beaked whales).

*PSO Data and Documentation*

PSOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially ''taken'' by harassment (as defined in the MMPA). They will also provide information needed to order a shut-down of the airguns when a marine mammal is within or near the exclusion zone. Observations will also be made during icebreaking activities as well as daytime periods when the *Palmer* is underway without seismic operations (i.e., transits, to, from, and through the study area) to collect baseline biological data.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the seismic source or vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, wind force, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations, as well as information regarding ramp-ups or shut-downs will be recorded in a standardized format. Data will be entered into an electronic database. The data accuracy will be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database by the PSOs at sea. These procedures will allow initial summaries of data to be prepared during and shortly after the field program, and will facilitate transfer of the data to statistical, graphical, and other programs for further processing and archiving.

Results from the vessel-based observations will provide the following information:

1. The basis for real-time mitigation (airgun shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

NSF and ASC will submit a comprehensive report to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report submitted to NMFS will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations and all marine mammal sightings (i.e., dates, times, locations, activities, and associated seismic survey activities). The report will minimally include:

- Summaries of monitoring effort—total hours, total distances, and distribution of marine mammals through the study period accounting for Beaufort sea state and other factors affecting visibility and detectability of marine mammals;
- Analyses of the effects of various factors influencing detectability of marine mammals including Beaufort sea state, number of PSOs, and fog/glare;
- Species composition, occurrence, and distribution of marine mammals sightings including date, water depth,

numbers, age/size/gender, and group sizes; and analyses of the effects of seismic operations;

- Sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability);
- Initial sighting distances versus airgun activity state;
- Closest point of approach versus airgun activity state;
- Observed behaviors and types of movements versus airgun activity state;
- Numbers of sightings/individuals seen versus airgun activity state; and
- Distribution around the source vessel versus airgun activity state.

The report will also include estimates of the number and nature of exposures that could result in ''takes'' of marine mammals by harassment or in other ways. After the report is considered final, it will be publicly available on the NMFS Web site at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha.*

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction, and/or entanglement), NSF and ASC will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov.* The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with NSF and ASC to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. NSF and ASC may not resume their activities until notified by NMFS via letter or email, or telephone.

In the event that NSF and ASC discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), NSF and ASC will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov.* The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with NSF and ASC to determine whether modifications in the activities are appropriate.

In the event that NSF and ASC discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate or advanced decomposition, or scavenger damage), NSF and ASC will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov,* within 24 hours of discovery. NSF and ASC will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS. Activities may continue while NMFS reviews the circumstances of the incident.

**Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Level B harassment is anticipated and proposed to be authorized as a result of the proposed low-energy marine seismic survey in the Dumont d'Urville Sea off the coast of East Antarctica. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array and icebreaking activities are expected to result in the behavioral disturbance of some marine mammals. There is no evidence that the planned activities could result in injury, serious injury, or mortality for which NSF and ASC seeks the IHA. The required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe NSF and ASC's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of marine mammals that could be affected during the proposed low-energy seismic survey in the Dumont d'Urville Sea off the coast of East Antarctica. The estimates are based on a consideration of the number of marine mammals that could be harassed by approximately 2,800 km (1511.9 nmi) of seismic operations with the two GI airgun array to be used and 1,000 km of icebreaking activities.

During simultaneous operations of the airgun array and the other sound sources, any marine mammals close enough to be affected by the single and multi-beam echosounders, pingers, ADCP, sub-bottom profiler, etc. would already be affected by the airguns. During times when the airguns are not operating, it is unlikely that marine mammals will exhibit more than minor, short-term responses to the echosounders, ADCPs, and sub-bottom profiler given their characteristics (e.g., narrow, downward-directed beam) and other considerations described previously. Therefore, for this activity, take was not authorized specifically for these sound sources beyond that which is already authorized for airguns and icebreaking activities.

There are no stock assessments and very limited population information available for marine mammals in the Dumont d'Urville Sea. Sighting data from the Australian Antarctic Division's (AAD) BROKE-West surveys (Southwell *et al.,* 2008; 2012) was used to determine and estimate marine mammals densities for mysticetes and odontocetes and AAD data components for pinnipeds, which were not available for the proposed seismic survey's action area in the Dumont d'Urville Sea. While population density data for cetaceans in the Southern Ocean is sparse to nonexistent, reported sightings data from previous research cruises suggest cetaceans such as those identified in Table 12 of the IHA application span a range greater than 4,000 km (2,159.8 nmi) off the coast of East Antarctica.

The AAD BROKE-West survey was not specifically designed to quantify marine mammals. The data was in terms of animals sighted per time unit, and this sighting data was then converted to an areal density by multiplying the number of animals observed by the estimated area observed during the survey. As such, some marine mammals that were present in the area may not have been observed.

The estimated number of cetaceans and pinnipeds that may be potentially exposed from the proposed seismic airgun operations and icebreaking activities based on sighting data from previous research cruises over a 52-day period and 13-day period. Some of the AAD sighting data was used as the basis for estimating take included ''unidentified whale'' species, this category was retained and pro-rated to the other species because environmental conditions may be present during the proposed action to limit identification of observed cetaceans. The estimated frequency of sightings data for cetaceans incorporates a correction factor of 5 that assumes only 20% of the animals present were reported due to sea ice and other conditions that may have hindered observation. The 20% factor was intended to conservatively account for this. Conservatively, a 40% correction factor was used for pinnipeds. The expected sightings data incorporates a 40% correction factor to account for seals that may be in the water versus those hauled-out on ice surface. This correction factor for pinnipeds was conservatively based on Southwell *et al.* (2012), which estimated 20 to 40% of crabeater seals may be in the water in a particular area while the rest are hauled-out. The correction factor takes into consideration some pinnipeds may not be observed due to poor visibility conditions.

Sightings data were collected by the AAD; however, the AAD methodology was not described. Density is generally reported in the number of animals per km or square km. Estimated area observed by observers was calculated by using the average vessel speed (5.6 km/hr) times the estimated hours of the survey to estimate the total distance covered for each of the surveys. This was then converted from the linear distance into an area by assuming a width of 5 km that could be reliably visually surveyed. Therefore, the estimated area was 5,753 km$^2$ (1,677.3 nmi$^2$) to obtain mysticete and odontocete densities and the estimated area was 1,419 km$^2$ (413.7 nmi$^2$) to obtain pinniped densities.

Of the six species of pinnipeds that may be present in the study area during the proposed action, only four species are expected to be observed and occur mostly near pack ice or coastal areas and not prevalent in open sea areas where the low-energy seismic survey would be conducted. Because density estimates for pinnipeds in that Antarctic regions typically represent individuals that have hauled-out of the water, those estimates are not representative of individuals that are in the water and could be potentially exposed to underwater sounds during the seismic airgun operations and icebreaking activities; therefore, the pinniped densities have been adjusted to account for this concern. Take was not requested for southern elephant seals and Antarctic fur seals because preferred habitat for these species is not within the proposed action area. Although no sightings of Weddell seals and spectacled porpoises were reported in the BROKE-West sighting data, take was requested for these species based on NMFS recommendation and IWC SOWER data. Although there is some uncertainty about the representatives of the data and the assumptions used in the calculations below, the approach used here is believed to be the best available approach.

Table 5. Estimated densities and possible number of marine mammal species that might be exposed to greater than or equal to 120 dB (icebreaking) and 160 dB (airgun operations) during NSF and ASC's proposed low-energy seismic survey (approximately 1,000 km of tracklines/approximately 3,500 km$^2$ ensonified area for icebreaking activities and approximately 2,800 km of tracklines/approximately 5,628 km$^2$ ensonified area for airgun operations) in the Dumont d'Urville Sea of the Southern Ocean, February to March 2014.

| Species | Reported sightings [1 2] *sightings have been pro-rated to include unidentified animals* | Corrected sightings (assume 20% for cetaceans, 40% of pinnipeds in water) | Density in-water [density in-water and/or on-ice] (#/km) [2] | Calculated take from seismic airgun operations (i.e., estimated number of individuals exposed to sound levels ≥160 dB re 1 μPa) [3] | Calculated take from icebreaking activities (i.e., estimated number of individuals exposed to sound levels ≥120 dB re 1 μPa) [4] | Approximate percentage of population estimate (calculated total take) [5] | Total requested take authorization [6] |
|---|---|---|---|---|---|---|---|
| Mysticetes: | | | | | | | |
| Southern right whale | 0 | 0 | 0 | 0 | 0 | NA | 0. |
| Humpback whale | 238 | 1,190 | 0.2068400 | 1,165 | 724 | 5.4 | 1,165 + 724 = 1,889. |
| Antarctic minke whale | 136 | 680 | 0.1181943 | 666 | 414 | 0.4 | 666 + 414 = 1,080. |
| Sei whale | 4 | 20 | 0.0034763 | 20 | 13 | 0.04 | 20 + 13 = 33. |
| Fin whale | 232 | 1,160 | 0.2016255 | 1,135 | 706 | 1.3 | 1,135 + 706 = 1,841. |
| Blue whale | 2 | 10 | 0.0017382 | 10 | 7 | 1.0 | 10 + 7 = 17. |
| Odontocetes: | | | | | | | |
| Sperm whale | 32 | 160 | 0.0278104 | 157 | 98 | 2.7 | 157 + 98 = 255. |
| Arnoux's beaked whale | 0 | 0 | 0 | 0 | 0 | NA | 0. |
| Cuvier's beaked whale | 0 | 0 | 0 | 0 | 0 | NA | 0. |
| Southern bottlenose beaked whale. | 0 | 0 | 0 | 0 | 0 | NA | 0. |
| Killer whale | 62 | 310 | 0.538827 | 304 | 189 | 2.0 | 304 + 189 = 493. |
| Long-finned pilot whale | 24 | 120 | 0.0208578 | 118 | 74 | 0.1 | 118 + 74 = 192. |
| Hourglass dolphin | 27 | 135 | 0.0234650 | 133 | 83 | 0.15 | 133 + 83 = 216. |
| Spectacled porpoise | 26 | 130 | 0.0225690 | 128 | 80 | NA | 128 + 80 = 208. |
| Pinnipeds: | | | | | | | |
| Crabeater seal | 2,220 | 888 | 0.625546 [2.189411] | 3,521 | 7,663 | 0.2 | 3,521 + 7,663 = 11,184. |
| Leopard seal | 17 | 7 | 0.00479 [0.016766] | 27 | 59 | 0.04 | 27 + 59 = 86. |
| Ross seal | 42 | 17 | 0.011835 [0.041421] | 66 | 145 | 0.2 | 66 + 145 = 211. |

| Species | Reported sightings [1 2] *sightings have been pro-rated to include unidentified animals* | Corrected sightings (assume 20% for cetaceans, 40% of pinnipeds in water) | Density in-water [density in-water and/or on-ice] (#/km) [2] | Calculated take from seismic airgun operations (i.e., estimated number of individuals exposed to sound levels ≥160 dB re 1 μPa) [3] | Calculated take from icebreaking activities (i.e., estimated number of individuals exposed to sound levels ≥120 dB re 1 μPa) [4] | Approximate percentage of population estimate (calculated total take) [5] | Total requested take authorization [6] |
|---|---|---|---|---|---|---|---|
| Weddell seal | 302 | 121 | 0.054 [0.054] | 303 | 189 | 0.1 | 303 + 189 = 492. |
| Southern elephant seal | 0 | 0 | 0 | 0 | 0 | NA | 0. |
| Antarctic fur seal | 0 | 0 | 0 | 0 | 0 | NA | 0. |

NA = Not available or not assessed.
[1] Sightings from a 52 day (5,753 km$^2$) period on the AAD BROKE-West survey during January to March 2006.
[2] Sightings December 3 to 16, 1999 (1,420 km$^2$ and 75,564 km$^2$), below 60° South latitude between 110 to 165° East longitude. All sightings were animals hauled-out of the water and on the sea ice.
[3] Calculated take is estimated density (reported density times correction factor) multiplied by the area ensonified to 160 dB (rms) around the planned seismic lines, increased by 25% for contingency.
[4] Calculated take is estimated density (reported density) multiplied by the area ensonified to 120 dB (rms) around the planned transit lines where icebreaking activities may occur.
[5] Total requested (and calculated) takes expressed as percentages of the species or regional populations.
[6] Requested Take Authorization includes unidentified animals that were added to the observed and identified species on a pro-rated basis.
**Note:** Take was not requested for southern elephant seals and Antarctic fur seals because preferred habitat for these species is not within the proposed action area.

Icebreaking in Antarctic waters will occur, as necessary, between the latitudes of approximately 66 to 70° South and between 140 and 165° East. Based on a maximum sea ice extent of 250 km and estimating that the *Palmer* will transit to the innermost shelf and back into open water twice—a round trip transit in each of the potential work regions, it is estimated that the Palmer will actively break ice up to a distance of 1,000 km. Based on the ship's speed of 5 kts under moderate ice conditions, this distance represents approximately 108 hrs of icebreaking operations. This calculation is likely an overestimation because icebreakers often follow leads when they are available and thus do not break ice at all times.

Numbers of marine mammals that might be present and potentially disturbed are estimated based on the available data about marine mammal distribution and densities in the Southern Ocean study are during the austral summer. NSF and ASC estimated the number of different individuals that may be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) for seismic airgun operations and greater than or equal to 120 dB re 1 μPa (rms) for icebreaking activities on one or more occasions by considering the total marine area that would be within the 160 dB radius around the operating airgun array and 120 dB radius for the icebreaking activities on at least one occasion and the expected density of marine mammals in the area (in the absence of the a seismic survey and icebreaking activities). The number of possible exposures can be estimated by considering the total marine area that would be within the 160 dB radius (i.e., diameter is 1,005 m times 2) around the operating airguns. The ensonified area for icebreaking was estimated by multiplying the distance of the icebreaking activities (1,000 km) by the estimated diameter of the area within the 120 dB radius (i.e., diameter is 1,750 m times 2). The 160 dB radii are based on acoustic modeling data for the airguns that may be used during the proposed action (see Attachment B of the IHA application). As summarized in Table 2 (see Table 11 of the IHA application), the modeling results for the proposed low-energy seismic airgun array indicate the received levels are dependent on water depth. Since the majority of the proposed airgun operations would be conducted in waters 100 to 1,000 m deep, the buffer zone of 1,005 m used for the two 105 in$^3$ GI airguns was used to be more conservative. The expected sighting data for pinnipeds accounts for both pinnipeds that may be in the water and those hauled-out on ice surfaces. While the number of cetaceans that may be encountered within the ice margin habitat would be expected to be less than open water, the estimates utilized expected sightings for the open water and represent conservative estimates. It is unlikely that a particular animal would stay in the area during the entire survey.

The number of different individuals potentially exposed to received levels greater than or equal to 160 dB re 1 μPa (rms) from seismic airgun operations and 120 dB re 1 μPa (rms) for icebreaking activities was calculated by multiplying:

(1) The expected species density (in number/km$^2$), times.

(2) The anticipated area to be ensonified to that level during airgun operations.

Applying the approach described above, approximately 5,628 km$^2$ (including the 25% contingency) would be ensonified within the 160 dB isopleth for seismic airgun operations and approximately 3,500 km$^2$ would be ensonified within the 120 dB isopleth for icebreaking activities on one or more occasions during the proposed survey. The take calculations within the study sites do not explicitly add animals to account for the fact that new animals (i.e., turnover) are not accounted for in the initial density snapshot and animals could also approach and enter the area ensonified above 160 dB for seismic airgun operations and 120 dB for icebreaking activities; however, studies suggest that many marine mammals will avoid exposing themselves to sounds at this level, which suggests that there would not necessarily be a large number of new animals entering the area once the seismic survey and icebreaking activities started. Because this approach for calculating take estimates does not allow for turnover in the marine mammal populations in the area during the course of the survey, the actual number of individuals exposed may be underestimated, although the conservative (i.e., probably overestimated) line-kilometer distances used to calculate the area may offset this. Also, the approach assumes that no cetaceans or pinnipeds will move away or toward the tracklines as the *Palmer* approaches in response to increasing sound levels before the levels reach 160 dB for seismic airgun operations and 120 dB for icebreaking activities. Another way of interpreting the

estimates that follow is that they represent the number of individuals that are expected (in absence of a seismic and icebreaking program) to occur in the waters that will be exposed to greater than or equal to 160 dB (rms) for seismic airgun operations and greater than or equal to 120 dB (rms) for icebreaking activities.

NSF and ASC's estimates of exposures to various sound levels assume that the proposed surveys will be carried out in full; however, the ensonified areas calculated using the planned number of line-kilometers has been increased by 25% to accommodate lines that may need to be repeated, equipment testing, etc. As is typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. The estimates of the numbers of marine mammals potentially exposed to 120 dB (rms) and 160 dB (rms) received levels are precautionary and probably overestimate the actual numbers of marine mammals that could be involved. These estimates assume that there will be no weather, equipment, or mitigation delays, which is highly unlikely.

Table 5 shows the estimates of the number of different individual marine mammals anticipated to be exposed to greater than or equal to 120 dB re 1 μPa (rms) for icebreaking activities and greater than or equal to 160 dB re 1 μPa (rms) for seismic airgun operations during the seismic survey if no animals moved away from the survey vessel. The total requested take authorization is given in the far right column of Table 5.

The estimate of the number of individual cetaceans and pinnipeds that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) and sounds from icebreaking activities with received levels greater than or equal to 120 dB re 1 μPa (rms) during the proposed survey is (with 25% contingency) in Table 5 of this document. That total (with 25% contingency) includes 1,889 humpback, 1,080 Antarctic minke, 33 sei, 1,841 fin, 17 blue, and 255 sperm whales could be taken by Level B harassment during the proposed seismic survey, which would represent 5.4, 0.4, 0.04, 1.3, 1, and 2.7% of the worldwide or regional populations, respectively. Some of the cetaceans potentially taken by Level B harassment are delphinids and porpoises: killer whales, long-finned pilot whales, hourglass dolphins, and spectacled porpoises are estimated to be the most common delphinid and porpoise species in the area, with estimates of 493, 192, 216, and 208, which would represent 2, 0.1, and 0.15% (spectacled porpoise population is not available) of the affected worldwide or regional populations, respectively. Most of the pinnipeds potentially taken by Level B harassment are: Crabeater, leopard, Ross, and Weddell seals with estimates of 11,184, 86, 211, and 492, which would represent 0.2, 0.04, 0.2, and 0.1% of the affected worldwide or regional populations, respectively.

**Encouraging and Coordinating Research**

NSF and ASC will coordinate the planned marine mammal monitoring program associated with the proposed low-energy seismic survey with other parties that express interest in this activity and area. NSF and ASC will coordinate with applicable U.S. agencies (e.g., NMFS), and will comply with their requirements. NSF has already reached out to the Australian Antarctic Division (AAD), who are the proponents of the proposed marine protected area and regularly conduct research expeditions in the marine environment off East Antarctica.

The proposed action would complement fieldwork studying other Antarctic ice shelves, oceanographic studies, and ongoing development of ice sheet and other ocean models. It would facilitate learning at sea and ashore by students, help to fill important spatial and temporal gaps in a lightly sampled region of coastal Antarctica, provide additional data on marine mammals present in the East Antarctic study areas, and communicate its findings via reports, publications and public outreach.

**Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

Section 101(a)(5)(D) of the MMPA also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (in the Dumont d'Urville Sea off the coast of East Antarctica) that implicate MMPA section 101(a)(5)(D).

**Negligible Impact and Small Numbers Analysis Determination**

As a preliminary matter, NMFS typically includes our negligible impact and small numbers analyses and determinations under the same section heading of our **Federal Register** notices. Despite co-locating these terms, NMFS acknowledges that negligible impact and small numbers are distinct standards under the MMPA and treat them as such. The analyses presented below do not conflate the two standards; instead, each standard has been considered independently and NMFS has applied the relevant factors to inform our negligible impact and small numbers determinations.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited); and

(3) The context in which the takes occur (i.e., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures.

As described above and based on the following factors, the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death. The factors include:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is relatively low and would likely be avoided through the implementation of the shut-down measures;

No injuries, serious injuries, or mortalities are anticipated to occur as a result of the NSF and ASC's planned low-energy marine seismic survey, and none are proposed to be authorized by NMFS. Table 5 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. Due to the

nature, degree, and context of Level B (behavioral) harassment anticipated and described (see ''Potential Effects on Marine Mammals'' section above) in this notice, the activity is not expected to impact rates of annual recruitment or survival for any affected species or stock, particularly given NMFS's and the applicant's proposal to implement mitigation, monitoring, and reporting measures to minimize impacts to marine mammals. Additionally, the seismic survey will not adversely impact marine mammal habitat.

For the other marine mammal species that may occur within the proposed action area, there are no known designated or important feeding and/or reproductive areas. Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (i.e., 24 hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Additionally, the seismic survey will be increasing sound levels in the marine environment in a relatively small area surrounding the vessel (compared to the range of the animals), which is constantly travelling over distances, and some animals may only be exposed to and harassed by sound for less than day.

Of the 14 marine mammal species under NMFS jurisdiction that may or are known to likely to occur in the study area, five are listed as threatened or endangered under the ESA: southern right, humpback, sei, fin, blue, and sperm whales. These species are also considered depleted under the MMPA. Of these ESA-listed species, incidental take has been requested to be authorized for humpback, sei, fin, blue, and sperm whales. There is generally insufficient data to determine population trends for the other depleted species in the study area. To protect these animals (and other marine mammals in the study area), NSF and ASC must cease or reduce airgun operations if any marine mammal enters designated zones. No injury, serious injury, or mortality is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, and the activity is not expected to impact rates of recruitment or survival.

As mentioned previously, NMFS estimates that 14 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 4 of this document.

NMFS's practice has been to apply the 160 dB re 1 μPa (rms) received level threshold for underwater impulse sound levels and the 120 dB re 1 μPa (rms) received level threshold for icebreaking activities to determine whether take by Level B harassment occurs. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* [2007]).

NMFS has preliminarily determined, provided that the aforementioned mitigation and monitoring measures are implemented, the impact of conducting a low-energy marine seismic survey in the Dumont d'Urville Sea off the coast of East Antarctica, February to March 2014, may result, at worst, in a modification in behavior and/or low-level physiological effects (Level B harassment) of certain species of marine mammals.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas for species and the short and sporadic duration of the research activities, have led NMFS to preliminary determine that the taking by Level B harassment from the specified activity will have a negligible impact on the affected species in the specified geographic region. NMFS believes that the length of the seismic survey, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), and the inclusion of the monitoring and reporting measures, will reduce the amount and severity of the potential impacts from the activity to the degree that it will have a negligible impact on the species or stocks in the action area.

NMFS has preliminary determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a low-energy marine seismic survey in the Dumont d'Urville Sea off the coast of East Antarctica, January to March 2014, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals. See Table 5 for the requested authorized take numbers of marine mammals.

**Endangered Species Act**

Of the species of marine mammals that may occur in the proposed survey area, several are listed as endangered under the ESA, including the humpback, sei, fin, blue, and sperm whales. NSF and ASC did not request take of endangered Southern right whales due to the low likelihood of encountering this species during the cruise. Under section 7 of the ESA, NSF, on behalf of ASC and five other research institutions, has initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this proposed seismic survey. NMFS's Office of Protected Resources, Permits and Conservation Division, has initiated formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. NMFS will conclude formal section 7 consultation prior to making a determination on whether or not to issue the IHA. If the IHA is issued, NSF and ASC, in addition to the mitigation and monitoring requirements included in the IHA, will be required to comply with the Terms and Conditions of the Incidental Take Statement corresponding to NMFS's Biological Opinion issued to both NSF and ASC, and NMFS's Office of Protected Resources.

**National Environmental Policy Act**

With NSF and ASC's complete application, NSF and ASC provided NMFS a ''Draft Initial Environmental Evaluation/Environmental Assessment to Conduct Marine-Based Studies of the Totten Glacier System and Marine Record of Cryosphere—Ocean Dynamics,'' (IEE/EA) prepared by AECOM on behalf of NSF and ASC. The IEE/EA analyzes the direct, indirect, and cumulative environmental impacts of the proposed specified activities on marine mammals including those listed as threatened or endangered under the ESA. Prior to making a final decision on the IHA application, NMFS will either prepare an independent EA, or, after review and evaluation of the NSF and ASC IEE/EA for consistency with the regulations published by the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, adopt the NSF and ASC IEE/EA and make a decision of whether or not to issue a

Finding of No Significant Impact (FONSI).

**Proposed Authorization**

As a result of these preliminary determinations, NMFS propose to issue an IHA to NSF and ASC for conducting the low-energy seismic survey in the tropical western Pacific Ocean, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided below:

National Science Foundation, Division of Polar Programs, 4201 Wilson Boulevard, Arlington, Virginia 22230 and Antarctic Support Contract, 7400 South Tucson Way, Centennial, Colorado 80112, is hereby authorized under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1371(a)(5)(D)), to harass small numbers of marine mammals incidental to a low-energy marine geophysical (seismic) survey conducted by the RVIB *Nathaniel* B. *Palmer* (*Palmer*) in the Dumont d'Urville Sea, Antarctica, January to March 2014:

1. This Authorization is valid from January 29 through April 27, 2014.

2. This Authorization is valid only for the *Palmer's* activities associated with low-energy seismic survey operations that shall occur in the following specified geographic area:

In selected regions of the Dumont d'Urville Sea in the Southern Ocean off the coast of East Antarctica and focus on the Totten Glacier and Moscow University Ice Shelf, located on the Sabrina Coast, from greater than approximately 64° South and between approximately 95 to 135° East, and the Mertz Glacier and Cook Ice Shelf systems located on the George V and Oates Coast, from greater than approximately 65° South and between approximately 140 to 165° East. The study sites are characterized by heavy ice cover, with a seasonal break-up in the ice that structures biological patterns. The studies may occur in both areas, or entirely in one or the other, depending on ice conditions. Water depths in the survey area generally range from approximately 100 to 1,000 m, and possibly exceeding 1,000 m in some areas. The low-energy seismic survey will be conducted in International Waters (i.e., high seas), as specified in NSF and ASC's Incidental Harassment Authorization application and the associated NSF and ASC Initial Environmental Evaluation/ Environmental Assessment (IEE/EA).

3. Species Authorized and Level of Takes

(a) The incidental taking of marine mammals, by Level B harassment only, is limited to the following species in the waters of the Southern Ocean off the coast of East Antarctica:

(i) *Mysticetes*—see Table 2 (attached) for authorized species and take numbers.

(ii) *Odontocetes*—see Table 2 (attached) for authorized species and take numbers.

(iii) *Pinnipeds*—see Table 2 (attached) for authorized species and take numbers.

(iv) If any marine mammal species are encountered during seismic activities that are not listed in Table 2 (attached) for authorized taking and are likely to be exposed to sound pressure levels (SPLs) greater than or equal to 160 dB re 1 μPa (rms) for seismic airgun operations or greater than or equal to 120 dB re 1 μPa (rms) for icebreaking activities, then the Holder of this Authorization must alter speed or course or shut-down the airguns to avoid take.

(b) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in Condition 3(a) above or the taking of any kind of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of this Authorization.

4. The methods authorized for taking by Level B harassment are limited to the following acoustic sources without an amendment to this Authorization:

(a) A two Generator Injector (GI) airgun array (each with a discharge volume of 45 cubic inches [$in^3$] or 105 $in^3$) with a total volume of 90 $in^3$ or 210 $in^3$ (or smaller);

(b) A multi-beam echosounder;

(c) A single-beam echosounder;

(d) An acoustic Doppler current profiler;

(e) An acoustic locator;

(f) A sub-bottom profiler; and

(g) Icebreaking.

5. The taking of any marine mammal in a manner prohibited under this Authorization must be reported immediately to the Office of Protected Resources, National Marine Fisheries Service (NMFS), at 301–427–8401.

6. Mitigation and Monitoring Requirements

The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable adverse impact on affected marine mammal species or stocks:

(a) Utilize one, NMFS-qualified, vessel-based Protected Species Observer (PSO) to visually watch for and monitor marine mammals near the seismic source vessel during daytime airgun operations (from nautical twilight-dawn to nautical twilight-dusk) and before and during ramp-ups of airguns day or night. The *Palmer's* vessel crew shall also assist in detecting marine mammals, when practicable. PSOs shall have access to reticle binoculars (7 × 50 Fujinon). PSO shifts shall last no longer than 4 hours at a time. PSOs shall also make observations during daytime periods when the seismic airguns are not operating for comparison of animal abundance and behavior, when feasible.

(b) PSOs shall conduct monitoring while the airgun array and streamer are being deployed or recovered from the water.

(c) Record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc., and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state of ramp-up or shut-down), Beaufort sea state and wind force, visibility, and sun glare; and

(iii) The data listed under Condition 6(c)(ii) shall also be recorded at the start and end of each observation watch and during a watch whenever there is a change in one or more of the variables.

(d) Visually observe the entire extent of the exclusion zone (180 dB re 1 μPa [rms] for cetaceans and 190 dB re 1 μPa [rms] for pinnipeds; see Table 2 [above] for distances) using NMFS-qualified PSOs, for at least 30 minutes prior to starting the airgun array (day or night). If the PSO finds a marine mammal within the exclusion zone, NSF and ASC must delay the seismic survey until the marine mammal(s) has left the area. If the PSO sees a marine mammal that surfaces, then dives below the surface, the PSO shall wait 30 minutes. If the PSO sees no marine mammals during that time, they should assume that the animal has moved beyond the exclusion zone. If for any reason the entire radius cannot be seen for the entire 30 minutes (i.e., rough seas, fog, darkness), or if marine mammals are near, approaching, or in the exclusion zone, the airguns may not be ramped-up. If one airgun is already running at a source level of at

least 180 dB re 1 μPa (rms), NSF and ASC may start the second airgun without observing the entire exclusion zone for 30 minutes prior, provided no marine mammals are known to be near the exclusion zone (in accordance with Condition 6[f] below).

(e) Establish a 180 dB re 1 μPa (rms) exclusion zone for cetaceans and a 190 dB re 1 μPa (rms) exclusion zone for pinnipeds before the two GI airgun array (90 or 210 $in^3$ total volume) is in operation. See Table 2 (above) for distances and exclusion zones.

(f) Implement a ''ramp-up'' procedure when starting up at the beginning of seismic operations or anytime after the entire array has been shut-down for more than 15 minutes, which means starting with a single GI airgun and adding a second GI airgun after five minutes. During ramp-up, the PSOs shall monitor the exclusion zone, and if marine mammals are sighted, a shut-down shall be implemented as though the full array (both GI airguns) were operational. Therefore, initiation of ramp-up procedures from shut-down requires that the PSOs be able to view the full exclusion zone as described in Condition 6(d) (above).

(g) Alter speed or course during seismic operations if a marine mammal, based on its position and relative motion, appears likely to enter the relevant exclusion zone. If speed or course alteration is not safe or practicable, or if after alteration the marine mammal still appears likely to enter the exclusion zone, further mitigation measures, such as a shut-down, shall be taken.

(h) Shut-down the airgun(s) if a marine mammal is detected within, approaches, or enters the relevant exclusion zone (as defined in Table 2, above). A shut-down means all operating airguns are shut-down (i.e., turned off).

(i) Following a shut-down, the airgun activity shall not resume until the PSO has visually observed the marine mammal(s) exiting the exclusion zone and is not likely to return, or has not been seen within the exclusion zone for 15 minutes for species with shorter dive durations (small odontocetes and pinnipeds) or 30 minutes for species with longer dive durations (mysticetes and large odontocetes, including sperm, killer, and beaked whales).

(j) Following a shut-down and subsequent animal departure, airgun operations may resume following ramp-up procedures described in Condition 6(f).

(k) Marine seismic surveys may continue into night and low-light hours if such segment(s) of the survey is initiated when the entire relevant exclusion zones are visible and can be effectively monitored.

(l) No initiation of airgun array operations is permitted from a shut-down position at night or during low-light hours (such as in dense fog or heavy rain) when the entire relevant exclusion zone cannot be effectively monitored by the PSO(s) on duty.

7. Reporting Requirements

The Holder of this Authorization is required to:

(a) Submit a draft report on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days of the completion of the *Palmer's* Dumont d'Urville Sea off the coast of East Antarctica cruise. This report must contain and summarize the following information:

(i) Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and associated activities during all seismic operations and marine mammal sightings;

(ii) Species, number, location, distance from the vessel, and behavior of any marine mammals, as well as associated seismic activity (e.g., number of shut-downs), observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that: (A) Are known to have been exposed to the seismic activity (based on visual observation) at received levels greater than or equal to 120 dB re 1 μPa (rms) (for icebreaking activities), greater than or equal to 160 dB re 1 μPa (rms) (for seismic airgun operations), and/or 180 dB re 1 μPa (rms) for cetaceans and 190 dB re 1 μPa (rms) for pinnipeds with a discussion of any specific behaviors those individuals exhibited; and (B) may have been exposed (based on modeled values for the two GI airgun array) to the seismic activity at received levels greater than or equal to 120 dB re 1 μPa (rms) (for icebreaking activities), greater than or equal to 160 dB re 1 μPa (rms) (for seismic airgun operations), and/or 180 dB re 1 μPa (rms) for cetaceans and 190 dB re 1 μPa (rms) for pinnipeds with a discussion of the nature of the probable consequences of that exposure on the individuals that have been exposed.

(iv) A description of the implementation and effectiveness of the: (A) Terms and Conditions of the Biological Opinion's Incidental Take Statement (ITS) (attached); and (B) mitigation measures of the Incidental Harassment Authorization. For the Biological Opinion, the report shall confirm the implementation of each Term and Condition, as well as any conservation recommendations, and describe their effectiveness, for minimizing the adverse effects of the action on Endangered Species Act-listed marine mammals.

(b) Submit a final report to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, within 30 days after receiving comments from NMFS on the draft report. If NMFS decides that the draft report needs no comments, the draft report shall be considered to be the final report.

8. In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction, and/or entanglement), NSF and ASC shall immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov*. The report must include the following information:

(a) Time, date, and location (latitude/longitude) of the incident; the name and type of vessel involved; the vessel's speed during and leading up to the incident; description of the incident; status of all sound source use in the 24 hours preceding the incident; water depth; environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility); description of marine mammal observations in the 24 hours preceding the incident; species identification or description of the animal(s) involved; the fate of the animal(s); and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with NSF and ASC to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. NSF and ASC may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that NSF and ASC discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), NSF and ASC will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources,

NMFS, at 301–427–8401, and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov*. The report must include the same information identified in Condition 8(a) above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with NSF and ASC to determine whether modifications in the activities are appropriate.

In the event that NSF and ASC discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), NSF and ASC shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov,* within 24 hours of the discovery. NSF and ASC shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

9. NSF and ASC is required to comply with the Terms and Conditions of the ITS corresponding to NMFS's Biological Opinion issued to both NSF, ASC, and NMFS's Office of Protected Resources (attached).

10. A copy of this Authorization and the ITS must be in the possession of all contractors and PSOs operating under the authority of this Incidental Harassment Authorization.

## Information Solicited

NMFS requests interested persons to submit comments and information concerning this proposed project and NMFS's preliminary determination of issuing an IHA (see **ADDRESSES**). Concurrent with the publication of this notice in the **Federal Register,** NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 30, 2013.

**P. Michael Payne,**

*Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2013–31471 Filed 12–31–13; 8:45 am]

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Part IV

## Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedures for Residential Furnace Fans; Final Rule

**DEPARTMENT OF ENERGY**

**10 CFR Parts 429 and 430**

**[Docket No. EERE–2010–BT–TP–0010]**

**RIN 1904–AC21**

## Energy Conservation Program: Test Procedures for Residential Furnace Fans

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

**ACTION:** Final rule.

**SUMMARY:** On May 15, 2012, the U.S. Department of Energy (DOE) issued a notice of proposed rulemaking (NOPR) to initiate the rulemaking to establish test procedures for residential furnace fans. On April 2, 2013 DOE issued a supplemental notice of proposed rulemaking (SNOPR) to address interested party comments received on the NOPR. The proposed rulemaking serves as the basis for today's action. DOE is issuing a final rule to establish test procedures for measuring the electrical consumption for electrically-powered devices used in weatherized and non-weatherized gas, oil and electric furnaces and modular blowers to circulate air through ductwork.

**DATES:** The effective date of this rule is February 3, 2014.

The incorporation by reference of certain publications listed in this rule was approved by the Director of the Federal Register on February 3, 2014.

**ADDRESSES:** The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *regulations.gov.* All documents in the docket are listed in the *regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page can be found at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/42*. This Web page will contain a link to the docket for this notice on the *regulations.gov* site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov*.

**FOR FURTHER INFORMATION CONTACT:**
Ronald Majette, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7935. Email: *residential_furnace_fans@ee.doe.gov*.
Ari Altman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6307. Email: *Ari.Altman@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:** This final rule incorporates by reference into part 430 the following industry standards:

(1) ANSI/ASHRAE Standard 103–2007, (Supersedes ANSI/ASHRAE 103–1993), Methods of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers, ASHRAE Standards Committee approved on June 23, 2007, ASHRAE Board of Directors on June 27, 2007, ANSI approved March 25, 2008.

(2) ANSI/ASHRAE 37–2009, Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment, ASHRAE Standards Committee approved on June 20, 2009, ASHRAE Board of Directors approved on June 24, 2009; ANSI approved June 25, 2009.

You can purchase copies of ASHRAE standards from the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. 1791 Tullie Circle NE., Atlanta, GA 30329, 404–636–8400, or *www.ashrae.org*.

You can also view copies of these standards at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

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### I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, *et seq.;* ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112–210 (Dec. 18, 2012)). Part B of title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309, as codified), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' These include products that use electricity for the purposes of circulating air through ductwork, hereinafter referred to as ''furnace fans,'' the subject of today's notice. (42 U.S.C. 6295(f)(4)(D))

Under the Act, this energy conservation program consists essentially of four parts: (1) Testing; (2) labeling; (3) Federal energy conservation standards; and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA and for making representations about the efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s)) Any representation made after July 2, 2014 for energy consumption of residential furnace fans must be based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for residential furnace fans, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required. Similarly, DOE must use these test procedures in any

enforcement action to determine whether covered products comply with these energy conservation standards. (42 U.S.C. 6295(s))

*General Test Procedure Rulemaking Process*

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. Under EPCA, ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, . . . or estimated annual operating cost of a covered product during a representative average use cycle or period of use . . . and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) In any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of a covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

*Energy Conservation Standards and Test Procedures for Furnace Fans*

Pursuant to EPCA under 42 U.S.C. 6295(f)(4)(D), DOE is currently conducting a rulemaking to consider new energy conservation standards for furnace fans. EPCA directs DOE to establish test procedures in conjunction with new energy conservation standards, including furnace fans. (42 U.S.C. 6295(o)(3)(A)) DOE does not currently have a test procedure for furnace fans. Hence, to fulfill the statutory requirements, DOE is conducting this test procedure rulemaking for furnace fans concurrently with the energy conservation standards rulemaking for furnace fans. The test procedure established by this final rule includes an energy consumption metric and the methods necessary to measure the energy performance of furnace fans. The energy consumption metric does not account for the electrical energy consumption in standby mode and off mode because consumption of a furnace fan in those modes is already accounted for in the DOE rulemakings for furnaces and central air conditioners (CAC) and heat pumps. 77 FR 76831 (Dec. 31, 2012); 76 FR 65616 (Oct. 24, 2011). Manufacturers will be required to use the energy consumption metric, sampling plans, and testing methods established in this final rule to verify compliance with the new energy conservation standards when they take effect and for making representations of the energy consumption of furnace fans.

On June 3, 2010, DOE published a Notice of Public Meeting and Availability of the Framework Document (the June 2010 Framework Document) to initiate the energy conservation standard rulemaking for furnace fans. 75 FR 31323. In the June 2010 Framework Document, DOE requested feedback from interested parties on many issues related to test methods for evaluating the electrical energy consumption of furnace fans. DOE held the framework public meeting on June 18, 2010. DOE originally scheduled the framework comment period to close on July 6, 2010. However, due to the large number and broad scope of questions and issues raised regarding the June 2010 Framework Document in writing and during the public meeting, DOE published a notice in the **Federal Register** reopening the comment period from July 15, 2010, until July 27, 2010, to allow additional time for interested parties to submit comments. 75 FR 41102 (July 15, 2010).

On May 15, 2012, DOE published a notice of proposed rulemaking in the **Federal Register** to initiate the test procedure rulemaking for furnace fans. 77 FR 28674. In the May 2012 NOPR, DOE proposed an energy consumption metric, fan efficiency rating (FER), and proposed methods to measure the performance of furnace fans based on FER. DOE held a public meeting on the test procedure NOPR on June 15, 2012. The test procedure NOPR comment period closed on September 10, 2012.

In response to the May 2012 NOPR, many interested parties commented that the proposed test procedure was unduly burdensome. The Air-Conditioning, Heating and Refrigeration Institute (AHRI), with support from Goodman Global, Inc. (''Goodman''), Ingersoll Rand, Lennox International, Inc. (''Lennox''), and Morrison Products, Inc. (''Morrison''), proposed an alternative test method that these parties argue would result in accurate and repeatable FER values that are comparable to the FER values resulting from the test procedure proposed in the NOPR, but are obtained at a significantly reduced test burden. (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Lennox, No. 12 at p. 5; Morrison, No. 21 at p. 3.) On April 2, 2013, DOE published a supplemental notice of proposed rulemaking (SNOPR) in the **Federal Register.** A detailed discussion of AHRI's proposed alternative method and interested parties' comments regarding the burden of the test procedure proposed in the NOPR is provided in the SNOPR. 78 FR 19612 (April 2, 2013) In the April 2013 SNOPR, DOE proposed to adopt a modified version of the test method presented by AHRI as the furnace fan test procedure. DOE agreed that the key concept embodied in the alternative method suggested by AHRI and manufacturers (using the AFUE test set up and temperature rise to determine airflow) may provide accurate and repeatable FER values at a significantly reduced burden to manufacturers.[1] DOE also explained the changes reflected in the test procedure proposed in the SNOPR compared to the test procedure proposed in the NOPR. 78 FR 19606 (Apr. 2, 2013)

## II. Summary of the Final Rule

Pursuant to EPCA, this final rule establishes test procedures to enable DOE to develop energy conservation standards to address the electricity used for the purpose of circulating air through duct work. (42 U.S.C. 6295(o)(3)(A) and (f)(4)(D)) The test procedure established by this notice is applicable to circulation fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers. The test procedure is not applicable to any non-ducted products, such as whole-house ventilation systems without ductwork, central air-conditioning (CAC) condensing unit fans, room fans, and furnace draft inducer fans.

DOE aligned the test procedure established by this final rule with the DOE test procedure for furnaces by incorporating by reference specific provisions from an industry standard that is also incorporated by reference in the DOE test procedure for furnaces. DOE's test procedure for furnaces is codified in appendix N of subpart B of part 430 of the code of federal regulations (CFR). The DOE furnace test procedure incorporates by reference American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) 103–1993, *Method of Testing for Annual Fuel Utilization Efficiency of Residential Central*

[1] Temperature rise in this context and for the purposes of this rule is the difference between the inlet and outlet air temperature.

*Furnaces and Boilers* (ASHRAE 103–1993). This final rule incorporates by reference the definitions, test setup and equipment, and procedures for measuring steady-state combustion efficiency provisions of the 2007 version of ASHRAE 103 (ASHRAE 103–2007). In addition to these provisions, the test procedure established by this final rule includes provisions for apparatuses and procedures for measuring temperature rise, external static pressure, and furnace fan electrical input power. The test procedure established by this final rule also incorporates by reference provisions for measuring temperature and external static pressure from ANSI/ASHRAE 37–2009, *Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment* (ASHRAE 37–2009). There are no differences between the 2005 version (which is already incorporated by reference in the CFR) and the 2009 version of the ASHRAE 37 provisions incorporated by reference for this final rule. This final rule also establishes calculations to derive the rating metric, fan energy rating (FER), for each furnace fan basic model based on the results of testing per the test method established by this notice.

FER is the estimated annual electrical energy consumption of the furnace fan normalized by: (a) The estimated total number of annual fan operating hours (1,870); and (b) the airflow in the maximum airflow-control setting. For the purposes of the test procedure established by this final rule, the estimated annual electrical energy consumption is the sum of the furnace fan electrical input power (in Watts), measured separately for multiple airflow-control settings at different external static pressures (ESPs), multiplied by national average operating hours associated with each setting. These ESPs are determined by a reference system, based on operation at maximum airflow, that represents national average ductwork system characteristics.

Table II.1 includes the reference system ESP values by installation type that are specified by the test procedure. In previous rulemaking documents for the furnace fan test procedure and energy conservation standard rulemaking, DOE used the term ''manufactured home furnace'' to be synonymous with ''mobile home furnace'', as defined in the **Federal Register**. 10 CFR 430.2. DOE will use the term ''mobile home'' hereinafter to be consistent with the **Federal Register** definition for ''mobile home furnace.'' All provisions and statements regarding mobile homes and mobile home furnaces are applicable to manufactured homes and manufactured home furnaces.

TABLE II.1—REQUIRED REFERENCE SYSTEM CRITERIA (I.E., ESP AT MAXIMUM AIRFLOW) BY FURNACE FAN INSTALLATION TYPE

| Installation type | ESP at maximum airflow (in. wc) |
|---|---|
| Units with an internal evaporator coil | 0.50 |
| Units designed to be paired with an evaporator coil | 0.65 |
| Units designed to be installed in a mobile home [2] | 0.30 |

DOE recognizes that some furnace fan basic models may be marketed and designed to be installed in multiple installation types. For example, a non-weatherized, non-condensing gas furnace that can be installed in both mobile homes and non-mobile residences meets the definition for ''units designed to be paired with an evaporator coil'' and ''units designed to be installed in a mobile home.'' In this final rule, DOE is specifying that a manufacturer must test, rate, and certify compliance of the basic model of furnace fan in all of the installation types for which it is marketed and designed. For example, the basic model of furnace fan that is used in a non-weatherized, non-condensing furnace, as described above, that is marketed and designed to be installed in both non-mobile home and mobile home residences will need to be tested and certified as both a non-weatherized, non-condensing gas furnace fan using the ''units designed to be paired with an evaporator coil'' reference system criteria and as a mobile home, non-weatherized, non-condensing gas furnace fan using the ''units designed to be installed in a mobile home'' reference system criteria.

This test procedure requires measurements for the airflow-control settings that correspond to fan operation while performing the cooling function (which DOE finds is predominantly associated with the maximum airflow-control setting), heating function, and constant-circulation function. Table II.2 describes the required airflow-control settings by product type.

TABLE II.2—AIRFLOW-CONTROL SETTINGS AT WHICH MEASUREMENTS ARE REQUIRED FOR EACH PRODUCT TYPE

| Product type | Airflow-control setting 1 | Airflow-control setting 2 | Airflow-control setting 3 |
|---|---|---|---|
| Single-stage Heating | Default constant-circulation | Default heat | Absolute maximum.* |
| Multi-stage or Modulating Heating | Default constant-circulation | Default low heat | Absolute maximum. |

* For the purposes of the test procedure established by this notice, ''absolute maximum'' airflow-control setting refers to the airflow-control setting that achieves the maximum attainable airflow at operating conditions specified by this test procedure.

As shown in Table II.2, for products with single-stage heating, the three airflow-control settings to be tested are: The default constant-circulation setting; the default heating setting; and the absolute maximum setting. For products with multi-stage heating or modulating heating, the airflow-control settings to be tested are: the default constant-circulation setting; the default low heating setting; and the absolute maximum setting. The absolute lowest airflow-control setting is used to represent constant circulation if a default constant-circulation setting is not specified. For this test procedure, DOE defines ''default airflow-control settings'' as the airflow-control settings for installed use specified by the manufacturer in the product literature shipped with the product in which the furnace fan is integrated. Manufacturers typically provide detailed instructions for setting the default heating airflow-control setting to ensure that the product in which the furnace fan is integrated operates safely. In instances where a manufacturer specifies multiple airflow-control settings for a given function to account for varying

[2] Mobile home external static pressure is much lower because there is no return air ductwork in mobile homes. Also, the United States Department of Housing and Urban Development (HUD) requirements for manufactured homes stipulate that the ductwork for cooling should be designed for 0.3 in. wc. 24 CFR 3280.715.

installation scenarios, the highest airflow-control setting specified for the given function shall be used for the DOE test procedure. High heat and reduced heat will be considered different functions for multi-stage heating units. Manufacturer installation guides also provide detailed instructions regarding compatible thermostats and how to wire them to achieve the specified default settings.

The Watt measurements for calculating FER are weighted using designated annual operating hours for each function (*i.e.,* cooling, heating, and constant circulation) that represent national average operation. Table II.3 shows the estimated national average operating hours for each function.

TABLE II.3—ESTIMATED NATIONAL AVERAGE OPERATING HOUR VALUES FOR CALCULATING FER

| Operating mode | Variable | Single-stage (hours) | Multi-stage or modulating (hours) |
|---|---|---|---|
| Heating | HH | 830 | 830/HCR. |
| Cooling | CH | 640 | 640. |
| Constant Circulation | CCH | 400 | 400. |

For multi-stage heating or modulating heating products, the specified operating hours for the heating mode are divided by the heating capacity ratio (HCR) to account for variation in time spent in this mode associated with turndown of heating output. The HCR is the ratio of the measured reduced heat input rate to the measured maximum heat input rate.

The FER equation is:

$$FER = \frac{(CH \times E_{Max}) + (HH \times E_{Heat}) + (CCH \times E_{Circ})}{(CH + 830 + CCH) \times Q_{Max}} \times 1000$$

## III. Discussion

### *A. Scope*

In the SNOPR, DOE addressed interested party comments on the NOPR regarding the scope of coverage. DOE proposed test procedures for circulation fans that are used in residential furnaces and modular blowers. 78 FR 19609 (Apr. 2, 2013)

AHRI and Morrison Products, Inc. believe that modular blowers should be excluded from the scope of the rulemaking because they are not currently a federally regulated product. They add that, if 42 U.S.C. 6295(f)(4)(D) were intended to cover modular blowers, then there would have been a corresponding change to the definition of furnace or the addition of this product class along with a direction to develop a corresponding test procedure. Additionally, the proposed test procedures in the SNOPR are insufficient for modular blowers and fail to account for the fact that some modular blowers in today's marketplace are not even designed to operate with electric heat resistance kits. (AHRI, No. 0034 at pg. 2; Morrison, No. 0036 at pg. 2) Lennox International, Inc. agrees with DOE's decision not to include fans used in other products, such as split-system central air-conditioning and heat pump air handlers or hydronic air handlers. (Lennox, No. 0031 at p. 1) Additionally, like AHRI, Lennox feels that DOE should not include modular blowers in the scope of coverage because the definition of modular blowers that is contained in the proposed regulation does not support the conclusion that modular blowers and electric furnaces are very similar in design. (Lennox, No. 0031 at p. 2) Furthermore, modular blowers that are not electric furnaces do not currently require AFUE testing. Thus, the test procedure imposes the requirement to run AFUE tests on non-furnaces, which adds additional burden to manufacturers as well as additional testing costs. (Lennox, No. 0031 at p. 2) Goodman Manufacturing Company, L.P. reiterated in comments that DOE's interpretation of the scope in the SNOPR is too broad and in error. Goodman stated that furnace fan electrical power consumption in cooling mode should not be included in the scope of this rule because it is already accounted for by the SEER metric when the furnace fan is used with a split-system air conditioner or split-system heat pump. DOE stated in the SNOPR that EPCA does not impose a limitation on DOE's authority to regulate fan electrical consumption for these products across all operating modes because, in this situation, two different products are being regulated, one the CAC or heat pump product, and one the separate furnace fan product, which may or may not be incorporated into a CAC or heat pump.'' (78 FR at 19612) Goodman commented that DOE's justification in the SNOPR for including furnace fan cooling mode operation ignores the fact that in 100% of applications where a furnace is operated in the cooling mode the furnace is matched with either a central air-conditioner or heat pump product. (Goodman, No. 0037 at pg. 4)

On the other hand, the Northwest Energy Efficiency Alliance (NEEA) and Northwest Power and Conservation Council (NPPC) strongly disagrees with DOE's proposal to exclude hydronic and split system air conditioning and heat pump air handlers from the proposed scope. NPPC/NEEA commented that DOE noted in the SNOPR that ''The NOPR test procedure's proposed scope of applicability included single phase, electrically-powered devices that circulate air through ductwork in HVAC systems with heating input capacities less than 225,000 Btu per hour, cooling capacities less than 65,000 Btu per hour, and airflow capacities less than 3,000 cfm.'' NPPC/NEEA finds this scope to be perfectly acceptable and appropriate, and suggests that there is nothing in this language that would exclude hydronic or central air conditioning and heat pump air handlers. (NPCC/NEEA, No. 0039 at pg. 2) Additionally, NPPC and NEEA note that sold separately, the air handlers used for central air conditioning and heat pump systems are virtually indistinguishable from a modular blower, as DOE defines the latter. NPPC and NEEA argue that they are the same thing, particularly since DOE plans to include modular blowers that can be sold with electric resistance heating kits. (NPCC/NEEA, No. 0039 at pg. 3) Furthermore, NPCC/NEEA state that hydronic air handlers can be properly referred to as ''furnaces'', thus, the need to specify a different test procedure for them, other than the one

proposed for gas- or oil-fired furnaces, is not a valid reason for excluding them from coverage in this rulemaking. (NPCC/NEEA, No. 0039 at pg. 3)

Like NPCC/NEEA, the American Gas Association (AGA) supports DOE including furnace fans used in other products, such as split-system central air-conditioning and heat pump air handlers, through-the-wall air handlers, as well as other types of air handlers, but understands that DOE is not addressing these products in this rulemaking but will do so in future rulemakings. (AGA, No. 0040 at pg. 1) The California Investor Owned Utilities (CA IOUs) also believe DOE should include furnace fans that are part of blower-coil and single-packaged central air-conditioners and heat pumps within the scope of the standards rulemaking because the SEER and HSPF do not adequately capture fan energy use. Additionally, CA IOUs encourage DOE to keep hydronic air-handlers within the scope, and to develop a test procedure for this product class. (CA IOUs, No. 0032 at p. 1)

As discussed in the SNOPR, DOE noted that, although the title of this statutory section refers to ''furnaces and boilers,'' the applicable provision at 42 U.S.C. 6295(f)(4)(D) was written using notably broader language than the other provisions within the same section. 78 FR 19606, 19611. Specifically, the applicable statutory provision directs DOE to ''consider and prescribe energy conservation standards or energy use standards for electricity used for purposes of circulating air through duct work.'' Such language could be interpreted as encompassing electrically-powered devices used in any residential HVAC product to circulate air through duct work, not just furnaces, and DOE has received numerous comments on both sides of this issue. At the present time, however, DOE is only establishing test procedures for those circulation fans that are used in residential furnaces and modular blowers (see discussion below). As a result, DOE is not addressing public comments that pertain to fans in other types of HVAC products. The following list describes the furnace fans that DOE is addressing in this rulemaking and those that DOE is not addressing in this rulemaking.

- Products addressed in this rulemaking: furnace fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers.
- Products not addressed in this rulemaking: furnace fans used in other products, such as split-system CAC and heat pump blower-coil units, through-the-wall blower-coil units, small-duct, high-velocity (SDHV) blower-coil units, energy recovery ventilators (ERVs), heat recovery ventilators (HRVs), draft inducer fans, exhaust fans, or hydronic blower-coil units.

The test procedure established by this notice is applicable to modular blowers. All modular blower models of which DOE is aware can be operated in conjunction with an electric resistance heat kit. DOE expects that the number of modular blowers that are not designed to operate with an electric resistance heat kit is de minimis. Consequently, DOE is including modular blowers in the scope of coverage of the test procedure established by this final rule. Manufacturers that produce modular blowers that cannot be operated in conjunction with an electric resistance heat kit will likely have to apply for a waiver from the test procedure. Waiver applications could include a proposed alternative test method that includes provisions for generating measureable heat in the airflow of the product that can be used to calculate airflow per the specified airflow equations. DOE recognizes that testing products that meet the definition of furnace fan, but were previously not subject to DOE's regulatory provisions, requires an investment of time and resources, as Lennox suggests. However, DOE interprets EPCA to require consideration of standards for modular blowers, and DOE does not find the time and resources required to test modular blowers according to the test procedure established by this final rule to be unduly burdensome.

After considering available information and public comments regarding exclusion of fan operation in cooling mode, DOE maintains that the test procedure established by this rule account for the electrical consumption of furnace fans while performing all active mode functions (i.e., heating, cooling, and constant circulation). DOE recognizes that furnace fans are used not just for circulating air through duct work during heating operation, but also for circulating air during cooling and constant-circulation operation. DOE anticipates that higher airflow-control settings are factory-set for cooling operation. Therefore, DOE expects that the electrical energy consumption of a furnace fan is generally higher while performing the cooling function. Additionally, the design of the fan as well as its typical operating characteristics (i.e., ESP levels during operation in different modes) is directly related to the performance requirements in cooling mode. DOE is also concerned that excluding some functions from consideration in rating furnace fan performance would incentivize manufacturers to design fans that are optimized to perform efficiently at the selected rating airflow-control settings but that are not efficient over the broad range of field operating conditions. In DOE's view, in order to obtain a complete assessment of overall performance and a metric that reflects the product's electrical energy consumption during a representative average use cycle, the metric must account for electrical consumption in a set of airflow-control settings that spans all active mode functions. This ensures a more accurate accounting of the benefits of improved furnace fans.

*B. Standby and Off Mode*

EPCA, as amended by the Energy Independence and Security Act of 2007, Public Law 110–140 (EISA), requires that any final rule for a new or amended energy conservation standard adopted after July 1, 2010, must address standby mode and off mode energy use pursuant to 42 U.S.C. 6295(o). (42 U.S.C. 6295(gg)(3)) In the NOPR and SNOPR, DOE explained that DOE has already fully incorporated standby mode and off mode energy use in the test procedures (or proposed test procedures) for all of the products to which the test procedure established by this notice is applicable. 77 FR 28688 (May 15, 2012) and 78 FR 19619 (April 2, 2013). summarizes the test procedure rulemaking vehicles through which DOE addresses standby mode and off mode energy consumption for the products covered by this rulemaking.

TABLE III.1—RULEMAKING ACTIVITIES ADDRESSING FURNACE FAN STANDBY MODE AND OFF MODE ENERGY CONSUMPTION

| HVAC products | DOE rulemaking | DOE rulemaking activity |
|---|---|---|
| • Gas Furnaces<br>• Oil-fired Furnaces<br>• Electric Furnaces | Residential Furnaces | • Docket: EERE–2013–BT–TP–0008.<br>• Most Recent Notice: September 13, 2011 NOPR (76 FR 56339). |
| • Modular Blowers<br>• Weatherized Gas Furnace | Residential Central Air Conditioners and Heat Pumps. | • Docket: EERE–2009–BT–TP–0004.<br>• Most Recent Notice: October 24, 2011 SNOPR (76 FR 65616). |

There is no need for DOE to adopt additional test procedure provisions for standby and off mode energy use in the test procedure established by this rulemaking. DOE maintains its position that the standby mode and off mode energy use associated with furnace fans used in products covered by this rulemaking would be measured by the established or proposed test procedures associated with these products.

In the NOPR, DOE proposed to include circulation fans used in hydronic air handlers in the scope of applicability of the test procedure. There are no current DOE test procedures for measurement of electrical energy use in hydronic air handlers, nor is there an ongoing rulemaking to establish such test procedures. Consequently, DOE also proposed in the NOPR to integrate the standby mode and off mode electrical energy consumption measurements with the active mode metric for hydronic air handlers, resulting in an integrated FER (IFER). DOE received a number of comments in response to the NOPR regarding the IFER metric. In the SNOPR, DOE proposed to exclude circulation fans used in hydronic air handlers from the scope of coverage of the test procedure. As discussed in section III.A above, the test procedure established by this final rule excludes circulation fans used in hydronic air handlers.

*C. AMCA 210*

In the NOPR, DOE proposed a test procedure based on the provisions specified in the American National Standards Institute (ANSI)/Air Movement and Control Association International, Inc. (AMCA) 210–07 | ANSI/American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) 51–07, Laboratory Methods of Testing Fans for Certified Aerodynamic Performance Rating (AMCA 210). 77 FR 28674 (May 15, 2012) Many interested parties commented on the NOPR that AMCA 210 is not an appropriate reference standard for rating furnace fan performance. (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3.) In the SNOPR, DOE proposed a test procedure that would not adopt provisions from AMCA 210. Consequently, DOE did not address comments received from interested parties on the NOPR regarding AMCA 210 in the SNOPR. Likewise, the test procedure established by this final rule does not include provisions from AMCA 210. Therefore, DOE is not addressing comments received from interested parties on the NOPR regarding AMCA 210 in this notice.

*D. Reference System*

In the NOPR, DOE proposed to specify a single reference system per product installation type that would be characterized by an ESP value representing national average operating conditions of a residential duct system for a furnace fan operating in the maximum airflow-control setting. 77 FR 28683 (May 15, 2012) In the SNOPR notice, DOE did not address interested parties' comments received in response to the NOPR regarding its proposed reference system requirements. DOE did not alter its proposed reference system requirements in the SNOPR. Hence, interested party comments regarding this topic are summarized and addressed below.

Many interested parties commented that the reference system ESP values should be lower than those proposed in the NOPR. Rheem stated that a single furnace ESP specification at 0.65 in. wc. has not been shown to represent a national average duct system, and ratings should not be based on poor ESP field conditions where installers ignore manufacturers' installation instructions. (Rheem, No. 0025 at pg. 3) AHRI stated that the proposed reference system in the NOPR specifies external static pressures that are too high as compared to the external static pressures in the federal test procedure for furnaces. (AHRI, No. 0023 at pg. 15) Goodman echoed AHRI's comments, stating that they are concerned that FER is based on elevated external static pressures and ignores the fact there are a significant number of applications with lower values. (Goodman, No. 0017 at pg. 2) Goodman added that using elevated static pressure values will only condone higher/increased energy consumption, poor ductwork design and application. (Goodman, No. 0017 at pg. 5) Goodman stated that a survey of its products indicated that watt/cfm is roughly 15% lower at 0.2 in. wc. and 25% lower at 0.4 in. wc. than at the DOE-proposed 0.65 in. wc., suggesting there should be incentive to operate at lower statics to reduce energy. (Goodman, No. 0017 at pg. 6) Morrison stated that by accounting for ESPs that are reported to be fully representative of field conditions in the NOPR, DOE is advocating scenarios that do not comply with the instructions in manufacturers' installation manuals. (Morrison, No. 0021 at pg. 6) Unico, Inc. stated that field pressure measurements are known to be notoriously inaccurate and extremely challenging to collect. (Unico No. 0023 at pg. 94)

Some interested parties recommended that DOE re-evaluate and increase its proposed reference system ESP requirements. NPCC/NEEA commented that DOE's data for manufactured home ESP values, which come primarily from the Northwest, may not be representative of the national average ESP for manufactured home products because of a long history of energy efficiency programs for those products in that region. NPCC/NEEA recommends that DOE collect additional data on field ESP from other regions of the country before settling on ESP values. (NPCC/NEEA, No. 0022 at pg. 6) CA IOU recommended that DOE increase the proposed test ESP based on a recent study for the California Energy Commission [3] for which the resulting average furnace fan cooling mode ESP was 0.85 in. wc. (CA IOU, No. 0020 at pg. 4) The Wisconsin Department of Administration, Division of Energy Services (WI–DOA) stated the reference system ESP should be over 0.55 inches. The WI–DOA provided field measurements for 39 furnace

[3] "Efficiency Characteristics and Opportunities for New California Homes" can be found at *http://www.energy.ca.gov/2012publications/CEC-500-2012-062/CEC-500-2012-062.pdf.*

installations throughout Wisconsin that had ESP values between 0.32 in. wc. and 1.33 in wc. (WI–DOA, No. 0007 at pg. 1)

In a joint comment from ASAP, ACEEE, NRDC, and the National Consumer Law Center (NCLC), hereinafter referred to as ACEEE, *et al.,* efficiency advocates strongly support DOE's proposal to characterize a reference system at external static pressures that mimic field conditions. (ACEEE, *et al.,* No. 0013 at pg. 3) NEEA stated that the range of external static pressures presented by DOE is reasonable based on measured data. (NEEA, No. 0023 at pg. 167) United Technologies (UTC) also agrees with the reference ESP values selected by DOE, but recommends that the reference ESPs should be no higher. (UTC, No. 0010 at pg. 2)

The test procedure established by this final rule specifies the reference system ESP values proposed in the NOPR, which DOE did not modify in the SNOPR. DOE finds that these ESP values are consistent with known field conditions. For the NOPR, DOE gathered field data from available studies and research reports to determine an appropriate ESP value to propose for the reference system for each installation type. DOE compiled over 1300 field ESP measurements from several studies that included furnace fans in single-family and mobile homes in different regions of the country as part of that effort.[4] DOE was not able to acquire nor did DOE receive from interested parties additional data sources for mobile home ESP values on which to base a revision of its previous analysis. However, DOE feels confident in its estimated national average reference system ESP value for these products because the field conditions underlying the values are prescribed by HUD, as explained in footnote Error! Bookmark not defined. in section II. DOE reviewed the CEC study referred to by the CA–IOU and the field measurements provided by WI–DOA. The range and average of the ESP data provided in the CEC study and WI–DOA's measurements are consistent with the rest of the data DOE collected. DOE therefore concludes that this new data supports the reference system ESP levels proposed in the SNOPR and adopted in this final rule (which is above 0.55 in. wc. as WI–DOA recommends for the product installation types included in its study).

DOE expects specifying ESP values that are representative of field conditions will result in ratings that are most representative of field energy use. DOE also expects that the use of manufacturer-recommended ESPs might underestimate furnace fan energy consumption, because the ESP of field-installed HVAC systems typically exceeds the ESP recommended by manufacturers. Like manufacturers, DOE is also concerned about the energy use impact of installations with high static pressures. However, DOE does not expect that a reduction in average field ESPs that approaches the manufacturer-recommended levels is likely to occur, because installing new, larger, and more-efficient ducts in existing homes is generally cost-prohibitive. DOE, like the manufacturers, would prefer that homeowners modify the ductwork to reduce energy use, but DOE has no authority to require larger ducts in this rulemaking. DOE is concerned that a metric based on a low, albeit desirable, static pressure level would not accurately represent actual furnace fan energy consumption. Also, DOE is concerned that a metric based on a low static pressure may lead to excessive energy use by furnace fan designs which do not achieve high efficiency levels when operating at the higher, field static pressures. Adapting the efficiency metric to the field conditions better facilitates meaningful comparisons of furnace fans operating under these conditions.

Interested parties commented on DOE's proposed approach to specify using the maximum airflow-control setting to characterize the required reference system. Goodman believes that because of the large variability of airflow rate provided by most furnaces, the use of a maximum value could potentially mislead the consumer to purchase a product to be applied at less than maximum airflow rate that has a better rating at maximum than another product, even though the other product may have lower energy consumption for a lower airflow rate. (Goodman, No. 0017 at pg. 4) National Resources Canada (NRCan) commented that the NOPR correctly noted that it is not clear from the reports of installed static pressures for residential furnaces if the measurements were taken with furnace control settings configured to provide their maximum air flow when operating in cooling mode. In the absence of clear evidence that field measurements of ESP in cooling mode were actually made with the furnaces adjusted to their highest air flow settings, it is not possible to link field measured ESPs in cooling mode to the maximum air delivery capabilities of the furnace fans. NRCan adds that establishing the reference system ESP using the maximum air flow for which a furnace is capable of operating in cooling mode biases the test and ratings for all other modes towards lower static pressures (which may be lower than field ESP levels for those operating modes). NRCan suggests that one approach that DOE might consider for specification of the reference system would be to use furnace fan control settings that produce an air flow suitable for a cooling system with a capacity that matches the national average cooling system (using a default design air flow rate of say 400 cfm per ton of cooling capacity) in place of using the maximum air flow setting and an unspecified cooling capacity. (NRCan, No. 0011 at pg. 2) Conversely, UTC agrees with DOE's use of a reference ESP that is based on the highest airflow control setting for the fan efficiency rating procedure. (UTC, No. 0010 at pg. 2)

DOE acknowledges the concerns of Goodman and NRCan regarding the impact that requiring measurements in the maximum airflow-control setting has on FER and, in turn, on manufacturer design and consumer purchasing decisions. However, FER is primarily intended for evaluating the national average performance of furnace fans. To best fulfill this intent, FER estimates national average annual energy use. Manufacturers have the option of providing a full account of fan performance in addition to FER in product literature to inform consumers. DOE expects that FER will enable consumers to evaluate relative performance across the entire range of expected field operation because FER is determined based on measurements of furnace fan electrical input power for multiple airflow-control settings at different external static pressures that span the entire range of expected operation. As a result, FER includes and reflects the reduced energy consumption of a product that performs more efficiently at less than maximum airflow compared to a product that performs more efficiently at maximum airflow, as in Goodman's example. DOE disagrees with NRCan that manufacturers are likely to design products with higher maximum airflow-control settings to achieve better FER ratings, because FER includes electrical input power consumption in that setting, which increases as the airflow in that setting increases. In turn, FER may also increase.

[4] DOE has included a list of citations for these studies in the docket for this rulemaking. The ADDRESSES section of this notice provides a link and instructions for accessing the docket. . . . The docket number for this rulemaking is EERE–2010–BT–TP–0010.

DOE recognizes NRCan's concern that DOE assumes that the ESP field measurement data DOE gathered are linked to the maximum airflow-control setting. However, the reports from which DOE gathered ESP field data specified that the ESP measurements were taken in cooling airflow-control settings. As NRCan and other interested parties have confirmed, furnace fans typically operate in the highest of available airflow-control settings for cooling. As mentioned above, DOE did not find or receive from interested parties any additional information upon which to re-evaluate its assumption that field ESP data collected in cooling airflow-control settings is representative of field ESP in maximum airflow-control settings.

DOE also recognizes that specifying the reference system in the maximum airflow-control setting may result in FER measurements taken in lower airflow-control settings at ESP levels that are lower than if a default cooling airflow-control setting were specified for the reference system (as suggested by NRCan). However, DOE expects that specifying the reference system in an airflow-control setting based on national average cooling capacity according to NRCan's suggestion will not address the issues that NRCan raises with the approach outlined by DOE. The NRCan approach will result in airflow-control selections that deviate from the settings ultimately selected at installation if the product is not installed to deliver national average cooling capacity, resulting in similar biases. In addition, some products that are designed for cooling capacities much higher or much lower than the national average may not have airflow-control settings that meet NRCan's national average criteria. Specifying the reference system in the maximum airflow-control setting is more appropriate than the alternative approach presented by NRCan for these reasons. Accordingly, the test procedure established by this notice specifies the reference system in the maximum airflow-control setting.

In the NOPR, DOE proposed to define ESP to mean the difference between the fan total pressure at the air outlet and the total pressure at the air inlet less velocity pressure at the air outlet, which is consistent with the AMCA 210 definition for ESP. In response to the NOPR, Unico and Goodman stated that they support the ASHRAE 37 definition and measurement specifications for external static pressure. ASHRAE 37 defines external static pressure as static pressure measured at the outlet less the static pressure measured at the inlet (or ambient if a return air duct is not used). (Unico, No. 0023 at pg. 40; Goodman, No. 0017 at pg. 6) UTC recommended that DOE use the following definition for ESP: ''The difference between the system inlet and outlet static pressures measured in the attached ducting. In laboratory testing, the inlet may be non-ducted such that the inlet static pressure is zero''. (UTC, No. 0010 at pg. 4) AMCA stated that ''fan static pressure'' is not the static pressure rise through the fan. According to AMCA, the ''Fan static pressure'' is the static pressure rise minus the inlet velocity pressure. (AMCA, No. 0019 at pg. 2) Conversely, NRCan had no issues with the definition of ESP as proposed in the NOPR. (NRCan, No. 0011 at pg. 6; NPCC/NEEA, No. 0022 at pg. 6)

The test procedure established by this final rule adopts the ASHRAE 37 definition of external static pressure as suggested by Unico and Goodman. The definition that UTC recommends is also consistent with the ASHRAE 37 methods for measuring ESP.

Interested parties also commented on using a single-reference system method for representing average residential ducting systems versus a multiple-reference system. UTC agreed with the fan efficiency rating method proposed in the NOPR using a single-reference system method. (UTC No. 0010 at pg. 2) Rheem prefers a single reference system which is consistent with the furnace rating plate and manufacturer's installation instructions, but agreed to the multi-reference system in CSA 823 as a compromise to avoid establishment of a rating based on an unsafe and faulty installation condition. (Rheem, No. 0025 at pg. 8) NPCC/NEEA find the CSA multi-reference system approach and manufacturer-recommended installation ESP values to be inconsistent with field data and a single set of ESP conditions should be specified. (NPCC/NEEA, No. 0022 at pg. 6) Ingersoll Rand supports only one reference system stating that a multi-reference system would not add enough value to warrant double testing. (Ingersoll Rand, No. 0014 at pg. 4) Morrison stated that it is better to have two static pressure levels rather than a single high static pressure level to help consumers and others distinguish between good and bad practice in the field. (Morrison, No. 0023 at pg. 171) Unico recommended a single reference system method because performance data based on multiple reference systems will not improve the quality of decision making on the part of the contractor or consumer. (Unico, No. 0015 at pg. 5) NRCan stated that DOE's assumption that default heating airflow is within 80 to 90 percent of maximum airflow for a given product undermines its conclusion that using multiple reference systems is not justified. NRCan provided example furnaces for which the heating airflow was between 35 and 88 percent of maximum airlfow. (NRCan, No. 0011 at pg. 3)

The test procedure established by this notice specifies one reference system curve for each installation type because DOE cannot set standards based on multiple metrics. Requiring measurements for a second reference system would also increase test burden. For the NOPR, DOE investigated the use of a combined metric based on multiple reference system curves. DOE found that the combined, multiple reference system FER values varied on average by less than 2 percent with a standard deviation of 2 percent compared to the proposed, single reference system FER and did not alter the ranking of furnace fans by FER. 77 FR 28686 (May 15, 2012) In response to the furnace fan framework document, Rheem suggested criteria for a two reference system approach: one reference system at 0.3 in. wc. and another at 0.6 in. wc both in the default heating setting. These reference system criteria are equivalent to those specified in CSA Standard C823–11, Performance of Air Handlers in Residential Space Conditioning Systems. DOE chose to use different criteria that comprised higher ESP values and in the maximum airflow-control setting for its NOPR evaluation of using multiple reference systems. In the NOPR, DOE stated that the reference system criteria it selected for its investigation is approximately equivalent to those suggested by Rheem for products for which the heating airflow is within 80 to 90 percent of maximum airflow. DOE recognizes NRCan's concern that a furnace fan's heating airflow is not always within 80 to 90 percent of maximum airflow. DOE presented this information to explain how its selected criteria for evaluating a multiple reference system approach compared to Rheem's recommended criteria, not as a justification for proposing to specify a single reference system.

In addition, the test method proposed by DOE in the NOPR would require measuring fan performance at enough operating points within each available airflow-control setting to derive performance curves. These curves would allow for calculating fan performance at any operating point in any given airflow-control setting, which would enable the use of multiple reference systems without requiring additional measurements. In the SNOPR, DOE modified its proposed test method to reduce burden. DOE's

proposed SNOPR test procedure would only require fan performance to be measured only at operating points consistent with the specified reference system. Requiring measurements for a second reference system would increase the burden of the test method DOE proposed in the SNOPR because additional measurements would be necessary. For these reasons, the test procedure established by this notice does not require multiple reference systems.

In the NOPR, DOE proposed to require measurements at three specific ESP values without any tolerances. 77 FR 28700 (May 15, 2012) Allied Air stated that because systems can become unstable when measuring airflow in the high or low end of the static pressure range, tolerances should be allowed. (Allied Air, No. 0023 at pg. 184) Additionally, UTC recommended that a minimum tolerance of +/−0.05 be allowed for the three ESPs to allow for slight variations in the measurement equipment. (UTC, No. 0010 at pg. 4)

DOE's test experience confirms Allied Air's and UTC's concerns that specific ESP values are difficult to achieve and maintain when measuring airflow. The test procedure established by this notice specifies that products maintain an ESP level between the minimum reference system value and 0.05 in. wc. above that minimum value throughout the stabilization period and at the time that measurements for the maximum airflow-control setting are taken to allow for slight variations.

*E. Airflow Equation*

In the NOPR, DOE proposed to require measurement of airflow directly using the pressure drop across nozzles according to the procedures in AMCA 210. Interested parties commented on the NOPR that this method would be overly burdensome. AHRI, with the support of a number of manufacturers, proposed a method of calculating airflow based on temperature rise, which would significantly reduce test burden because it can be measured using procedures and a test setup consistent with those used for the DOE test procedure for furnaces (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3). Specifically, AHRI proposed the following equation for calculating airflow (AHRI, No. 26 at p. 23):

$$Q = \frac{AFUE \times Q_{IN}}{1.08 \times \Delta T}$$

Where:

$Q$ = airflow, in cubic feet per minute (CFM),
$AFUE$ = annual fuel utilization efficiency, as determined by the DOE furnace test procedure,
$Q_{IN}$ = fuel energy maximum nameplate input rate at steady-state operation (including any pilot light input), in British Thermal Units per hour (Btu/h),
*1.08* = Conversion from airflow and temperature rise to heating rate, and
$\Delta T$ = measured temperature rise.

In the SNOPR, DOE proposed to use a modified version of AHRI's proposed equation to calculate airflow. The numerator of AHRI's proposed airflow equation estimates the amount of heat energy produced by the furnace as the nameplate annual fuel utilization efficiency (AFUE) multiplied by the nameplate fuel energy input rate ($Q_{IN}$). DOE proposed to estimate heat energy differently because nameplate AFUE and $Q_{IN}$ are determined based on measurements taken at the ESP levels required by the DOE furnace test procedure (*i.e.* specified in ASHRAE 103–1993), which are significantly lower than those proposed in the SNOPR of this rule. Specifically, DOE proposed to estimate heat energy as steady-state efficiency ($Effy_{SS}$) less percent jacket losses quantity multiplied by $Q_{IN}$ all measured at the operating conditions proposed in the SNOPR. DOE also proposed to add a term to the numerator to account for the recoverable heat from the fan. DOE expects that its estimate of heat energy improves the accuracy of the equation. DOE proposed the following equation for calculating airflow in the SNOPR. 78 FR 19615 (April 2, 2013)

$$Q = \frac{\left(Effy_{SS} - L_J\right) \times Q_{IN} + \left[(3413 \times E\right]_{Heat})}{1.08 \times \Delta T}$$

Where:

$Q$ = airflow in CFM,
$Effy_{SS}$ = steady-state efficiency in % as determined according to ASHRAE 103–2007 at the specified operating conditions,
$L_J$ = jacket loss in % as determined according to ASHRAE 103–2007 at specified operating conditions,
$Q_{IN}$ = measured fuel energy input in Btu/h at specified operating conditions based on the fuel's high heating value determined as required in section 8.2.1.3 or 8.2.2.3 of ASHRAE 103–2007,
*3413* = conversion of kW to Btu/h;
$E_{Heat}$ = electrical energy to the furnace fan motor in kW that is recovered as useable heat,
*1.08* = conversion from airflow and temperature rise to heating rate, and
$\Delta T$ = temperature rise measured at specified operating conditions.

AHRI, Lennox, Rheem, and Morrison are concerned that the test procedures specified within the SNOPR would require that a manufacturer test the steady-state efficiency and jacket losses of a furnace at a new and higher external static pressure operating point, causing an undue increase in testing burden. (AHRI, No. 0034 at pg. 3; Lennox, No. 0031 at p. 3; Rheem, No. 0035 at pg. 3; Morrison, No. 0036 at pg. 3) AHRI and Morrison stated that the FER metric is comprised of two distinct furnace operation descriptors—the first is calculated from electrical energy measurements at three separate test conditions and the second is airflow at a single test condition. AHRI, Rheem, and Morrison believe that the airflow component of the FER metric is secondary in importance and is meant to simply provide a frame of reference. They believe that some of DOE's proposed modifications to AHRI's proposed test procedure would increase the testing burden on the industry while adding little or no benefit, and strongly urge that DOE not require furnace manufacturers to measure an additional steady-state efficiency to calculate the FER metric because it would impose an additional testing burden. (AHRI, No. 0034 at pg. 1; Rheem, No. 0035 at pg. 1; Morrison, No. 0036 at pg. 1) Ingersoll Rand stated that if the furnace is running within the allowable rise range, the AFUE can be used in place of the steady-state efficiency and jacket loss in the calculation procedure. (Ingersoll Rand, No. 0038 at pg. 1) AHRI and Morrison believe that using nominal values associated with AFUE (which also accounts for jacket losses) and $Q_{IN}$ to calculate airflow is a conservative approach and will eventually lead to conservative FER values. Additionally, using AFUE and $Q_{IN}$ reduces the testing burden on manufacturers, as compared to measuring steady-state combustion efficiency and determining jacket losses, which could take up to two additional hours for every basic model. (AHRI, No. 0034 at pg. 2; Morrison, No. 0036 at pg. 2) Lennox and Rheem, on the other

hand, agree with DOE that using the steady-state combustion efficiency and the measured fuel energy input would provide more accurate air flow calculations, as opposed to using AFUE and nominal fuel energy input. (Lennox, No. 0031 at p. 3; Rheem, No. 0035 at pg. 2) Goodman strongly suggests DOE consider allowing an alternate method of directly measuring airflow using a code tester and ASHRAE 37 ductwork (a method typically used by manufacturers for airflow data published in technical product literature). (Goodman, No. 0037 at pg. 1)

DOE is aware that manufacturers will be required to test products that include furnace fans that have already been tested to comply with other DOE rulemaking requirements (e.g., the residential furnace energy conservation standard). However, EPCA requires DOE to consider standards for furnace fans, and DOE does not find the time and resources required to test furnace fans according to the test procedure established by this final rule to be unduly burdensome.

DOE agrees with interested parties that the SNOPR proposal to measure steady-state efficiency (EffySS), jacket loss ($L_J$), and fuel energy input ($Q_{IN}$) instead of using nameplate values of AFUE and $Q_{IN}$ to calculate airflow would result in increased accuracy, but would require additional testing time. In the SNOPR, DOE stated that $Effy_{SS}$ could range from 0 to 6 percentage points higher than AFUE. More recent DOE tests resulted in $Effy_{SS}$ values that ranged from 0 to 4 percentage points higher than AFUE, confirming DOE's previous estimates. DOE agrees with manufacturers' estimates that approximately 2 hours of additional testing time would be required if measured values for $Effy_{SS}$, $L_J$ and $Q_{IN}$ are used to calculate heat energy instead of nameplate AFUE and $Q_{IN}$. Through testing, DOE finds that as much as 1.5 hours of this additional testing time will be needed for set up of the jacket loss test. The flue or stack gas temperature and carbon dioxide concentration measurements needed to measure steady-state efficiency require less than 10 minutes in DOE's experience. For condensing furnaces, the test procedure proposed in the SNOR would require 30 additional minutes to collect condensate to measure steady-state efficiency. DOE disagrees with AHRI, Rheem, and Morrison that the airflow calculation is secondary in importance and that accuracy should be compromised. However, DOE agrees that time to test should be minimized while maximizing accuracy. The test procedure established by this final rule requires that the airflow used in the FER equation be calculated based on measured values of steady-state efficiency and fuel input energy. However, like the DOE test procedure for furnaces, the test procedure established by this final rule allows manufacturers the option of measuring jacket loss or using a default value of 1 percent. In recent DOE tests, jacket loss measurements ranged from 0.1 to 0.9 percent, with an average of 0.5 percent and a standard deviation of 0.2 percent. Consequently, the difference between measured $L_J$ and the default value can be expected to be less than 1 percent. Manufacturers that opt to use the default jacket loss value of 1 percent will avoid a significant majority of the additional testing time required to calculate airflow, but the expected deviation from measured values is reduced to less than 1 percent with this approach. DOE considers this an acceptable range of accuracy to reduce test burden.

DOE also recognizes that using a code tester and ASHRAE 37 ductwork, as Goodman suggests, could be an alternative test method that provides similar results to the test procedure established by this final rule. However, a test procedure based on this approach would differ significantly from the test procedure established in this notice. An auxiliary fan at the outlet of the airflow chamber may be required to achieve the external static pressures specified by this rule. This method of varying external static pressure is not consistent with the method specified by this final rule, which requires that the same duct restrictions be maintained throughout the test after initial reference system conditions are met. In addition, a test setup that includes a code tester is not typical when currently testing a furnace and would add substantial burden. Instead, DOE tried to harmonize, where possible, the test set up for furnaces and furnace fans. These differences could have significant impacts on the consistency of using a code tester in lieu of the setup and methods specified in this rule. Consequently, DOE is not adopting an alternative method of using a code tester to measure airflow for this rule.

AHRI and Lennox stated that the assumption that the cooling airflow rate can be calculated using the measured temperature rise in the heating mode is not substantiated in the SNOPR. AHRI recommended that the furnace is fired at the maximum airflow rate to calculate $Q_{Max}$. (AHRI, No. 0034 at pg. 3; Lennox, No. 0031 at p. 3) Additionally, Rheem and Morrison stated that the $Q_{Max}$ value is representative and that the method proposed by AHRI based on firing the furnace at the maximum airflow is sufficiently accurate. (Rheem, No. 0035 at pg. 3; Morrison, No. 0036 at pg. 3) NPCC/NEEA stated that for multi-stage systems, three modes of test are not enough to properly characterize how the system will be used in the field. (NPCC/NEEA, No. 0022 at pg. 5)

DOE disagrees with AHRI, Rheem, Lennox, and Morrison that firing the furnace in the maximum airflow-control setting is always sufficiently accurate. As stated previously, DOE finds that the maximum airflow-control setting is most often designated for cooling. Firing the burner in the maximum airflow-control setting in these instances would not be representative of field use. Also, DOE finds that firing the furnace in a maximum airflow-control setting that is designated only for cooling is not always achievable by third-party testing facilities by interfacing with the product controls. DOE's airflow adjustment approach is a necessity in these cases. For these reasons, the test procedure established in this final rule includes provisions for both product variations: products for which the maximum airflow-control setting is designated for heating, and products for which the maximum airflow-control setting is designated only for cooling. The provisions for products for which the maximum airflow-control setting is designated for heating are provided in section III.M. The provisions for products for which the maximum airflow-control setting is designated only for cooling are as proposed in the SNOPR. 78 FR 19627 (April 2, 2013) In short, the maximum airflow is determined by calculating the airflow according to the equation above for a heating setting and adjusted to the maximum (cooling) setting based on pressure measurements.

In the SNOPR, DOE proposed to calculate airflow based on the temperature rise in the default heat setting for single-stage products and the default low heat setting for multi-stage products. DOE requested comment from interested parties in the SNOPR on whether a more accurate calculation of airflow could be achieved based on temperature rise measured in the maximum heat setting for multi-stage furnaces because temperature rises in the maximum heat setting would be higher. 78 FR 19624 (April 2, 2013)

AHRI, Rheem, Morrison, and Goodman disagree with DOE's assertion that operating a multi-stage furnace at the maximum heat setting results in a higher temperature rise. They went on to state that there are instances where the temperature rise at a reduced heat setting is higher than the temperature

rise at the maximum heat setting. (AHRI, No. 0034 at pg. 3; Rheem, No. 0035 at pg. 3; Morrison, No. 0036 at pg. 3; Goodman, No. 0037 at pg. 2)

DOE's review of product literature confirms comments from AHRI, Rheem, Morrison and Goodman that the maximum heat setting does not always result in higher temperature rise. Consequently, the test procedure established in this final rule adopts the provisions proposed in the SNOPR, which require firing at the reduced heat input and associated airflow-control setting to calculate airflow.

In the SNOPR, DOE proposed to calculate airflow based on temperature rise using the equation presented in this section above. DOE's proposed equation included a constant of 1.08 for converting temperature rise and heating rate to airflow. This constant assumes that air has a constant density of 0.075 pounds per cubic foot (lb/ft$^3$). In the SNOPR, DOE requested comments from interested parties on whether the 1.08 constant should be adjusted by barometric pressure because air density changes with pressure (often due to elevation changes and varying weather conditions). 78 FR 19624 (April 2, 2013)

AHRI, Lennox, Rheem, Morrison, and Goodman agree with DOE that higher elevations would have an impact on temperature rise and calculated airflow. They believe that the maximum test elevation should be 2,000 feet and recommend that furnace fans should not be tested above 2,000 feet without an appropriate adjustment to the test conditions and calculations. (AHRI, No. 0034 at pg. 3; Lennox, No. 0031 at p. 3; Rheem, No. 0035 at pg. 4; Morrison, No. 0036 at pg. 3; Goodman, No. 0037 at pg. 2) AHRI, Lennox, Rheem, Morrison, Goodman, and Ingersoll Rand suggest that DOE consider the use of a 1.08 conversion factor that is adjusted by barometric pressure at test conditions. (AHRI, No. 0034 at pg. 3; Lennox, No. 0031 at p. 3; Rheem, No. 0035 at pg. 3; Morrison, No. 0036 at pg. 3; Goodman, No. 0037 at pg. 1; Ingersoll Rand, No. 0038 at pg. 2)

DOE agrees with AHRI, Lennox, Rheem, Morrison, Goodman, and Ingersoll Rand that the 1.08 conversion factor should be adjusted by barometric pressure at test conditions. The test procedure established by this final rule includes provisions for measuring the humidity ratio and dry bulb temperature of the test room near the inlet to determine the specific volume of test room air in cubic feet per pound of dry air to calculate airflow. As a result, the 1.08 conversion factor is no longer a constant. Instead the constant is a function of the specific volume of test room air in cubic feet per pound of dry air at test conditions. Consequently, the airflow calculation specified by the test procedure established by this final rule is:

$$Q = \frac{\left(Effy_{SS} - L_J\right) \times Q_{IN} + \left[\left(3413 \times E\right]_{motor}\right)}{60 \times (0.24 + 0.444 \times W) \times \left(\frac{1}{v_{ai}}\right) \times \Delta T}$$

Where:

$Q$ = airflow in CFM,

$Effy_{SS}$ = steady-state efficiency in % as determined according to ASHRAE 103–2007 at the specified operating conditions,

$L_J$ = jacket loss in % as determined according to ASHRAE 103–2007 at specified operating conditions or a default value of 1%,

$Q_{IN}$ = measured fuel energy input in Btu/h at specified operating conditions based on the fuel's high heating value determined as required in section 8.2.1.3 or 8.2.2.3 of ASHRAE 103–2007,

*3413* = conversion of kW to Btu/h;

$E_{motor}$ = electrical energy to the furnace fan motor in the settings for which airflow is being calculated in kW that is recovered as useable heat,

*60* = conversion from hours to minutes,

*0.24* = specific heat capacity of dry air in Btu/lb°F,

*0.44* = specific heat capacity of water vapor in Btu/lb°F,

$W$ = humidity ratio in pounds water vapor per pounds dry air,

$v_{air}$ = specific volume of dry air at specified operating conditions per the equations in the psychrometric chapter in 2001 ASHRAE Handbook—Fundamentals in lb/ft$^3$

$\Delta T$ = temperature rise measured at specified operating conditions.

Test room air properties are required to be measured near the inlet of the product under test to minimize the impacts of test room humidity and temperature gradients. For electric furnaces and modular blowers, $Effy_{SS}$ equals 100, and $Q_{IN}$ is the measured electrical input power to the sub-metered electric resistance heat kit multiplied by 3,413 kW per Btu/h.

*F. Duct Specifications and External Static Pressure Measurement*

In the NOPR, DOE proposed to use the methods specified in AMCA 210 for rating fans. The proposal called for evaluation of the fan performance at the flows and ESPs associated with a reference system curve by (1) measuring performance at multiple conditions at each airflow-control setting, (2) developing equations to represent the airflow and power input of the fan as a quadratic function of ESP, (3) mathematically determining the ESP associated with the reference system curve for the tested airflow-control setting using the airflow equation, and (4) calculating power input using the developed power input equation. Interested parties commented on the NOPR that the AMCA 210 method would be unduly burdensome and that an acceptable alternative would be to maintain the same duct restrictions throughout the test after initial reference system conditions are met in lieu of the previously proposed methods of making multiple determinations in each airflow-control setting and curve-fitting to identify operating points. Because the AMCA 210 method requires use of a supplemental test facility fan to achieve the desired flow and ESP conditions, this method is not amenable to moving to all of the target flow conditions on the reference system curve simply by changing the speed of the furnace fan under test. In contrast, the test approach suggested by AHRI and other stakeholders and adopted in the SNOPR is amenable to this simplified approach. DOE proposed in the SNOPR to adopt the alternative method suggested by interested parties and to use the provisions in ASHRAE 103–2007 for achieving the specified ESP levels in the maximum airflow-control setting by ''symmetrically restricting the outlet duct''. DOE requested comments from interested parties whether this language was sufficiently instructive or if more details are necessary (such as which materials and procedures to use to restrict the duct). 78 FR 19624 (April 2, 2013)

AHRI, Lennox, Morrison, and Goodman all agree that DOE should not specify the methods for restricting the outlet duct. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 3; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 2) AHRI and Morrison stated that a symmetrical duct restriction is needed in order to achieve repeatable results, but the manufacturer should be allowed

to determine the type of material that would lead to symmetrical restrictions on the outlet duct. (AHRI, No. 0034 at pg. 4; Morrison, No. 0036 at pg. 4) Rheem also stated that a specific duct restriction is needed to assure repeatable test results, and further explained that they have adopted the method of ''symmetrically restricting the outlet of the test duct.'' (Rheem, No. 0035 at pg. 4)

DOE agrees with AHRI, Lennox, Morrison, and Goodman that the proposed requirement to symmetrically restrict the outlet of the test duct to achieve the specified ESP is sufficient. The test procedure established by this final rule includes this provision.

In the SNOPR, DOE proposed to allow manufacturers the option of rating their products with or without a return air duct. 78 FR 19616 (April 2, 2013) AHRI, Lennox, Morrison, and Goodman all agree with DOE's proposal to allow for the optional use of a return air duct. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 2) Furthermore, Goodman added that if a return air duct is used, then DOE should specify that the return air pressure tap should be downstream of any bends or turns in the return air duct. (Goodman, No. 0037 at pg. 2) Rheem stated that it follows the duct and plenum arrangements shown in Figure 2 of ASHRAE 103–1993, in which the downflow configuration requires an inlet duct and the upflow and horizontal configurations do not require an inlet duct. (Rheem, No. 0035 at pg. 4) Ingersoll Rand proposed that inlet ducts should be allowed on an optional basis as detailed in ASHRAE 103–2007 with pressure taps 12 inches from the furnace inlet. (Ingersoll Rand, No. 0038 at pg. 2)

DOE agrees with manufacturers that the test procedure established by this final rule should allow for the optional use of a return air duct. The test procedure includes this provision. The test procedure also specifies that pressure taps be placed on all four sides of the duct, 12 inches from the inlet, and downstream of any bends or turns in the return air duct.

In the SNOPR, DOE proposed to adopt the provisions in ASHRAE 37 for measuring external static pressure that specify duct geometry and pressure tap placement. 78 FR 19616 (April 2, 2013)

AHRI and Lennox agree that the DOE test procedures should provide a detailed specification and a diagram for measuring the external static pressure. However, using the provisions in ANSI/ASHRAE Standard 37 may require a duct that is too tall for the ceiling height of a laboratory that is used for testing furnaces. Additionally, in Figure 7a in ANSI/ASHRAE 37–2005, the tap location dimension from the furnace outlet is two times the square root of the duct width times the duct depth, which would put the tap into the 90 degree bend of the duct and cause inaccurate static pressure measurements. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4). AHRI, Rheem, Morrison, and Goodman added that DOE should specify the four tap arrangement in AHSI/ASHRAE Standard 37 with the specification that the pressure taps be placed 18 inches from the furnace outlet. (AHRI, No. 0034 at pg. 4; Rheem, No. 0035 at pg. 5; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 2). Furthermore, Rheem stated that the proposed DOE requirement would no longer allow Rheem to make test measurements for AFUE and FER on the same test stand. A horizontal test set up would be required for FER measurement. (Rheem, No. 0035 at pg. 5) Ingersoll Rand proposed that the fan test method specify ASHRAE 103–2007 ducts with static pressure taps on all four sides located 12 inches from furnace outlet. (Ingersoll Rand, No. 0038 at pg. 2)

Through recent testing experience, DOE confirms AHRI's, Lennox's, and Rheem's comments that the ASHRAE 37duct requirements, in some cases, can be incompatible with the ASHRAE 103–2007 setup, and that for larger products, ducts that meet the ASHRAE 37 requirements are too large for typical furnace testing facilities. Consequently, the test procedure established by this final rule adopts the provisions suggested by AHRI, Rheem, Morrison, and Goodman which require ducting dimensions to meet ASHRAE 103 setup requirements with a pressure tap on each of the four faces of the outlet duct, 18 inches from the outlet, and upstream of any bends or turns in the duct.

*G. Temperature Measurement Accuracy Requirement*

In the SNOPR, DOE proposed to require temperature measurement errors no greater than +/−0.5 degrees Fahrenheit. 78 FR 19617 (April 2, 2013)

AHRI, Lennox, Morrison, and Goodman do not believe that a requirement to have temperature measurement errors no greater than +/−0.5 degrees Fahrenheit is reasonably achievable. AHRI, Morrison, and Goodman recommend that DOE specify an error of +/−0.9 degrees Fahrenheit, per the special limits of error of T-type thermocouples. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 3) Rheem stated that an allowable temperature measurement error would be +/−1 degree Fahrenheit, while Ingersoll Rand stated that the ASHRAE 103–2007 accuracy level should be maintained (i.e., ±2 degrees Fahrenheit). (Rheem, No. 0035 at pg. 5; Ingersoll Rand, No. 0038 at pg. 2)

DOE agrees with AHRI, Lennox, Morrison, and Goodman that an allowable temperature measurement error of ±0.5 °F is not reasonable for thermocouples, which are the temperature measurement instruments typically used in ASHRAE 103. However, DOE finds that T-type thermocouples can meet tighter tolerances than the allowable error of ±2 °F specified in ASHRAE 103. The test procedure established by this final rule specifies an allowable error of ±0.75 °F, which is consistent with the special limit of error for T-type thermocouples specified in ASHRAE 41.1 and referenced in ASHRAE 37. Consequently, manufacturers will be able to continue using thermocouples while errors in temperature measurements will be minimized.

*H. Minimum Temperature Rise*

In the SNOPR, DOE requested comment on whether a minimum temperature rise of 18 °F should be required. 78 FR 19617 (April 2, 2013)

AHRI, Lennox, Morrison, and Goodman all believe that a minimum temperature rise is not required, but agree that a minimum temperature rise of 18 degrees Fahrenheit is reasonable. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 3) Rheem stated that a minimum temperature rise of 18 degrees Fahrenheit could eliminate some furnaces with single speed blower motors from the marketplace. (Rheem, No. 0035 at pg. 5)

DOE agrees with AHRI, Lennox, Morrison, and Goodman that a minimum temperature rise of 18 °F is reasonable. In addition, DOE expects that a significant majority of products are able to meet this minimum requirement. The test procedure established by this final rule includes a minimum temperature rise requirement of 18 °F. Any manufacturer of products that cannot meet this requirement can apply for a test procedure waiver. Waivers could include alternative test methods that ensure a higher level of temperature measurement accuracy in lieu of the minimum temperature rise requirement.

*I. Steady-State Stabilization Criteria*

In the SNOPR, DOE proposed to adopt the following steady-state stabilization

criteria. For testing furnace fans used in gas and oil furnaces, DOE proposed that steady-state conditions are attained as indicated by a temperature variation in three successive readings, taken 15 minutes apart, of not more than:

- 1.5 °F in the stack gas temperature for furnaces equipped with draft diverters;
- 2.5 °F in the stack gas temperature for furnaces equipped with either draft hoods, direct exhaust, or direct vent systems; and
- 0.5 °F in the flue gas temperature for condensing furnaces.

For electric furnaces, DOE proposed that steady-state conditions are reached as indicated by a temperature variation of not more than 1 °F in the outlet temperature in four successive temperature readings taken 15 minutes apart. The proposed criteria for all product types are more stringent than the criteria specified in ASHRAE 103–2007, which are incorporated by reference in the DOE test procedure for furnaces. 78 FR 19617 (April 2, 2013)

AHRI, Lennox, Morrison, Goodman, and Ingersoll Rand all believe that the steady-state stabilization criteria proposed by DOE are not reasonably achievable and will increase testing burden on manufacturers without significantly improving the accuracy of the results. Furthermore, they suggest that the current residential furnace stabilization criteria in 10 CFR part 430, subpart B, appendix N are stringent enough for accuracy and repeatability purposes. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4; Morrison, No. 0036 at pg. 4; Goodman, No. 0037 at pg. 3; Ingersoll Rand, No. 0038 at pg. 2) Additionally, AHRI, Lennox, Rheem, and Morrison stated that a process that involved three temperature readings taken 15 minutes apart, instead of four, is more than adequate for electric furnaces and cold flow tests. (AHRI, No. 0034 at pg. 4; Lennox, No. 0031 at p. 4; Rheem, No. 0035 at pg. 6; Morrison, No. 0036 at pg. 5)

Recent DOE test results confirm AHRI's, Lennox's, Morrison's, Goodman's, and Ingersoll Rand's comments that the steady-state stabilization criteria proposed in the SNOPR are not reasonably achievable. Therefore, the test procedure established by this final rule adopts the steady-state stabilization criteria in ASHRAE 103–2007 (which are identical to those codified in 10 CFR Part 430, Subpart B, Appendix N as part of the DOE furnaces test procedure) for the parts of the test that involve firing a furnace burner or energizing electric heat resistance elements. For the parts of the test that do not require firing a burner or energizing electric heat resistance elements (*i.e.,* cold flow tests), DOE likewise found that the steady-state stabilization criteria proposed in the SNOPR, which are based on outlet temperature variation, are not reasonably achievable. Outlet temperature is sensitive to changes in ambient temperature, which is highly variable in ASHRAE 103–2007 compliant test facilities. To address this issue, the test procedure established by this final rule specifies steady-state conditions for cold-flow tests based on the difference in temperature between the outlet airflow temperature and the ambient temperature. During testing, DOE collected over 30 minutes per test of time series inlet, outlet, and ambient temperature data for over 10 cold-flow tests. DOE observed a maximum difference in temperature between the outlet airflow and ambient of 2.7 °F. DOE believes this is a reasonable threshold for determining steady-state conditions for cold-flow tests. The test procedure established by this final rule specifies that steady-state conditions for cold-flow tests are indicated by a temperature rise variation in three successive readings, taken 15 minutes apart, of not more than 3 °F to address this issue.

*J. Inlet and Outlet Airflow Temperature Gradients*

In the SNOPR, DOE proposed to specify the use of a mixer, as depicted in Figure 10 of ASHRAE 37, which references ANSI/ASHRAE Standard 41.1–1986 (RA 2001), to minimize outlet flow temperature gradients if the temperature difference between any two thermocouples of the outlet air temperature grid is greater than 1.5 °F. 78 FR 19617 (April 2, 2013)

AHRI, Lennox, Rheem, Morrison, Goodman, and Ingersoll Rand are all opposed to using a mixer due to their effect on external static pressure. They also stated that mixers are never found in the field. (AHRI, No. 0034 at pg. 5; Lennox, No. 0031 at p. 4; Rheem, No. 0035 at pg. 6; Morrison, No. 0036 at pg. 5; Goodman, No. 0037 at pg. 3; Ingersoll Rand, No. 0038 at pg. 2) Furthermore, AHRI and Morrison believe that the air temperature can be adequately measured by the thermocouple arrangements that are specified in ANSI/ASHRAE Standard 103–1993. (AHRI, No. 0034 at pg. 5; Morrison, No. 0036 at pg. 5)

DOE recognizes interested party concerns that using an air mixer is inconsistent with the current DOE residential furnaces test set up. Consequently, the ESP of the test setup with an air mixer installed may be higher than the ESP at which furnace manufacturers typically test to comply with the DOE test procedure for residential furnaces. DOE is not aware of any negative impacts on the results of the DOE test procedure for residential furnaces of gradients in the outlet air temperature. The test procedure established by this final rule does not require the use of an air mixer for these reasons. In addition, the outlet temperature used to calculate airflow, and ultimately FER, is the average of the outlet temperature measurements of the thermocouples in the outlet thermocouple grid required by this test procedure.

*K. Certification Testing*

In the NOPR, DOE proposed that the existing sampling plans used for furnaces be adopted and applied to measures of energy consumption for furnace fans. 77 FR at 28691 (May 15, 2012). AHRI and a number of manufacturers commented that the furnace sampling plan is too stringent for furnace fans and that DOE should use sampling plan criteria consistent with the DOE test procedure for residential central air conditioners (CAC). (Allied Air, Public Meeting Transcript, No. 23 at p. 225; Goodman, No. 17 at p. 6; Rheem, No. 25 at p. 11; Ingersoll Rand, No. 14 at p. 2; Lennox, No. 12 at p. 5; Morrison, No. 21 at p. 8.) UTC explained that the CAC sampling plan requirements are more appropriate because the components of the furnace fan (*i.e.* electric motors, blower wheels and blower housings) are more analogous to an air conditioner or refrigerator than to the combustion process of a fuel-fired furnace. (UTC, No. 10 at p. 4.) DOE agreed with interested parties that the furnace fan electrical input power measurements and external static pressure measurements that would be required by the test procedure proposed in the SNOPR are different and inherently more variable than the measurements required for AFUE. Consequently, DOE proposed in the SNOPR to adopt a sampling plan that requires any represented value of FER to be greater than or equal to the higher of: the mean of the sample or the upper 90 percent (one-tailed) confidence limit divided by 1.05, as specified in the sampling plan for CAC products. 78 FR 19718 (April 2, 2013)

AHRI, Lennox, Rheem, Morrison, Goodman, Ingersoll Rand, and NPCC/NEEA agree with DOE's proposal to adopt a sampling plan that requires any represented value of FER to be greater than or equal to the higher of the mean

of the sample or the upper 90 percent (one-tailed) confidence limit divided by 1.05. (AHRI, No. 0034 at pg. 5; Lennox, No. 0031 at p. 5; Rheem, No. 0035 at pg. 7; Morrison, No. 0036 at pg. 5; Goodman, No. 0037 at pg. 3; Ingersoll Rand, No. 0038 at pg. 3; NPCC/NEEA, No. 0039 at pg. 5)

DOE's testing experience confirms that the furnace fan electrical input power measurements and external static pressure measurements that are required by the test procedure established by this rule are more variable than the measurements required for AFUE. Consequently, as was proposed in the SNOPR, the test procedure established by this final rule adopts a sampling plan that requires any represented value of FER to be greater than or equal to the higher of the mean of the sample or the upper 90 percent (one-tailed) confidence limit divided by 1.05, as specified in the sampling plan for CAC products. 78 FR 19718 (April 2, 2013)

NPCC/NEEA and CA IOU urge DOE to require manufacturers to certify individual mode FERs. (CA IOU, No. 0032 at p. 3) NPCC/NEEA claims there is no additional testing burden associated with this proposal, even though they recognize some manufacturer reluctance to certify multiple values. NPCC/NEEA believes the importance and value of the transparency afforded by certifying the individual mode values far outweighs any concerns the manufacturers might have with regard to certifying the components of a single FER rating metric. (NPCC/NEEA, No. 0039 at pg. 5) WI–DOA stated that furnace manufacturers should be required to provide fan tables for airflow and corresponding watts with static pressure up to 1.20 in. wc. (WI–DOA, No. 0007 at pg. 1) DOE is not adopting certification requirements for furnace fans in this rulemaking. DOE proposed in the furnace fan standards rulemaking that manufacturers be required to certify the single FER rating metric, along with some intermediary values that provide DOE details about the values used when the manufacturer conducted its own testing. DOE will consider these comments on certification requirements for furnace fans along with any others submitted in response to the proposal in the standards rulemaking. Should commenters have additional details about why individual mode values are important and would be useful to consumers, they may provide additional comments to the standards docket (Docket Number: EERE–2010–BT–STD–0011).

AHRI, Morrison, and Ingersoll Rand added that the sampling plan for the DOE enforcement testing of residential furnaces employs a statistic that is based on a 95 percent two-tailed probability level with degrees of freedom ($n_1 - 1$), where $n_1$ is the total number of tests. AHRI, Morrison, Goodman, and Ingersoll Rand believe that DOE must ensure that the confidence limits with respect to the certification and enforcement testing of the FER metric are the same. (AHRI, No. 0034 at pg. 5; Morrison, No. 0036 at pg. 5; Goodman, No. 0037 at pg. 3; Ingersoll Rand, No. 0038 at pg. 3) The sampling plan for certification testing utilizes a one-sided confidence limit, which ensures that the rating used by manufacturers is supported by the test data they conducted on a given basic model and allows the manufacturers the option to conservatively rate if they desire. DOE uses a one-sided confidence limit in determination of ratings because it is interested in ensuring consumers get a level of performance for a given basic model that is at least as good as what is being represented by manufacturers. In other words, DOE is primarily concerned with preventing overrating. On the other hand, the Department employs a two-sided sampling plan for enforcement testing with a 95-percent probability limit for all high-volume covered products and equipment because it is interested in the variability of all units within the sample when considering compliance against the standard. DOE is looking at the distribution of values within the sample as compared to the Federal standard. While DOE is open to further investigating whether the sampling plans for enforcement testing should be changed, specifically whether DOE should move to a one-sided probability limit for assessing compliance with standards, DOE is declining to do so in this rulemaking. DOE is accepting data which attempts to characterize the variability, both the testing and manufacturing, of furnace fan basic models.

*L. Alternative Efficiency Determination Method (AEDM)*

AHRI, Rheem, Morrison, Goodman, and Lennox believe the option of employing an alternative efficiency determination method to determine FER must be made available instead of mandating that a minimum of two samples be tested in order to achieve DOE certification. (AHRI, No. 0034 at pg. 2; Rheem, No. 0035 at pg. 2; Morrison, No. 0036 at pg. 2; Goodman, No. 0037 at pg. 4; Lennox, No. 0012 at pg. 5) In response to the NOPR, Mortex Products, Inc. commented that it is concerned about the testing burden and cost for small manufacturers, and requested that DOE prepare a regulatory flexibility analysis for the rulemaking that would relax the testing burden or combine testing requirements with an AEDM so that all models need not be tested. (Mortex, No. 0018 at pg. 3) Morrison, Unico, and AHRI echoed Mortex's comments, requesting DOE provide the option of employing an AEDM. (Morrison, No. 0021 at pg. 8; Unico, No. 0015 at pg. 6; AHRI, No. 0016 at pg. 9)

At this time, DOE is not adopting provisions that allow for the ratings of furnace fans to be established based on simulations or computer models. DOE currently does not allow the use of AEDMs for residential products, with the exception of central air conditioners and heat pumps. DOE believes that the number of furnace fan basic models that a manufacturer will need to test and certify will be significantly smaller than the number of combinations of split-system air conditioners and heat pumps that are currently allowed to be rated with an alternative rating method. While DOE is not opposed to considering AEDMs for furnace fans in the future, it is declining to do so in this rulemaking until manufacturers provide DOE with evidence that alternative rating methods are needed. DOE recognizes Mortex's concerns regarding differential impacts on small manufacturers. DOE conducted a regulatory flexibility analysis as part of the NOPR of the furnace fans energy conservation standards rulemaking to assess impacts on small manufacturers, as Mortex requested. 78 FR 64132–64134 (October 25, 2013). Further, DOE adopted burden reducing measures to the test procedure during the rulemaking in response to manufacturers' comments (e.g., DOE aligned the test procedure established by this final rule with the DOE test procedure for furnaces). Even in the absence of the ability to rate furnace fans with AEDMs, only basic models of furnace fans are required to be tested and rated in accordance with the test procedure established by this final rule. Manufacturers may group individual furnace fan models into a basic model if they have essentially identical physical, functional, and electrical characteristics and are represented by the same FER. For example, only one model of a series of electric furnace fan models that only differ by electric resistance heat capacity is required to be tested in accordance with the test procedure established by this rule, if the capacity variation does not include design changes that alter furnace fan

performance as measured by the test procedure established by this rule.

*M. FER Modifications and Alternatives*

In the NOPR, DOE proposed to require measurements in the absolute maximum airflow-control setting, which DOE found is most often designated for cooling. DOE also proposed to specify that the reference system ESP be set in the maximum airflow-control setting to avoid rating performance above the proposed reference system ESP values. 77 FR 28683 (May 15, 2012). Interested parties commented on the NOPR that the maximum airflow-control setting is not always designated for cooling. In the SNOPR, DOE did not change the airflow-control settings in which it proposed to require measurements nor its proposal to set the reference system ESP in the maximum airflow-control setting. 78 FR 19608 (April 2, 2013)

Interested parties stated that the maximum airflow-control setting is not always designated for cooling. Goodman disagrees with DOE's comment that the maximum airflow-control setting is often designated for cooling operation. They stated that a single furnace capacity (e.g. 60,000 Btu/h) is often offered with more than one air moving option (''drive''), and the heating speed tap will vary depending upon the drive provided. A 60,000 Btu/h furnace for northern applications may have a 3-ton drive with ''high'' speed tap for heating, while a 60,000 Btu/h furnace for southern applications may have a 4-ton drive with ''medium'' speed tap for heating. (Goodman, No. 0037 at pg. 2) Rheem added that the assumption that the cooling speed will be the highest speed is a worst case assumption. (Rheem, No. 0025 at pg. 5) During the NOPR public meeting and in written comments, Ingersoll Rand noted that if the maximum airflow speed is multiplied by cooling hours and the heating speed is higher than the cooling speed, then the FER equation is incorrect. (Ingersoll Rand, No. 0023 at pg. 124) Ingersoll Rand proposed that when a furnace's highest air flow setting is used for heating, that the test procedure and calculations allow $Q_{Max}$ to equal $Q_{Heat}$ and allow the cooling speed energy to be determined at maximum cooling speed tap as specified in the installation and operating instructions. (Ingersoll Rand, No. 0038 at pg. 2) Ingersoll Rand stated that many furnaces will run appropriately with the blower set to the maximum speed setting. They proposed that for those units the airflow, $Q_{Max}$ be determined directly from testing at the maximum airflow setting. Ingersoll Rand went on to state that the DOE proposed method of testing at the heating speed to determine $Q_{Heat}$ and using a multiplier to calculate $Q_{Max}$ should be an optional method for furnaces that cannot be operated or run appropriately at the maximum airflow setting. (Ingersoll Rand, No. 0038 at pg. 2) Rheem added that the assumption that the heating speed can be determined by an assumed system curve must be adjusted by the safety requirement that the furnace operate within prescribed temperature rise range that is listed on each rating plate. (Rheem, No. 0025 at pg. 5)

UTC agreed with DOE that the maximum airflow-control setting on a furnace is typically referred to as the cooling speed. (UTC, No. 0010 at pg. 1)

DOE understands that, in some cases, the maximum airflow-control setting is designated for heating, not cooling. Even though DOE finds that the maximum airflow-control setting is most often designated for cooling, the test procedure established by this final rule specifies that measurements be taken in the absolute maximum airflow-control setting, not the default cooling airflow-control setting to accommodate both scenarios as Ingersoll Rand recommends. Specifying that measurements be taken in the maximum airflow-control setting ensures that the full range of fan operation is accounted for in the FER metric regardless of whether the maximum airflow-control setting is designated for heating or cooling. The test procedure established in this final rule has specific provisions for units for which the maximum airflow-control setting is a heating setting. For such units, the test procedure established by this notice specifies that:

- The burner or electric resistance heat elements of the HVAC product in which the furnace fan is integrated shall be firing/energized while setting the initial conditions (i.e., achieving steady-state at the specified reference system ESP in the maximum airflow-control setting).
- airflow for the maximum airflow-control setting shall be calculated using temperature rise measured in the maximum airflow-control setting (as Ingersoll Rand suggests) because the HVAC product will be producing heat. Consequently, calculating airflow based on temperature rise in an intermediate airflow-control setting that is designated for heating and using the airflow adjustment equation [5] to determine maximum airflow (as is specified for products for which the maximum airflow-control setting is only a cooling setting) is unnecessary. This approach avoids the uncertainty inherent in using the airflow adjustment equation.
- $E_{Max}$ shall be measured while the HVAC product is producing heat in the maximum airflow-control setting and steady-state conditions have been met. For single-stage units, $E_{Max}$ and $E_{Heat}$ are equivalent because the maximum airflow-control setting and the heating airflow-control setting in which measurements are specified to be made are the same. Consequently, the same value is used for both variables in the FER equation. For multi-stage units, $E_{Max}$ and $E_{Heat}$ are not equivalent because the maximum airflow-control setting and the heating airflow-control setting (the default low heat airflow control setting) in which measurements are specified to be made are not the same. $E_{Heat}$ is required to be measured in the reduced heat airflow-control setting.

Contrary to Ingersoll Rand's recommendation, the test procedure established by this final rule does not require firing in the maximum airflow-control setting if that setting is not designated for heating (even if it is possible to do so). Instead, the test procedure established by this final rule requires firing in the default heating airflow-control setting. Requiring firing in the maximum airflow-control setting in addition would result in increased testing burden. Also contrary to Ingersoll Rand's recommendation, the test procedure established by this final rule does not allow fan energy for cooling to be determined at an intermediate airflow-control setting (i.e., the highest airflow-control setting designated for cooling as specified in the installation and operating instructions that is not the absolute maximum airflow-control setting). DOE finds that manufacturers are not as limited in the setting they designate for cooling as they are by safety concerns and design constraints for designating heating settings. Consequently, manufacturers could designate the lowest airflow-control setting for cooling to produce favorable FER values, resulting in a potential loophole in the test method.

In the NOPR, DOE proposed to incorporate the HCR to adjust the heating operating hours in both the numerator (i.e. estimated annual energy consumption) and denominator (i.e. normalization factor of total operating hours times airflow in the maximum airflow-control setting) of the FER equation. 77 FR at 28701 (May 15, 2012). In the SNOPR, DOE revised its

[5] The airflow adjustment equation can be found in the regulatory text of this notice and the furnace fan test procedure SNOPR published on April 2, 2013. 78 FR.

proposed FER equation by proposing to incorporate HCR in the numerator, and eliminate it from the denominator. DOE proposed this revision after finding that this modification results in FER values that more accurately reflect the relative estimated annual energy consumption of multi-stage and modulating units compared to single-stage units. 78 FR 19609 (April 2, 2013)

AHRI, Lennox, Rheem, and Morrison oppose DOE's proposal to modify the FER equation by eliminating the HCR from the denominator and replacing it with 830. They argue that this change will penalize multi-stage and modulating furnaces (AHRI, No. 0034 at pg. 2; Lennox, No. 0031 at p. 5; Rheem, No. 0035 at pg. 2; Morrison, No. 0036 at pg. 2) Goodman also echoed AHRI's comment in regards to the FER equation, but added that the cooling hours should not be included in FER. (Goodman, No. 0037 at pg. 5)

DOE finds that when HCR is included in the numerator and denominator of the FER equation (as AHRI, Lennox, Rheem, Morrison and Goodman recommend), FER comparisons between multi-stage and single-stage units results in an estimated reduction in FER of approximately 30 percent when adding multi-staging to a product with a constant-torque BPM motor. DOE data shows that the estimated annual energy consumption, as calculated for the FER metric, is 15 percent less for multi-stage products compared to similar single-stage products. DOE finds that eliminating HCR from the denominator of the FER equation results in an estimated reduction in FER of 15 percent, which is more consistent with estimated annual energy consumption comparisons. Consequently, the test procedure established by this final rule excludes HCR from the denominator of the FER equation as proposed in the SNOPR. As stated in the SNOPR, cooling hours are included pursuant to EPCA because electricity used to circulate air through duct work occurs in cooling and constant circulation modes, not just in heating mode. 42 U.S.C. 6295(f)(4)(D)

Interested parties suggested modifications and alternatives to the units of FER and how its factors are weighted. ASAP, ACEEE, NCLC, and NRDC recommended that DOE incorporate a time weighted airflow value (i.e., weighted for time spent in cooling, heating, and circulation modes) instead of choosing the maximum airflow. (ACEEE *et al.,* No. 0013 at pg. 5) Unico suggested that a preferred metric to FER would be a weighted average watts/cfm for all modes of operation to prevent a design push to a maximum airflow, where the efficiency is measured. (Unico, No. 0015 at pg. 3) NRCan stated that normalizing the FER rating to produce watts/cfm is difficult for stakeholders to understand when compared to having a kWh metric. (NRCan, No. 0011 at pg. 6) Conversely, ACEEE stated that a watts/cfm metric is better than a kWh/year metric due to the number of assumptions and extrapolations required to determine annual energy consumption. (ACEEE, No. 0023 at pg. 198) During the NOPR public meeting, NEEA stated operating hours should be used to weight average fan efficiency watts/cfm and not the energy use metric because annual energy use will vary more than the efficiency of the fan. (NEEA, No. 0023 at pg. 190)

DOE considered FER metric variations similar to those suggested by ASAP, ACEEE, NRDC, NRCan, NEEA and Unico. The FER metric established by this final rule is not normalized by a time-weighted airflow value instead of the maximum airflow, as ACEEE *et al.* suggests, because the additional measurements required to determine airflow in additional airflow-control settings would increase test burden. The metric recommended by NEEA would also require added burden to measure airflow in additional airflow-control settings. DOE disagrees with Unico that FER will incentivize manufacturers to only optimize performance in the maximum airflow-control setting because FER is determined based on furnace fan electrical input measurements in multiple airflow-control settings across the entire range of expected operation. DOE disagrees with NRCan that interested parties will have difficulty understanding a metric in units of watts per 1000 cfm. Interested parties are familiar with discussing fan efficiency in terms of watts per 1000 cfm, as this is how fan performance is estimated in the alternative rating method for coil-only CAC products.

Interested parties commented on DOE's estimated national average operating hours and how these estimates are used in determining FER. Ingersoll Rand questions the value of using operating hours because those estimates come from such a small section of the country, and suggested evaluating performance of the appliance based on the end condition, removing any dependence on location. (Ingersoll Rand, No. 0023 at pg. 198) Rheem stated that it does not agree that DOE has the authority to set an energy conservation standard that weights multiple metrics (45% heating mode, 34% cooling mode, 21% circulation mode) to create a single FER for furnace fans. (Rheem, No. 0025 at pg. 3) ASAP, ACEEE, NCLC, and NRDC strongly support DOE's proposal to incorporate multiple measures of power consumption into the certifiable rating metric, including heating, cooling, and constant circulation modes. (ACEEE *et al.,* No. 0013 at pg. 2) NRCan, NPCC, and NEEA suggested that DOE consider developing fan efficiency ratings for different climatic conditions which would entail development of different assumptions regarding the operating hours in each mode, mimicking DOE's rating procedures for heat pumps. (NRCan, No. 0011 at pg. 1 and NPCC/ NEEA, No. 0022 at pg. 7) Goodman stated that the FER metric does not accurately portray to the consumer what the relative energy consumption would be as applied in different regions and in different applications. According to Goodman, weighting energy consumption on a ''national average'' basis can potentially cause consumers in either northern or southern regions to choose a product that has a lower FER rating, but actually consumes more energy for their locale. (Goodman, No. 0017 at pg. 5) Goodman stated that a product with a higher SEER, HSPF or AFUE metric will consume less energy annually regardless of climate region than a different product with a lower SEER, HSPF or AFUE. However, this is not the case with the FER metric. (Goodman, No. 0017 at pg. 2)

DOE acknowledges the concerns of Ingersoll Rand, NRCan, and Goodman that using national average operating hours may not result in ratings that are reflective of furnace fan energy consumption in all climate regions. However, the residential furnace fan energy conservation standard will result in a national standard, not a regional standard. Consequently, the metric established by this final rule is proportional to the estimated national average annual energy consumption of furnace fans. As detailed in the NOPR, DOE's estimated national average furnace fan cooling and heating hours are based on data sources that include inputs from all U.S. climate regions. 77 FR 28680 (May 15, 2012) DOE recognizes that its estimated national average constant circulation hours are based on limited data from a single climatic region. As described in the NOPR, DOE made adjustments to its national average constant circulation hours estimate to account for climate region biases. 77 FR 28683 (May 15, 2012) Interested parties did not provide any additional data with which DOE could revise its estimate for national

average constant circulation hours. DOE disagrees with Rheem that DOE does not have the authority to issue standards based on a weighted metric. EPCA does not contain language limiting DOE's authority to determine the appropriate metric. Accordingly, determining the nature of a technical measurement is within the scope of authority delegated to the agency.

AGA recommends that DOE include a secondary FER that would convert the primary FER using the extended site measure of energy consumption until DOE/EERE can consider and complete a transition to the use of full-fuel-cycle measure of energy consumption. The addition of a secondary energy descriptor to capture full-fuel-cycle efficiency would be in line with the general response to the National Research Council (NRC) recommendations on appliance efficiency ratings that would also be applicable to ''furnace fans.'' (AGA, No. 0040 at pg. 1)

DOE will continue to set energy conservation standards for covered products based on energy consumption at the point-of-use, as required by EPCA, as amended. (42 U.S.C. 6291(4)–(6), 6311(3)(4), (18)) Consequently, DOE does not require a secondary FER that captures full-fuel-cycle energy consumption. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (August 17, 2012). However, DOE used FFC measures of energy use and greenhouse gas (GHG) and other emissions in the national impact analysis and environmental analysis for the furnace fan energy conservation standard rulemaking. 78 FR 64127 (October 25, 2013)

Interested parties commented that the rating metric should be tied to heating performance and capacity. Taitem Engineering, PC is concerned about a rating metric that is based on power demand per unit of airflow. They recommend a metric based on power demand per delivered unit of heat be used. (Taitem, No. 0033 at p. 1) Unico and Morrison added that since furnace-type products are purchased for their heating capacity, an artificial mechanism like watts/cfm should not be used. (Unico, No. 0023 at pg. 94; Morrison, No. 0023 at pg. 113) Morrison noted that the metric proposed in the NOPR moves too far away from end-user application, and would prefer the metric was tied to heating performance and capacity of the unit so that the energy descriptor is useful to consumers. (Morrison, No. 0023 at pg. 133) Unico suggested that a watts/cfm metric would make a product's efficiency look worse than it actually is compared to using a BTU output comparison. (Unico, No. 0023 at pg. 112)

DOE recognizes that a metric based on power demand per unit of heat, as suggested by Taitem, Unico and Morrison, could be useful. However, furnace fans consume electricity to circulate air through duct work in modes that are not for heating (i.e., cooling and constant circulation). FER accounts for energy consumption in heating and non-heating modes and is therefore, a more appropriate metric for this test procedure. FER, as described in section II, is the rating metric for the test procedure established by this final rule.

Pertaining to the rating metric, AHRI and Morrison commented that the note under Appendix AA to Subpart B of Part 430 on page 19625 of the SNOPR should be revised to clarify that it pertains to the FER rating metric. (AHRI, No. 0034 at pg. 2; Morrison, No. 0036 at pg. 2)

DOE recognizes that furnace fan manufacturers may already include raw fan energy use at various operating conditions in product literature. DOE also realizes that furnace fan manufacturers use fan energy metrics other than FER to report and make representations of fan energy consumption and efficiency. Pursuant to EPCA, manufacturers of covered products must use the applicable test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA and for making representations about the efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s)) DOE's regulations allow for representations and reporting of raw fan energy consumption in various airflow-control settings and at varying ESP in addition to FER. While DOE is not including fan energy consumption for individual functions of operation (i.e., cooling, heating, and constant circulation) in the certification requirements for this rule, manufacturers can use these representations as long as they are made in accordance with the test procedure established by this rule. In regards to other metrics, manufacturers may continue using the annual auxiliary electrical energy consumption (Eae) metric as specified by the DOE furnace test procedure as long as it is reported in conjunction with FER once compliance with FER is required. Manufacturers cannot use any other metrics to make representations about furnace fan energy consumption or efficiency beginning 180 days after publication of this final rule in the **Federal Register**. DOE understands that current ENERGY STAR specifications are based on a different metric, *e,* which is furnace fan energy consumption as a percentage of total furnace energy consumption. Since manufacturers are prohibited from making representations of furnace fan efficiency using a metric other than FER after 180 days, DOE will work with EPA to transition the ENERGY STAR program.

During the NOPR public meeting, both AHRI and Allied Air stated that they feel that DOE should consider adopting the EISA $e_b$ metric because it allows for relative electrical performance comparison of furnace fans without imposing unnecessary burden of air flow measurement at additional external static pressures.[6] (AHRI, No. 0023 at pg. 16; Allied Air, No. 0023 at pg. 129) On the other hand, ACEEE stated that they would be very uncomfortable with consideration of using $e_b$ because $e_b$ was originally developed as a threshold mechanism for incentive programs that wanted to recognize efficient air handlers. (ACEEE, No. 0023 at pg. 125) In more recent written comments in response to the SNOPR, AHRI (with the support of manufacturers) proposed an alternative test method that included the use of FER as proposed by DOE in the SNOPR as the rating metric. (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3)

DOE believes that BE, *e,* and $e_b$ are less appropriate than FER, because they are based on measurements at one operating point for units with single-stage heating or measurements at two operating points for units with multi-stage or modulating heating. These metrics do not account for operation in cooling or constant circulation modes. Also, these metrics are inappropriate because they are measured at ESPs that are not representative of field conditions.

*N. Air Leakage*

NPCC and NEEA are concerned about the impacts of air handler cabinet leakage on energy efficiency and health and safety.[7] NPCC/NEEA field testing has shown that cabinet leakage can occur on the order of one to five percent. According to NPCC/NEEA, the appropriate amount of air to measure is the amount of air excluding cabinet air

[6] The ''eb'' metric is a ratio of the electrical energy consumed by the furnace fan to the total fuel and electrical energy consumed by the furnace.

[7] According to NPCC/NEEA, air leakage is also a matter of health and safety when an air handler is located in a garage because contaminants often found in garages are pulled in by the air handler and delivered to the home. (NPCC/NEEA, No. 0039 at pg. 4)

leakage in the process of rating the efficiency with which air is delivered to a residence. NPCC/NEEA strongly recommends that DOE require testing of air handlers using ANSI/ASHRAE 193–2010, and either adjusting the air delivered by an air handler accordingly before calculating FER (and therefore the rated efficiency of the air handler), or providing a separate rating for cabinet leakage, so that consumers and contractors can choose the best-performing products for the market. (NPCC/NEEA, No. 0039 at pg. 4) CA IOU also recommends the adoption of ASHRAE 193–2010 for measuring air leakage, which should also be incorporated into the FER. (CA IOU, No. 0032 at p. 2)

DOE disagrees with NPCC, NEEA, and CA IOU that the test procedure established by this final rule should incorporate ANSI/ASHRAE 193–2010 to account for cabinet air leakage. The test procedure established by this final rule calculates airflow such that the results do not include any air that may have leaked from the cabinet upstream of the heat exchanger. This air will not have absorbed any significant amount of heat before leaking from the cabinet. Hence the heat addition will cause a greater temperature rise in the remaining air that does absorb heat from the heat exchanger, and for which temperature is measured by the discharge temperature sensors. Hence, assuming that most of the leaked air absorbs a negligible amount of heat before leaking out of the cabinet, the measurement already takes the air leakage into account. Air that does not pass over the heat exchanger (which would include air leaked through the cabinet upstream of the heat exchanger, or air that passes near potential leakage gaps in the cabinet casing surrounding, but distant from, the heat exchanger) is not included in the equation.

*O. Brushless Permanent Magnet Motor Issues*

In the NOPR, DOE requested comment on whether independent test labs would have difficulty selecting and operating a furnace fan in the airflow-control settings DOE proposed in the NOPR. 77 FR 28697 May 15, 2012 UTC, Rheem, and Morrison confirmed that independent test labs will need additional guidance on motor control and recommends that the independent test laboratory be allowed to confer with the individual manufacturers on particular models. (UTC, No. 0010 at pg. 6; Rheem, No. 0025 at pg. 9; Morrison, No. 0021 at pg. 7) DOE expects that independent test labs would have difficulty selecting and operating furnace fans in combinations of airflow-control and heating/cooling/circulation settings for which they are not intended to operate (i.e., firing the burner while the circulation fan operates in an airflow-control setting designated only for cooling). The test procedure established by this final rule does not specify combinations of settings for which a product is not designed. Consequently, independent test labs will be able to achieve operating settings required by this rule without guidance from manufacturers other than the product literature that is shipped with the product.

*P. Manufacturer Burden*

In response to the NOPR, AHRI stated that it found the manufacturer testing burden to be high since it includes AFUE, standby and off mode requirements, FER rating at different static pressures outside of ASHRAE 103, airflow measurements, as well as Canada's new and different furnace fan metric. (AHRI, No. 0023 at pg. 238) Morrison believes the DOE estimated testing cost of 2% of the manufacturer selling price in the NOPR does not account for the cumulative regulatory burden associated with the AFUE, standby and off mode, and fan efficiency. (Morrison, No. 0021 at pg. 9) Additionally, Morrison believes that the test burden of the NOPR proposal will be increased because this is a second static test point in addition to what is already required under the DOE AFUE testing. (Morrison, No. 0023 at pg. 152) Rheem commented that they do not currently have airflow data to rate current furnace models using the proposed metric, and it is not reasonable to assume manufacturers already have this data. (Rheem, No. 0025 at pg. 3) Lennox stated that due to variability in motor performance, manufacturing and testing, more than two units may need to be tested for some models. The additional testing time, engineering time to review and convert data into the FER calculation, along with time required to statistically develop the FER rating and maintain the required DOE documentation, are additional burdens. (Lennox, No. 0012 at pg. 4) Since the SNOPR, AHRI (with the support of a number of manufacturers) proposed a method of calculating airflow based on temperature rise, which would significantly reduce test burden because it can be measured using procedures and a test setup consistent with those used for the DOE test procedure for furnaces (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3).

DOE realizes that the cumulative effect of multiple regulations on an industry may significantly increase the burden faced by manufacturers that need to comply with regulations and testing requirements from different organizations and levels of government. DOE considers the cumulative cost of multiple regulations on manufacturers in the cumulative regulatory burden section in the standards NOPR published on October 25, 2013. 78 FR 64103 DOE agrees that the key concept embodied in the alternative method suggested by AHRI and manufacturers (using the AFUE test set up and temperature rise to determine airflow) provides reasonable FER values at a significantly reduced burden to manufacturers. The test procedure established by this final rule adopts a modified version of the test method presented by AHRI as the furnace fan test procedure to minimize test burden.

## IV. Procedural Issues and Regulatory Review

*A. Review Under Executive Order 12866*

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

*B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel*.

DOE reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies

published on February 19, 2003. 68 FR 7990. DOE has concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than a threshold number of workers as specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System (NAICS) that are available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* The threshold number for NAICS classification for 333415, which applies to Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (this includes furnace fan manufacturers) is 750 employees.[8] DOE reviewed AHRI's Directory of Certified Product Performance for Residential Furnaces and Boilers (2009),[9] the ENERGY STAR Product Databases for Gas and Oil Furnaces (May 15, 2009),[10] the California Energy Commission's Appliance Database for Residential Furnaces and Boilers,[11] and the Consortium for Energy Efficiency's Qualifying Furnace and Boiler List (April 2, 2009).[12] From this review, DOE identified 14 small businesses within the furnace fan industry. DOE does not believe the test procedure described in this rule would represent a substantial burden to any manufacturer, including small manufacturers, as explained below.

This rule establishes test procedures that would be used for representations of energy use and to test compliance with new energy conservation standards, which are being developed in a concurrent rulemaking, for the products that are the subject of this rulemaking. This notice establishes new test procedures for active mode testing for all such products. The rule will require a modified version of the testing methods prescribed in a public submission from AHRI (the trade organization that represents manufacturers of furnace fans). The AHRI proposal recommends test methods that are purposely aligned with the current DOE test procedure for furnaces in order to minimize test burden. (AHRI, No. 26); Appendix N of Subpart B of 10 CFR part 430. As discussed above, this would not represent a substantial burden to any furnace fan manufacturer, small or large. According to AHRI, its proposed method would result in an 80 to 90 percent reduction in test burden compared to the test procedure proposed by DOE in the NOPR. AHRI attributed this reduction primarily to manufacturers not having to acquire or use any test equipment beyond the equipment that is already used to conduct the test method specified in the DOE furnace test procedure (*i.e.* the AFUE test setup). (AHRI, No. 16 at p. 3.) Mortex, a small manufacturer, stated that measuring airflow and electrical power input at a few more airflow-control settings as a part of the existing AFUE test procedure should not require any capital outlay, unlike the method proposed by DOE in the NOPR. (Mortex, No. 18 at p. 2.) DOE's modifications to AHRI's approach will not require equipment beyond what is currently used to perform the AFUE test. Therefore, DOE expects no additional cost as the result of the new test procedure.

DOE also expects that the time and cost to conduct testing according to the proposed test procedure will not be significantly burdensome. During discussions with manufacturers, DOE received feedback that the time to test a single unit according to the AHRI method would be 30 to 60 percent less relative to using the procedure DOE proposed in the NOPR. Goodman performed tests according to both DOE's NOPR test procedure proposal and AHRI's suggested method and found that testing time is reduced by almost 60 percent using AHRI's method. (Goodman, No. 17 at p. 3.) Rheem also conducted tests according to both procedures and stated that the time to test a single-stage furnace was reduced from 4 hours to 45 minutes by using the AHRI method. (Rheem, No. 25 at p. 4.) Assuming that the labor rate for a given manufacturer would be the same regardless of test method, DOE expects that the cost to conduct a test would also be reduced by 30 to 60 percent. DOE estimated that conducting a test according to its NOPR proposed test procedure would cost a small manufacturer $2.30 per unit shipped. This estimate is largely based on DOE's experience with third-party test lab labor rates for fan testing. 77 FR at 28691 (May 15, 2012). A 30 percent reduction would yield a conservative cost estimate of $1.61 per unit shipped to conduct a test according to AHRI's method. DOE does not expect that its modifications to the AHRI method would result in additional costs to conduct a test. DOE finds that the selling price for HVAC products that incorporate furnace fans ranges from approximately $400 to $4,000. Therefore, the added cost of testing according to DOE's test procedure would be less than one percent of the manufacturer selling price (and lower than 0.1 percent in some cases).

For these reasons, DOE certifies that the test procedure established by this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE will provide its certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

### *C. Review Under the Paperwork Reduction Act of 1995*

There is currently no information collection requirement related to the test procedure for furnace fans. In the event that DOE proposes an energy conservation standard with which manufacturers must demonstrate compliance, or otherwise proposes to require the collection of information derived from the testing of furnace fans according to this test procedure, DOE will seek OMB approval of such information collection requirement.

Manufacturers of covered products must certify to DOE that their products comply with any applicable energy conservation standard. 10 CFR 429.12. In certifying compliance, manufacturers must test their products according to the applicable DOE test procedure, including any amendments adopted for that test procedure. *See* 10 CFR 429.13.

DOE established regulations for the certification and recordkeeping requirements for certain covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and

[8] U.S. Small Business Administration, Table of Small Business Size Standards (August 22, 2008) (Available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf*).

[9] The Air-Conditioning, Heating, and Refrigeration Institute, Directory of Certified Product Performance (June 2009) (Available at: *http://www.ahridirectory.org/ahridirectory/pages/home.aspx*).

[10] The U.S. Environmental Protection Agency and the U.S. Department of Energy, ENERGY STAR Furnaces—Product Databases for Gas and Oil Furnaces (May 15, 2009) (Available at: *http://www.energystar.gov/index.cfm?c=furnaces.pr_furnaces).*

[11] The California Energy Commission, Appliance Database for Residential Furnaces and Boilers (2009) (Available at: *http://www.appliances.energy.ca.gov/QuickSearch.aspx).*

[12] Consortium of Energy Efficiency, Qualifying Furnace and Boiler List (April 2, 2009) (Available at: *http://www.ceedirectory.org/ceedirectory/pages/cee/ ceeDirectoryInfo.aspx).*

recordkeeping was subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement was approved by OMB under OMB Control Number 1910–1400. Public reporting burden for the certification was estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

As stated above, in the event DOE proposes an energy conservation standard for furnace fans with which manufacturers must demonstrate compliance, DOE will seek OMB approval of the associated information collection requirement. DOE will seek approval either through a proposed amendment to the information collection requirement approved under OMB control number 1910–1400 or as a separate proposed information collection requirement.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

*D. Review Under the National Environmental Policy Act of 1969*

In this final rule, DOE establishes its test procedure for furnace fans. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the amount, quality or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*E. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

*F. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel*. DOE examined today's final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 12630*

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

*J. Review Under Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

*L. Review Under Section 32 of the Federal Energy Administration Act of 1974*

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The test procedure established by this action incorporates testing methods contained in the DOE test procedure for furnaces codified in Appendix N or Subpart B of part 430 of the CFR (which incorporates by reference ANSI/ASHRAE Standard 103, ''*Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers,''*) and ANSI/ASHRAE Standard 37–2009, *''Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment.''*) While today's proposed test procedure is not exclusively based on these standards, some components of the DOE test procedure would adopt definitions, test setup, measurement techniques, and additional calculations from them without any change. DOE has evaluated these two versions of this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (i.e. whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in these standards and has received no comments objecting to their use.

*M. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

*N. Approval of the Office of the Secretary*

The Secretary of Energy has approved publication of this final rule.

**List of Subjects**

*10 CFR Part 429*

Confidential business information, Energy conservation, Household appliances, Imports, Reporting and recordkeeping requirements.

*10 CFR Part 430*

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on December 24, 2013.

**Kathleen B. Hogan,**

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

For the reasons stated in the preamble, DOE amends parts 429 and 430 of chapter II, subchapter D, of Title 10 of the Code of Federal Regulations as set forth below:

## PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317.

■ 2. Add § 429.58 to read as follows:

### § 429.58 Furnace fans.

(a) *Sampling plan for selection of units for testing.* (1) The requirements of § 429.11 are applicable to furnace fans; and

(2) For each basic model of furnace fan, a sample of sufficient size shall be randomly selected and tested to ensure that any represented value of fan energy rating (FER), rounded to the nearest integer, shall be greater than or equal to the higher of:

(i) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

And, $\bar{x}$ is the sample mean; $n$ is the number of samples; and $x_i$ is the measured value for the $i^{th}$ sample;

Or,

(ii) The upper 90 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{0.90}\left(\frac{s}{\sqrt{n}}\right)$$

And $\bar{x}$ is the sample mean; $s$ is the sample standard deviation; $n$ is the number of samples; and $t_{0.90}$ is the t statistic for a 90% one-tailed confidence interval with n-1 degrees of freedom (from Appendix A).

(b) [Reserved]

## PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 3. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 4. Section 430.2 is amended by
■ a. Adding paragraph (3) to the definition for ''basic model''; and
■ b. Adding a definition for ''furnace fan'' in alphabetical order.

The additions read as follows:

### § 430.2 Definitions.

* * * * *

*Basic model* * * *

(3) with respect to furnace fans: Are marketed and/or designed to be installed in the same type of installation.

* * * * *

*Furnace fan* means an electrically-powered device used in a consumer product for the purpose of circulating air through ductwork.

* * * * *

■ 5. Section 430.3 is amended by:
■ a. Redesignating paragraphs (f)(4) through (10) as paragraphs (f)(5) through (11);
■ b. Adding new paragraph (f)(4);
■ c. Removing, in newly redesignated (f)(5), ''Reaffirmed 2001'' and adding in its place ''Reaffirmed 2006''; and removing ''appendix E and appendix M to subpart B'' and adding in its place ''appendices E, M, and AA to subpart B'';
■ d. Revising newly redesignated paragraph (f)(10);

The addition and revision read as follows:

### § 430.3 Materials incorporated by reference.

* * * * *

(f) * * *

(4) ANSI/ASHRAE Standard 37–2009, (''ASHRAE 37–2009''), Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment, ANSI approved June 25, 2009, IBR approved for appendix AA to subpart B.

* * * * *

(10) ANSI/ASHRAE Standard 103–2007, (''ASHRAE 103–2007''), Methods of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers, except for sections 7.2.2.5, 8.6.1.1, 9.1.2.2, 9.5.1.1, 9.5.1.2.1, 9.5.1.2.2, 9.5.2.1, 9.7.1, 11.2.12, 11.3.12, 11.4.12, 11.5.12 and appendices B and C, ANSI approved March 25, 2008, IBR approved for appendix AA to subpart B.

* * * * *

■ 6. Section 430.23 is amended by adding paragraph (cc) to read as follows:

### § 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(cc) *Furnace Fans.* The energy consumption of a single unit of a furnace fan basic model expressed in watts per 1000 cubic feet per minute (cfm) to the nearest integer shall be calculated in accordance with Appendix AA of this subpart.

■ 7. Appendix AA to subpart B of part 430 is added to read as follows:

## Appendix AA to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Furnace Fans

**Note:** Any representation made after July 2, 2014 for energy consumption of furnace fans must be based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for furnace fans, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required.

1. *Scope.* This appendix covers the test requirements used to measure the energy consumption of fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers.

2. *Definitions.* Definitions include the definitions as specified in section 3 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and the following additional definitions, some of which supersede definitions found in ASHRAE 103–2007:

2.1. *Active mode* means the condition in which the product in which the furnace fan is integrated is connected to a power source and circulating air through ductwork.

2.2. *Airflow-control settings* are programmed or wired control system configurations that control a fan to achieve discrete, differing ranges of airflow—often designated for performing a specific function (*e.g.,* cooling, heating, or constant circulation)—without manual adjustment other than interaction with a user-operable control such as a thermostat that meets the manufacturer specifications for installed-use. For the purposes of this appendix, manufacturer specifications for installed-use shall be found in the product literature shipped with the unit.

2.3. *ASHRAE 103–2007* means ANSI/ASHRAE Standard 103–2007, published in 2007 by ASHRAE, approved by the American National Standards Institute (ANSI) on March 25, 2008, and entitled ''Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers''. Only those sections of ASHRAE 103–2007 (incorporated by reference; see § 430.3) specifically referenced in this test procedure are part of this test procedure. In cases where there is a conflict, the language of the test procedure in this appendix takes precedence over ASHRAE 103–2007.

2.4. *ANSI/ASHRAE Standard 41.1–1986 (RA 2006)* means the test standard published in 1986, approved by ANSI on February 18, 1987, reaffirmed in 2006, and entitled ''Standard Method for Temperature Measurement'' (incorporated by reference; see § 430.3).

2.5. *ASHRAE Standard 37–2009* means the test standard published in 2009 by ASHRAE entitled ''Methods of Testing for Rating Unitary Air-Conditioning and Heat Pump Equipment'' (incorporated by reference; see § 430.3).

2.6. *Default airflow-control settings* are the airflow-control settings specified for installed-use by the manufacturer. For the purposes of this appendix, manufacturer specifications for installed-use are those specifications provided for typical consumer installations in the product literature shipped with the product in which the furnace fan is installed. In instances where a manufacturer specifies multiple airflow-control settings for a given function to account for varying installation scenarios, the highest airflow-control setting specified for the given function shall be used for the procedures specified in this appendix.

2.7. *External static pressure* (ESP) means the difference between static pressures measured in the outlet duct and return air opening (or return air duct when used for testing) of the product in which the furnace fan is integrated.

2.8. *Furnace fan* means an electrically-powered device used in a consumer product for the purpose of circulating air through ductwork.

2.9. *Modular blower* means a product which only uses single-phase electric current, and which:

(a) Is designed to be the principal air circulation source for the living space of a residence;

(b) Is not contained within the same cabinet as a furnace or central air conditioner; and

(c) Is designed to be paired with HVAC products that have a heat input rate of less than 225,000 Btu per hour and cooling capacity less than 65,000 Btu per hour.

2.10. *Off mode* means the condition in which the product in which the furnace fan is integrated either is not connected to the power source or is connected to the power source but not energized.

2.11. *Seasonal off switch* means a switch on the product in which the furnace fan is integrated that, when activated, results in a measurable change in energy consumption between the standby and off modes.

2.12. *Standby mode* means the condition in which the product in which the furnace fan is integrated is connected to the power

source, energized, but the furnace fan is not circulating air.

2.13. *Thermal stack damper* means a type of stack damper that opens only during the direct conversion of thermal energy of the stack gases.

3. *Classifications.* Classifications are as specified in section 4 of ASHRAE 103–2007 (incorporated by reference, see § 430.3).

4. *Requirements.* Requirements are as specified in section 5 of ASHRAE 103–2007 (incorporated by reference, see § 430.3). In addition, Fan Energy Rating (FER) of furnace fans shall be determined using test data and estimated national average operating hours pursuant to section 10.10 of this appendix.

5. *Instruments.* Instruments must be as specified in section 6, not including section 6.2, of ASHRAE 103–2007 (incorporated by reference, see § 430.3); and as specified in section 5.1 and 5.2 of this appendix.

5.1. *Temperature.* Temperature measuring instruments shall meet the provisions specified in section 5.1 of ASHRAE 37–2009 (incorporated by reference, see § 430.3) and shall be accurate to within 0.75 degree Fahrenheit (within 0.4 degrees Celsius).

5.1.1. *Outlet Air Temperature Thermocouple Grid.* Outlet air temperature shall be measured as described in section 8.2.1.5.5 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and illustrated in Figure 2 of ASHRAE 103–2007. Thermocouples shall be placed downstream of pressure taps used for external static pressure measurement.

5.2. *Humidity.* Air humidity shall be measured with a relative humidity sensor that is accurate to within 5% relative humidity. Air humidity shall be measured as close as possible to the inlet of the product in which the furnace fan is installed.

6. *Apparatus.* The apparatus used in conjunction with the furnace during the testing shall be as specified in section 7 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) except for section 7.1, the second paragraph of section 7.2.2.2, section 7.2.2.5, and section 7.7, and as specified in sections 6.1, 6.2, 6.3,6.4, 6.5 and 6.6 of this appendix.

6.1. *General.* The product in which the furnace fan is integrated shall be installed in the test room in accordance with the product manufacturer's written instructions that are shipped with the product unless required otherwise by a specific provision of this appendix. The apparatus described in this section is used in conjunction with the product in which the furnace fan is integrated. Each piece of the apparatus shall conform to material and construction specifications and the reference standard cited. Test rooms containing equipment shall have suitable facilities for providing the utilities necessary for performance of the test and be able to maintain conditions within the limits specified.

6.2. *Downflow furnaces.* Install the internal section of vent pipe the same size as the flue collar for connecting the flue collar to the top of the unit, if not supplied by the manufacturer. Do not insulate the internal vent pipe during the jacket loss test (if conducted) described in section 8.6 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) or the steady-state test described in section 9.1 of ASHRAE 103–2007. Do not insulate the internal vent pipe before the cool-down and heat-up tests described in sections 9.5 and 9.6, respectively, of ASHRAE 103–2007. If the vent pipe is surrounded by a metal jacket, do not insulate the metal jacket. Install a 5-ft test stack of the same cross sectional area or perimeter as the vent pipe above the top of the furnace. Tape or seal around the junction connecting the vent pipe and the 5-ft test stack. Insulate the 5-ft test stack with insulation having a minimum R-value of 7 and an outer layer of aluminum foil. (See Figure 3–E of ASHRAE 103–2007.)

6.3. *Modular Blowers.* A modular blower shall be equipped with the electric heat resistance kit that is likely to have the largest volume of retail sales with that particular basic model of modular blower.

6.4. *Ducts and Plenums.* Ducts and plenums shall be built to the geometrical specifications in section 7 of ASHRAE 103–2007. An apparatus for measuring external static pressure shall be integrated in the plenum and test duct as specified in sections 6.4, excluding specifications regarding the minimum length of the ducting and minimum distance between the external static pressure taps and product inlet and outlet, and 6.5 of ASHRAE 37–2009 (incorporated by reference, see § 430.3). External static pressure measuring instruments shall be placed between the furnace openings and any restrictions or elbows in the test plenums or ducts. For all test configurations, external static pressure taps shall be placed 18 inches from the outlet.

6.4.1. *For tests conducted using a return air duct.* Additional external static pressure taps shall be placed 12 inches from the product inlet. Pressure shall be directly measured as a differential pressure as depicted in Figure 8 of ASHRAE 37–2009 rather than determined by separately measuring inlet and outlet static pressure and subtracting the results.

6.4.2. *For tests conducted without a return air duct.* External static pressure shall be directly measured as the differential pressure between the outlet duct static pressure and the ambient static pressure as depicted in Figure 7a of ASHRAE 37–2009.

6.5. *Air Filters.* Air filters shall be removed.

6.6. *Electrical Measurement.* Only electrical input power to the furnace fan (and electric resistance heat kit for electric furnaces and modular blowers) shall be measured for the purposes of this appendix. Electrical input power to the furnace fan and electric resistance hate kit shall be sub-metered separately. Electrical input power to all other electricity-consuming components of the product in which the furnace fan is integrated shall not be included in the electrical input power measurements used in the FER calculation. If the procedures of this appendix are being conducted at the same time as another test that requires metering of components other than the furnace fan and electric resistance heat kit, the electrical input power to the furnace fan and electric resistance heat kit shall be sub-metered separately from one another and separately from other electrical input power measurements.

7. *Test Conditions.* The testing conditions shall be as specified in section 8, not including section 8.6.1.1, of ASHRAE 103–2007 (incorporated by reference, see § 430.3); and as specified in section 7.1 of this appendix.

7.1. *Measurement of Jacket Surface Temperature (optional).* The jacket of the furnace or boiler shall be subdivided into 6-inch squares when practical, and otherwise into 36-square-inch regions comprising 4 in. x 9 in. or 3 in. x 12 in. sections, and the surface temperature at the center of each square or section shall be determined with a surface thermocouple. The 36-square-inch areas shall be recorded in groups where the temperature differential of the 36-square-inch area is less than 10 °F for temperature up to 100 °F above room temperature and less than 20 °F for temperature more than 100 °F above room temperature. For forced air central furnaces, the circulating air blower compartment is considered as part of the duct system and no surface temperature measurement of the blower compartment needs to be recorded for the purpose of this test. For downflow furnaces, measure all cabinet surface temperatures of the heat exchanger and combustion section, including the bottom around the outlet duct, and the burner door, using the 36 square-inch thermocouple grid. The cabinet surface temperatures around the blower section do not need to be measured (*see* figure 3–E of ASHRAE 103–2007.)

8. *Test Procedure.* Testing and measurements shall be as specified in section 9 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) except for sections 9.1.2.1, 9.3, 9.5.1.1, 9.5.1.2.1, 9.5.1.2.2, 9.5.2.1, and section 9.7.1; and as specified in sections 8.1 through 8.6 of this appendix.

8.1. *Direct Measurement of Off-Cycle Losses Testing Method.* [Reserved.]

8.2. *Measurement of Electrical Standby and Off Mode Power.* [Reserved]

8.3. *Steady-State Conditions for Gas and Oil Furnaces.* Steady-state conditions are indicated by an external static pressure within the range shown in Table 1 and a temperature variation in three successive readings, taken 15 minutes apart, of not more than any of the following:

(a) 3 °F in the stack gas temperature for furnaces equipped with draft diverters;

(b) 5 °F in the stack gas temperature for furnaces equipped with either draft hoods, direct exhaust, or direct vent systems; and

(c) 1 °F in the flue gas temperature for condensing furnaces.

8.4. *Steady-state Conditions for Electric Furnaces and Modular Blowers.* Steady-state conditions are indicated by an external static pressure within the range shown in Table 1 and a temperature variation of not more than 5 °F in the outlet air temperature in four successive temperature readings taken 15 minutes apart.

8.5. *Steady-State Conditions for Cold Flow Tests.* For tests during which the burner or electric heating elements are turned off (i.e., cold flow tests), steady-state conditions are indicated by an external static pressure within the range shown in Table 1 and a

variation in the difference between outlet temperature and ambient temperature of not more than 3 °F in three successive temperature readings taken 15 minutes apart.

8.6. *Fan Energy Rating (FER) Test.*

8.6.1. *Initial FER test conditions and maximum airflow-control setting measurements.* Measure the relative humidity (W) and dry bulb temperature ($T_{db}$) of the test room.

8.6.1.1. *Furnace fans for which the maximum airflow-control setting is not a default heating airflow-control setting.* The main burner or electric heating elements shall be turned off. Adjust the external static pressure to within the range shown in Table 1 by symmetrically restricting the outlet of the test duct. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix. Measure furnace fan electrical input power ($E_{Max}$), external static pressure ($ESP_{Max}$), and outlet air temperature ($T_{Max,Out}$).

8.6.1.2. *Furnace fans for which the maximum airflow-control setting is a default heating airflow-control setting.* Adjust the main burner or electric heating element controls to the default heat setting designated for the maximum airflow-control setting. Burner adjustments shall be made as specified by section 8.4.1 of ASHRAE 103–2007 (incorporated by reference, see § 430.3). Adjust the furnace fan controls to the maximum airflow-control setting. Adjust the external static to within the range shown in Table 1 by symmetrically restricting the outlet of the test duct. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix and the temperature rise ($\Delta T_{Max}$) is at least 18 °F. Measure furnace fan electrical input power ($E_{Max}$), fuel or electric resistance heat kit input energy ($Q_{IN,\ Max}$), external static pressure ($ESP_{Max}$), steady-state efficiency for this setting ($Effy_{SS,\ Max}$) as specified in sections 11.2 and 11.3 of ASHRAE 103–2007, outlet air temperature ($T_{Max,Out}$), and temperature rise ($\Delta T_{Max}$)

TABLE 1—REQUIRED MINIMUM EXTERNAL STATIC PRESSURE IN THE MAXIMUM AIRFLOW-CONTROL SETTING BY INSTALLATION TYPE

| Installation type | ESP (in. wc.)* |
|---|---|
| Units with an internal, factory-installed evaporator coil | 0.50–0.55 |
| Units designed to be paired with an evaporator coil, but without one installed | 0.65–0.70 |
| Mobile home | 0.30–0.35 |

Once the specified ESP has been achieved, the same outlet duct restrictions shall be used for the remainder of the furnace fan test.

8.6.2. *Constant circulation airflow-control setting measurements.* The main burner or electric heating elements shall be turned off. The furnace fan controls shall be adjusted to the default constant circulation airflow-control setting. If the manufacturer does not specify a constant circulation airflow-control setting, the lowest airflow-control setting shall be used. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix. Measure furnace fan electrical input power ($E_{Circ}$) and external static pressure ($ESP_{Circ}$).

8.6.3. *Heating airflow-control setting measurements.* For single-stage gas and oil furnaces, the burner shall be fired at the maximum heat input rate. For single-stage electric furnaces, the electric heating elements shall be energized at the maximum heat input rate. For multi-stage and modulating furnaces the reduced heat input rate settings shall be used. Burner adjustments shall be made as specified by section 8.4.1 of ASHRAE 103–2007 (incorporated by reference, see § 430.3). After the burner is activated and adjusted or the electric heating elements are energized, the furnace fan controls shall be adjusted to operate the fan in the default heat airflow-control setting. In instances where a manufacturer specifies multiple airflow-control settings for a given function to account for varying installation scenarios, the highest airflow-control setting specified for the given function shall be used. High heat and reduced heat shall be considered different functions for multi-stage heating units. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix and the temperature rise ($\Delta T_{Heat}$) is at least 18 °F. Measure furnace fan electrical input power ($E_{Heat}$), external static pressure ($ESP_{Heat}$), steady-state efficiency for this setting ($Effy_{SS}$) as specified in sections 11.2 and 11.3 of ASHRAE 103–2007, outlet air temperature ($T_{Heat,\ Out}$) and temperature rise ($\Delta T_{Heat}$).

9. *Nomenclature.* Nomenclature shall include the nomenclature specified in section 10 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and the following additional variables:

CH = annual furnace fan cooling hours

CCH = annual furnace fan constant-circulation hours

$E_{Circ}$ = furnace fan electrical consumption at the default constant-circulation airflow-control setting (or minimum airflow-control setting operating point if a default constant-circulation airflow-control setting is not specified), in watts

$E_{Heat}$ = furnace fan electrical consumption in the default heat airflow-control setting for single-stage heating products or the default low-heat setting for multi-stage heating products, in watts

$E_{Max}$ = furnace fan electrical consumption in the maximum airflow-control setting, in watts

$ESP_i$ = external static pressure, in inches water column, at time of the electrical power measurement in airflow-control setting *i,* where *i* can be ''Circ'' to represent constant-circulation (or minimum airflow) mode, ''Heat'' to represent heating mode, or ''Max'' to represent cooling (or maximum airflow) mode.

FER = fan energy rating, in watts/1000 cfm

HH = annual furnace fan heating operating hours

HCR = heating capacity ratio (nameplate reduced heat input capacity divided by nameplate maximum input heat capacity)

$k_{ref}$ = physical descriptor characterizing the reference system

$T_{db}$ = dry bulb temperature of the test room, in °F

$T_{i,\ In}$ = inlet air temperature at time of the electrical power measurement, in °F, in airflow-control setting *i,* where *i* can be ''Circ'' to represent constant-circulation (or minimum airflow) mode, ''Heat'' to represent heating mode, or ''Max'' to represent maximum airflow (typically designated for cooling) mode

$T_{i,\ Out}$ = average outlet air temperature as measured by the outlet thermocouple grid at time of the electrical power measurement, in °F, in airflow-control setting *i,* where *i* can be ''Circ'' to represent constant-circulation (or minimum airflow) mode, ''Heat'' to represent heating mode, or ''Max'' to represent maximum airflow (typically designated for cooling) mode

$\Delta T_i = T_{i,\ Out}$ minus $T_{i,\ In}$, which is the air throughput temperature rise in setting *i,* in °F

$Q_i$ = airflow in airflow-control setting *i,* in cubic feet per minute (CFM)

$Q_{IN,i}$ = for electric furnaces and modular blowers, the measured electrical input power to the electric resistance heat kit at specified operating conditions *i* in kW. For gas and oil furnaces, measured fuel energy input rate, in Btu/h, at specified operating conditions *i* based on the fuel's high heating value determined as required in section 8.2.1.3 or 8.2.2.3 of ASHRAE 103–2007, where *i* can be ''Max'' for the maximum heat setting or ''R'' for the reduced heat setting.

W = humidity ratio in pounds water vapor per pounds dry air

$v_{air}$ = specific volume of dry air at specified operating conditions per the equations in the psychrometric chapter in 2001 ASHRAE Handbook—Fundamentals in lb/ft$^3$

10. *Calculation of derived results from test measurements for a single unit.* Calculations shall be as specified in section 11 of ASHRAE 103–2007 (incorporated by reference, see § 430.3), except for appendices B and C; and as specified in sections 10.1 through 10.10 and Figure 1 of this appendix.

10.1. *Fan Energy Rating (FER)*

$$FER = \frac{(CH \times E_{Max}) + (HH \times E_{Heat}) + (CCH \times E_{Circ})}{(CH + 830 + CCH) \times Q_{Max}} \times 1000$$

Where:

$Q_{max} = Q_{heat}$ for products for which the maximum airflow-control setting is a default heat setting, or

$$Q_{Max} = Q_{Heat}\sqrt{\frac{ESP_{Max}}{ESP_{Heat}} \times \frac{(T_{Heat,Out} + 460)}{[(T]_{Max,Out} + 460)}}$$

for products for which the maximum airflow control setting is only designated for cooling; and

$$Q_i = \frac{(Effy_{SS,i} - L_J) \times Q_{IN,i} + (3413 \times E_i)}{60 \times (0.24 + 0.44 \times W) \times \left(\frac{1}{v_{air}}\right) \times \Delta T_i}$$

The estimated national average operating hours presented in Table IV.2 shall be used to calculate FER.

TABLE IV.2—ESTIMATED NATIONAL AVERAGE OPERATING HOUR VALUES FOR CALCULATING FER

| Operating mode | Variable | Single-stage (hours) | Multi-stage or modulating (hours) |
|---|---|---|---|
| Heating | HH | 830 | 830/HCR. |
| Cooling | CH | 640 | 640. |
| Constant Circulation | CCH | 400 | 400. |

Where:

$$HCR = \frac{Q_{IN,R(nameplate)}}{Q_{IN,Max(nameplate)}}$$

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# FEDERAL REGISTER

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Part V

## The President

Memorandum of December 27, 2013—Provision of Aviation Insurance Coverage for Commercial Air Carrier Service in Domestic and International Operations

Federal Register
Vol. 79, No. 2
Friday, January 3, 2014

# Presidential Documents

**Title 3—**

## The President

**Memorandum of December 27, 2013**

## Provision of Aviation Insurance Coverage for Commercial Air Carrier Service in Domestic and International Operations

**Memorandum for the Secretary of Transportation**

By the authority vested in me as President by the Constitution and the laws of the United States, including 49 U.S.C. 44301–44310, I hereby:

1. Determine that the continuation of U.S. air transportation is necessary in the interest of air commerce, national security, and the foreign policy of the United States.

2. Approve provision by the Secretary of Transportation of insurance or reinsurance to U.S.-certificated air carriers against loss or damage arising out of any risk from the operation of an aircraft, in the manner and to the extent provided in chapter 443 of title 49, United States Code, until January 15, 2014, if he determines that such insurance or reinsurance cannot be obtained on reasonable terms from any company authorized to conduct an insurance business in a State of the United States.

3. Delegate to the Secretary of Transportation the authority, vested in me by 49 U.S.C. 44306(c), to extend this approval and determination through December 31, 2014, or until any date prior to December 31, 2014, provided that the Congress further extends the date contained in section 44310 and further provided that he not use this delegation to extend this determination and approval beyond the dates authorized under any such provision of law with an ending effective date prior to December 31, 2014.

You are directed to bring this determination immediately to the attention of all air carriers, as defined in 49 U.S.C. 40102(a)(2), and to arrange for its publication in the *Federal Register.*

THE WHITE HOUSE,
*Washington, December 27, 2013*

[FR Doc. 2014–00004
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Billing code 4910–09

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